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INTRODUCTION TO THE SYMPOSIUM ON FEDERAL JUDICIAL ADMINISTRATION: STEWARDSHIP IN A CHANGING ENVIRONMENT

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Few government institutions have been affected by change in the last twenty-five years more than the federal judiciary. It is a testament to the flexibility and resilience of the federal judges and judicial administrators that in the last quarter century the federal courts have been able to remain a strong, effective institution. In that period, the number of Article III judges has nearly doubled;[1] and two courts of appeals, one a national court with special subject matter jurisdiction,[2] have been added. Federal district courts now conduct proceedings in over 425 locations.[3] Filings in district courts have risen from 104,020[4] to 276,636,[5] while filings in the courts of appeals have increased from 9116[6] to 50,224.[7]

The nature and complexity of federal courts' workload has likewise changed dramatically. Over the last two and a half decades, criminal cases,[8] particularly drug cases,[9] and prisoner complaints[10] have risen substantially. Sentencing

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1. In 1968, there were 337 authorized district court judgeships and 97 authorized judgeships for the courts of appeals. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, HISTORY OF THE AUTHORIZATION OF FEDERAL JUDGESHIPS tbl. 7 (1991). In 1993, authorized judgeships were 649 for the district courts and 179 for the courts of appeals. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbl. 26 (1993) [hereinafter AO REPORT].

2. The United States Court of Appeals for the Federal Circuit was established in 1982. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 403, 96 Stat. 25, 57-58. The Eleventh Circuit was established in 1980 when the former Fifth Circuit split. Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994. For a discussion of issues related to the Federal Circuit, see generally Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603 (1989); S. Jay Plager, *The United States Courts of Appeals, the Federal Circuit, and the Non-Regional Subject Matter Concept: Reflections on the Search for a Model*, 39 AM. U. L. REV. 853 (1990); Randall R. Rader, *Specialized Courts: The Legislative Response*, 40 AM. U. L. REV. 1003 (1991).

3. 28 U.S.C. §§ 81-131 (1988 & Supp. V 1993).

4. AO REPORT, *supra* note 1, tbls. C-1 & D-1 (1968).

5. AO REPORT, *supra* note 1, tbls. C-1 & D-1 (1993).

6. AO REPORT, *supra* note 1, tbl. B-1 (1968).

7. AO REPORT, *supra* note 1, tbl. B-1 (1993).

8. In the district courts, 30,714 criminal cases were filed in 1968. AO REPORT, *supra* note 1, tbl. D-1 (1968). In 1993, 45,903 criminal cases were filed in the district courts. AO REPORT, *supra* note 1, tbl. D-1 (1993). These figures exclude transfers.

9. In the district courts, drug cases in 1968 numbered 2860. AO REPORT, *supra* note 1, tbl. D-2 (1968). These cases numbered 12,643 in 1993. AO REPORT, *supra* note 1, tbl. D-2 (1993).

10. United States and private prisoner petitions in the district courts were 11,152 in 1968. AO REPORT, *supra* note 1, tbl. C-2 (1968). These cases rose to 53,451 petitions in 1993. AO REPORT, *supra* note 1, tbl. C-2 (1993).

guidelines[11] have created disincentives to plea-bargain cases,[12] and incentives to appeal sentences. Multi-defendant criminal cases have increased.[13]

Change has not been confined to the Article III bench. The bankruptcy courts, which adapted to a new bankruptcy code in 1979,[14] saw their own workload reach a record level in 1992 of nearly one million filings.[15] Magistrate judges, who now number 483,[16] serve in a relatively new judicial office, created by the Federal Magistrates Act in 1968.[17] The number of support personnel in the judiciary has likewise increased.[18]

The continuing efforts of the national government to down-size and reduce expenditures have had, and will continue to have, profound effects on the federal judiciary. Any judicial reform efforts must succeed within the climate of fiscal austerity characterizing the federal government today. Congress is confronted with a range of tough spending decisions and, simply stated, it may not be able to be as supportive of the judiciary's resource needs as it has been in the recent past.

As part of its effort to cope with this new world of diminished resources, the Judicial Conference recently created a Subcommittee on Economy of its Budget Committee. This Subcommittee of judges will coordinate the judiciary's considerable efforts to improve fiscal responsibility, accountability, and efficiency.

