

1994

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14 Miss. C. L. Rev. 199 (1993-1994)

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# LONG RANGE PLANNING IN THE FEDERAL JUDICIARY: SOME OBSERVATIONS ON A WORK IN PROGRESS

Otto R. Skopil, Jr. \*

## I. INTRODUCTION

Commissions and committees with charters to make recommendations to improve the judicial system are not new. In the last twenty years alone several formal study groups have made significant proposals for system improvements (not to mention the numerous scholarly articles which have offered proposals for federal court reform).<sup>1</sup> These study groups include the Hruska Commission,<sup>2</sup> the Freund Study Groups,<sup>3</sup> the Bork Committee,<sup>4</sup> several ABA study groups,<sup>5</sup> the Federal Courts Study Committee,<sup>6</sup> and, more recently, the President's Council on Competitiveness.<sup>7</sup> Each of these bodies has made serious proposals for permanent and long term improvement of federal courts, and therefore, each may properly be seen as having been involved in planning for the federal judiciary.

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\* Senior Judge, United States Court of Appeals for the Ninth Judicial Circuit. Chairman, Committee on Long Range Planning of the United States Judicial Conference. Although I discuss in this Article the work of the Long Range Planning Committee, the views expressed are my own, and not those of the Long Range Planning Committee as a whole, or of the Judicial Conference of the United States.

1. See, e.g., Edward N. Beiser et al., *Perspectives on the Judiciary*, 39 AM. U. L. REV. 475 (1990); 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); Erwin N. Griswold, *Cutting the Cloak to Fit the Cloth: An Approach to Problems in the Federal Courts*, 32 CATH. U. L. REV. 787 (1983); Frank A. Kaufman et al., *The United States Courts of Appeals: Reexamining Structure and Process After a Century of Growth*, 125 F.R.D. 523 (1989); 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); Maurice Rosenberg, *Enlarging the Federal Courts' Capacity to Settle the National Law*, 10 GONZ. L. REV. 709 (1975); Kenneth W. Starr, *The Supreme Court and the Future of the Federal Judiciary*, 32 ARIZ. L. REV. 211 (1990); Robert L. Stern, *Remedies For Appellate Overloads: The Ultimate Solution*, 75 JUDICATURE 103 (1988); Todd E. Thompson, *Increasing Uniformity and Capacity in the Federal Appellate System*, 11 HASTINGS CONST. L.Q. 457 (1984); J. Clifford Wallace, *Our Judicial System Needs Help: A Few Inside Thoughts*, 12 U.S.F. L. REV. 3 (1977).

2. The official name of the "Hruska Commission" was the Commission on Revision of the Federal Court Appellate System. The "Hruska Commission" was established in 1975.

3. The Freund Study Group was established in 1972.

4. The official name of the "Bork Committee" was the Department of Justice Committee on Revision of the Federal Judicial System. The "Bork Committee" was established in 1977.

5. The official name of the ABA study groups is the American Bar Association Standing Committee on Federal Judicial Improvements. The Committee was established in 1989.

6. See generally George D. Brown, *Nonideological Judicial Reform and Its Limits - The Report of the Federal Courts Study Committee*, 47 WASH. & LEE L. REV. 973 (1990); Levin H. Campbell, *Into the Third Century: Views of the Appellate System from the Federal Courts Study Committee*, 74 MASS. L. REV. 292 (1989); Cris Carmody, *Federal Courts Study Committee Issues Final Report*, 74 JUDICATURE 51 (1990); 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); William K. Slate II, *Report of the Federal Courts Study Committee: An Update*, 21 SETON HALL L. REV. 336 (1991); J. Clifford Wallace, *Working Paper - Future of the Judiciary*, 94 F.R.D. 225 (1981); Joseph F. Weis, Jr., *The Federal Courts Study Committee Begins Its Work*, 21 ST. MARY'S L.J. 15 (1989).

7. The official name of the Council on Competitiveness was the President's Council on Competitiveness. The Council was established in 1991.