Additionally, in October 1992, I established a District Court Efficiencies Task Force and selected as its members four district court judges and four district court clerks. Each of the judges sits on a Judicial Conference committee relating either to budget, case management, judicial resources, or automation. In March 1993, I appointed additional members to the task force representing bankruptcy courts and probation and pretrial services offices. The task force will identify and promote efficiencies and eliminate unnecessary, redundant, or resource-wasting practices.

Certainly the judiciary, on its own and with the direction of Congress, has attempted to foretell and adapt to new challenges. My sense is that any lawyer who has practiced in the federal court system for the last two decades has observed firsthand the changing environment in which federal judges now operate. I need

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11. Sentencing Guidelines Act of 1986, Pub. L. No. 99-363, 100 Stat. 770.

12. Reliance on plea bargaining is not without its detractors. *See* Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983).

13. In 1980, there were 4805 criminal case filings with four or more defendants. *The Criminal Caseload: Increasing Burden on the District Courts?*, *in* LONG RANGE PLANNING OFFICE, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, LONG RANGE PLANNING WORKING PAPERS 8 (June 1993). In 1992, those cases had risen to nearly 8200. *Id.*

14. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

15. AO REPORT, *supra* note 1, tbl. F (1993).

16. As of September 30, 1993, there were 381 full-time, 97 part-time, and five combination positions authorized. *See* AO REPORT, *supra* note 1, tbl. 28 (1993).

17. *See* Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107 (1968), *amended by* Pub. L. No. 94-577, 90 Stat. 2729 (1976) *and* Pub. L. No. 96-82, 93 Stat. 643 (1979). *See generally* Peter G. McCabe, *The Federal Magistrate Act of 1979*, 16 HARV. J. ON LEGIS. 343 (1979).

18. Concerns about the increase in judicial staff have been raised often. *See, e.g.*, Patrick E. Higginbotham, *Bureaucracy—The Carcinoma of the Federal Judiciary*, 31 ALA. L. REV. 261 (1980); Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 784 (1981).

look no further than my own agency, the Administrative Office of the United States Courts, to assess the nature and extent of recent change, and the judiciary's administrative response to it.

Ten years ago, when I came to the Administrative Office, budget and personnel systems of the federal judiciary were centrally administered from Washington, D.C. With the approval of the Judicial Conference, the Administrative Office has moved to both greater budget and personnel decentralization, in part because of the need for greater regional autonomy and circuit experimentation in the now expanded and more complex federal judicial system.

A decade ago, judicial impact statements were rarely developed.[19] Now, in order to prepare effectively for change resulting from new federal legislation, the Administrative Office has a unit dedicated to assessing the impact of proposed legislation prior to its enactment.

Since the passage of the Civil Justice Reform Act,[20] the Administrative Office, working with the Federal Judicial Center, drafted a model plan identifying procedures and techniques for cost and delay reduction. This model plan contains recommendations, in addition to those in the statute, calling for differentiated case management and alternative dispute resolution. The Administrative Office, at the direction of the Judicial Conference Committee on Court Administration and Case Management, has contracted with the RAND Corporation to evaluate the civil justice reform approaches of the various federal courts, as well as the effects of the reforms that have been implemented. Results of this study will assist in determining the best means of achieving the goals of this important legislation.

In 1991, I also created within the Administrative Office a discrete and small planning office to support the activities of the Judicial Conference Long Range Planning Committee and the strategic planning activities of the judiciary generally.[21] The positive impact of both the Planning Committee and this small Administrative Office in stimulating debate about major challenges facing the judiciary in the years to come can be seen in this symposium issue which includes articles by Judge Otto Skopil, Jr., Chairman of the Conference's Long Range Planning

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19. *See generally* FORECASTING THE IMPACT OF LEGISLATION ON COURTS (Keith O. Boyum & Sam Krislov eds., 1980).

20. 28 U.S.C. §§ 471-472 (Supp. V 1993).

21. Early support of federal judicial planning is found in J. Clifford Wallace, *Working Paper—Future of the Judiciary*, 94 F.R.D. 225, 231 (1981). For a discussion of the process of federal judicial planning, see ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, PLANNING HANDBOOK FOR FEDERAL COURTS (William M. Lucianovic ed., Mar. 1994); LONG RANGE PLANNING OFFICE, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BRANCH PLANNING GUIDE—READINGS ON LONG RANGE PLANNING (William M. Lucianovic ed., Aug. 1993).