At least two of the committees mentioned above recommended the creation of a permanent planning body for the federal courts. The Bork Committee, for instance, proposed in 1975 the creation of a permanent agency for federal court planning, made up of six members, two from each branch of the federal government. The Federal Courts Study Committee, in its final report dated April 2, 1990, recommended that the courts develop a permanent and effective planning capability as quickly as possible.<sup>8</sup> In commenting on this recommendation, the Study Committee stated:

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. Indeed, our [Federal Courts Study C]ommittee, with its charge to "develop a long-range plan for the future of the Federal judiciary," represents Congress's recognition of that void. The courts need a stronger, permanent capacity to determine long-term goals and develop strategic plans by which they can reach those goals.<sup>9</sup>

The Judicial Conference of the United States agreed and, in 1991, the Chief Justice appointed members to the Committee on Long Range Planning of that Conference.<sup>10</sup>

Creation of the Long Range Planning Committee, however, did not originate intra-branch planning in the judiciary, which for some time has engaged in planning in various areas. Some of this planning, such as ongoing long-term automation and technology planning<sup>11</sup> and the development of cost-and-delay-reduction plans in district courts under the Civil Justice Reform Act<sup>12</sup> have been congressionally mandated. However, other planning, such as ongoing efforts to account and provide for future space and facilities' needs, has been driven by the judicial branch itself, through efforts of the Judicial Conference and its Space and Facilities Committee.

The work of the Long Range Planning Committee differs from these previous efforts undertaken by or on behalf of the judiciary. Unlike ongoing intra-branch planning for selected areas or on selected topics, the Long Range Planning Committee's work is intended to be more comprehensive, inclusive of many topics. Unlike the Federal Courts Study Committee and similar ad hoc commissions, the Planning Committee is an intra-branch committee with members drawn only from the third branch.<sup>13</sup> The Planning Committee is an experiment by the third branch

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8. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 146-48 (Apr. 2, 1990) [hereinafter FCSC].

9. *Id.* at 146-47.

10. *Id.* Members of the Committee on Long Range Planning include: Chief Judge Sarah Evans Barker (S.D. Ind.); Judge Edward R. Becker (3d Cir.); Judge Wilfred Feinberg (2d Cir.); Judge Elmo B. Hunter (W.D. Mo.); Chief Judge James Lawrence King (S.D. Fla.); Magistrate Judge Virginia Morgan (E.D. Mich.); Bankruptcy Judge A. Thomas Small (E.D.N.C.); and Judge Harlington Wood, Jr. (7th Cir.).

11. 35 U.S.C.A. § 14(b) (West Supp. 1993).

12. 28 U.S.C. §§ 471-482 (Supp. IV 1992).

13. The intra-branch character of the Committee should not suggest that the Committee is insular. As will be discussed below, the Committee has sought and will continue to seek input and consultation from stakeholders within the Committee and from within the judiciary.

to determine whether a permanent, comprehensive planning process can be established which will allow the judiciary itself to identify and perhaps resolve issues of long range concern to the federal judiciary.

In this Article I discuss briefly the tasks before the Long Range Planning Committee and the process used by the Committee in formulating the first long range plan for the federal judiciary.

## II. DEFINING THE TASK OF THE PLANNING COMMITTEE

The Planning Committee began its work by studying private<sup>14</sup> and public sector planning.<sup>15</sup> One of our tasks was to provide some definition of our charge to coordinate judicial planning. The Chief Justice has suggested that the Committee's task is to define the role of federal courts, and to determine what type of federal courts we will leave to our grandchildren. Essentially, planning is determining what can be done now to insure that the judiciary can meet the challenges of the future. Our planning for the federal judiciary involves:

1. Recognizing the fundamental and instrumental values which define the essential role and nature of the federal courts.<sup>16</sup> Most judges probably would agree these values include fairness, excellence, access, independence, federalism, uniformity, the autonomy of individual judges, and the like. However, some of these values often are in tension. For example, while uniformity might be increased by

14. See generally F. Paul Carlson, *The Long and Short of Strategic Planning*, J. BUS. STRATEGY, May-June 1990, at 15; Richard G. Hamermesh, *Making Planning Strategic*, HARV. BUS. REV., July-Aug. 1986, at 115; Jef Mason, *Developing Strategic Thinking*, LONG RANGE PLANNING, June 1986, at 72; David M. Reid, *Where Planning Fails in Practice*, INT'L J. STRATEGIC MGMT., Apr. 1990, at 85; *Strategists Confront Planning Challenges: An Interview with Bell & Howell's Ingeborg A. Marquardt*, J. BUS. STRATEGY, May-June 1990, at 4; Robert Szakonyi, *Critical Issues in Long-Range Planning*, RES. TECH. MGMT., May-June 1989, at 28.