Committee, as well as articles by several current and former members of the Administrative Office's planning office.[22]

For the federal judiciary, change is now a constant. Federal judges and judicial administrators are stewards of an extremely valuable societal resource. As a group, they are committed to maintaining our federal judiciary as the best court system in the world. Consistent with that obligation of stewardship, the Judicial Conference, through its Committee on Long Range Planning, is attempting to create a permanent judicial planning capability, which will allow the judiciary to anticipate change, and to be pro-active, rather than reactive, in a changing environment. In his article in this symposium,[23] Judge Skopil reviews the recent history of national judicial planning and particularly the work of his Committee. He emphasizes the importance of establishing within the judiciary a planning process capable of integrating various segments of the judiciary's policy-making apparatus[24] and ensuring that the judiciary remains rooted in the values which have allowed it to serve its essential role in our changing society.

Other articles in this symposium address the major issues of appropriate federal jurisdiction,[25] federal workload,[26] and the appropriate size[27] and structure of the judiciary to implement that jurisdiction. The significant problem of extensive judicial vacancies and the efforts of one judicial circuit to cope with the problems presented by explosive caseload growth are analyzed in some detail.

In his contribution to this symposium,[28] Judge Charles Clark, former Chief Judge of the Fifth Circuit and a former Chair of the Judicial Conference's Budget and Executive Committees, makes the case for tailoring federal jurisdiction to that required to ensure that courts of the national government try only cases and controversies serving an identified national interest. He concludes that failure to make substantive jurisdictional change concedes the battle for improved federal courts.

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22. One article has been authored by Judge Skopil, Chairman of the Judicial Conference Planning Committee, two articles (one by Charles W. Nihan & Harvey Rishikof and one by William T. Rule & Jeffrey Jackson) have been authored by current or former members of the Administrative Office's planning office staff, and a third (by Gordon Bermant, Jeffrey A. Hennemuth & A. Fletcher Mangum) has been authored by a member of the Administrative Office's planning office and two members of the Federal Judicial Center's Planning and Technology Division.

23. Otto R. Skopil, Jr., *Long Range Planning in the Federal Judiciary: Some Observations on a Work in Progress*, 14 MISS. C. L. REV. 199 (1994).

24. Of course, the Long Range Planning Committee is an outgrowth of a recommendation of the Federal Courts Study Committee. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 146 (Apr. 1990). For a discussion of the work of that Committee, see Levin H. Campbell, *Into the Third Century: Views of the Appellate System from the Federal Courts Study Committee*, 74 MASS. L. REV. 292 (1989); Roger J. Miner, *Planning for the Second Century of the Second Circuit Court of Appeals: The Report of the Federal Courts Study Committee*, 65 ST. JOHN'S L. REV. 673 (1991); Joseph F. Weis, Jr., *The Federal Courts Study Committee Begins Its Work*, 21 ST. MARY'S L.J. 15 (1989).

25. *See generally* Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761 (1989).

26. *See generally* WILLIAM P. MCLAUCHLAN, FEDERAL COURT CASELOADS (1984); RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 59-76 (1985).

27. *See generally and compare* Stephen Reinhardt, *Too Few Judges, Too Many Cases* 79 A.B.A. J. 52 (Jan. 1993) *with* Jon O. Newman, *1,000 Judges—The Limit for an Effective Federal Judiciary*, 76 JUDICATURE 187 (1993).

28. Charles Clark, *Mules and Wagons—A Plea for Jurisdictional Reform*, 14 MISS. C. L. REV. 263 (1994).

Part of the change Judge Clark favors involves elimination of jurisdiction based upon diversity of citizenship. He believes diversity jurisdiction is an anachronism overloading federal courts with non-federal cases while belittling state court systems.[29] His position on jurisdiction is supported by Judge Robert M. Parker and Ms. Leslie J. Hagin,[30] who argue in their article that resolving the problems of federal courts involves the proper allocation of jurisdiction between federal and state courts.

Judge Clark also argues for imposing restrictions on appeal as of right from decisions of federal district courts and federal administrative agencies, restricting the latter to appeals which implicate constitutional values or agency actions which exceed statutory power. Although the Supreme Court has never held that there is a right to appeal from district court decisions, the availability of such an appeal has long been a hallmark of the American federal judicial system.

Here again, Parker and Hagin agree that a limitation must be imposed upon appeal of all final judgments and other presently appealable decisions of district courts. Judge Parker and Ms. Hagin, however, propose a solution which includes "differentiated case management" in the federal courts of appeals, which, to some, will be controversial. Differentiated case management would allow the courts of appeals to limit the full panoply of appellate procedures to only those cases which, in the court's opinion, require exhaustive treatment to ensure that error did not occur in the court below.[31]

Judge Parker and Ms. Hagin's thesis is grounded in the assertion that caseloads of the federal courts, particularly the courts of appeals, are currently at levels that fundamentally undermine their ability to administer justice.[32] They argue that the federal court system must be reformed if it is to continue to perform its historic role in the American system of justice. This reform would involve the structure of the federal courts, particularly the courts of appeals, and the manner in which all federal courts provide services to the nation.

Issues of court structure, and appropriate mechanisms to study and deal with that structure, are addressed by Professor Thomas E. Baker,[33] a former acting Administrative Assistant to the Chief Justice. Professor Baker argues that Congress should create a Commission on Federal Court Structure to encourage a more rational discourse on the issue of court structure. He endorses an earlier

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29. *See* A REPORT TO THE UNITED STATES JUDICIAL CONFERENCE FROM THE COMMITTEE ON FEDERAL-STATE JURISDICTION, A FRESH LOOK AT IN-STATE PLAINTIFF DIVERSITY JURISDICTION: WHY IT WAS ENACTED AND WHY IT SHOULD BE REPEALED (June 18, 1993).

30. Robert M. Parker & Leslie J. Hagin, *Federal Courts at the Crossroads: Adapt or Lose!*, 14 Miss. C. L. Rev. 211 (1994).

31. For a study of the existing mechanism for handling appeals in the selected courts of appeals, see JOE S. CECIL & DONNA STIENSTRA, DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS OF APPEALS (Federal Judicial Ctr. ed., 1987).

32. *See also* Harry T. Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871 (1983).

33. Thomas E. Baker, *A Proposal That Congress Create A Commission on Federal Court Structure*, 14 MISS. C. L. REV. 271 (1994).

recommendation of Judge Joseph Weis, Chairman of the Federal Courts Study Committee, that an interbranch study group be created to examine federal appellate structure.

Professor Baker argues that neither Congress nor the judiciary individually is well suited to the task of evaluating federal court structure options. In his view, congressional practices and procedures are not conducive to the kind of study needed, but the judiciary cannot be expected to act alone, other than on matters of intramural reform.

Support for assertions about the impact of rising caseloads can be found in Dr. William T. Rule and Professor Jeffrey Jackson's careful analysis of the recent workload of the Fifth Circuit.[34] Dr. Rule and Professor Jackson describe a circuit whose judges each year terminate more cases (and who terminate far more cases per judge than the national average) but which, nonetheless, has an ever-increasing backlog of pending cases.

In their article *Judicial Vacancies: An Examination of the Problem and Possible Solutions*,[35] Messrs. Gordon Bermant, Jeffrey A. Hennemuth, and A. Fletcher Mangum review the historical, legal, and political dimensions of today's significant problem involving judicial vacancies. This article is the most extensive modern scholarly treatment of this important issue, which has been largely ignored in recent legal scholarship. The authors identify and analyze a variety of methods for reducing the length of judicial vacancies or mitigating their impact on the operation of the federal courts.

Finally, Messrs. Charles W. Nihan and Harvey Rishikof explore some of the central issues shaping the current debate over the appropriate role of the federal courts.[36] The authors argue that the future role and function of the federal courts are in large part governed by basic questions regarding size, structure, and growth. Answers to these questions selected by Congress will determine the future ability of citizens to obtain quality and timely federal justice.

In sum, the judiciary has been engaged in the process of self-assessment and self-improvement for decades. As noted, a wide range of improvement activities are underway, some spawned by legislation but most initiated by the judiciary itself. In either case, the courts themselves are the laboratories of change and innovation and the public itself the ultimate beneficiary. Debate about the appropriate size, structure, and jurisdiction of federal courts will continue. The larger issues of what role federal courts should play in our society and, to paraphrase the Chief Justice, the quality of the federal judiciary that we will leave to our grandchildren, will be determined by future resolution of the issues raised in this symposium.

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34. William T. Rule & Jeffrey Jackson, *After the Split – The Recent Workload of the Court of Appeals for the Fifth Judicial Circuit*, 14 MISS. C. L. REV. 281 (1994).

35. 14 MISS. C. L. REV. 319 (1994).

36. Charles W. Nihan & Harvey Rishikof, *Rethinking the Federal Court System, Thinking the Unthinkable*, 14 MISS. C. L. REV. 349(1994).