15. Numerous state court systems have completed long range plans. See, e.g., ADMINISTRATIVE OFFICE OF THE CTS., TRENDS AND OBJECTIVES FOR THE FUTURE OF THE NORTH CAROLINA JUDICIAL BRANCH OF GOVERNMENT (Nov. 1990); ADMINISTRATIVE OFFICE OF THE CTS., UTAH COURTS STATE JUDICIAL PLAN, 1989-1990 (1989); ARIZONA SUPREME COURT'S COMM'N ON THE CTS., REPORT OF THE COMMISSION ON THE COURTS, 1989 (1989); CARL F. BIANCHI, AMERICAN U. L. INST., A TRAINING MANUAL FOR COURT PLANNERS: TRANSLATING STATE UMBRELLA GOALS INTO OPERATIONAL GOALS AND OBJECTIVES (Apr. 1979); DAINA FARTHING-CAPOWICH, NATIONAL CTR. FOR STATE CTS., A DESCRIPTIVE DIRECTORY OF STATE JUDICIAL PLANS (July 20, 1983); COMPREHENSIVE PLANNING IN THE HAWAII JUDICIARY (1990); COURT PLANNING CAPABILITIES PROJECT, NATIONAL CTR. FOR STATE CTS., ESTABLISHING AN EFFECTIVE COURT PLANNING CAPABILITY, INITIAL CONSIDERATION, IN ORGANIZING A JUDICIAL PLANNING EFFORT: SCOPE AND STRUCTURE (May 31, 1977); COURT PLANNING CAPABILITIES PROJECT, NATIONAL CTR. FOR STATE CTS., ESTABLISHING AN EFFECTIVE COURT PLANNING CAPABILITY, THE ROLE OF DATA IN JUDICIAL PLANNING (Aug. 19, 1977); INSTITUTE FOR ALTERNATIVE FUTURES ET AL., CREATING 21ST CENTURY COURTS: GUIDEBOOK FOR COURT VISIONING (1991); JUDICIAL SYS. OF VA. EXECUTIVE SUMMARY, FORESIGHT 2000: A STRATEGIC PLAN (1990-1992); HARRY O. LAWSON & BARBARA J. GLETNE, ADJUDICATIVE TECHNICAL ASSISTANCE PROJECT, BJA COOP. AGREEMENT NO. 86-SA = CX-K010, PLANNING IN THE COURT ENVIRONMENT—PERCEPTIONS AND PROSPECTS (June 1987); HARRY O. LAWSON & BARBARA J. GLETNE, CRIMINAL CTS. TECHNICAL ASSISTANCE PROJECT, JUDICIAL PLANNING IN TRANSITION, 1977-1981 (Jan. 1982); NEW YORK STATE UNIFIED CT. SYS., THE PLAN FOR THE ADMINISTRATION AND OPERATION OF THE TRIAL COURTS (1990); OFFICE OF THE STATE CT. ADM'R, COLORADO JUDICIAL DEP'T, COLORADO COURTS IN THE 21ST CENTURY (1990); STATE CT. PLANNING CAPABILITIES PROJECT OF THE NAT'L CTR. FOR STATE CTS., PLANNING IN STATE COURTS: TRENDS AND DEVELOPMENTS 1976-1978 (July 1978); JAY C. UPPAL & RICHARD A. BRUN, THE COUNCIL OF STATE GOV'TS, JUDICIAL PLANNING IN THE STATES (1976); Russell R. Wheeler, *Planning in the State Courts*, in MANAGING THE STATE CTS.: TEXTS AND READINGS 337 (Larry C. Berkson et al. eds., 1977); Franklin M. Zweig et al., *Securing the Future for America's State Courts*, 73 JUDICATURE 296 (1990).

16. JEFFREY J. JACKSON ET AL., ADMINISTRATIVE OFFICE OF THE U.S. CTS., JUDICIAL BRANCH PLANNING GUIDE: READINGS ON LONG RANGE PLANNING (William M. Lucianovic ed., 1993) [hereinafter JACKSON].

establishing uniform procedures for disposing of appellate cases, such uniformity might sacrifice the autonomy of regional courts of appeals over how appeal cases are processed. The cost to achieve the benefit of increased uniformity might be the loss of innovation and experimentation in the courts of appeals in the area of case management. Increasing litigant access may reduce the ability of federal courts to provide quality justice to litigants already in the system. Planning clearly requires balancing between and among competing values.

2. Identifying trends (either internal or external) which will affect the judiciary over the long term.<sup>17</sup> Obvious trends include national and regional workload developments which can be quantified, and trends in case processing, such as reduced reliance on oral argument in courts of appeals, increased reliance on staff attorneys, and increased use of third-party neutrals in alternative dispute resolution for the disposition of cases. Societal trends which might affect federal courts include, for example, the middle-aging of the population with resultant possible reduction in specific types of crime and increasing diversity including multi-lingualism and multi-culturalism in the population.

3. Selecting planning topics and issues where action might be necessary in order to insure that the judiciary can serve its defined role function consistent with articulated values.<sup>18</sup> Examples of such topics are the division of jurisdictional authority between the state and federal courts,<sup>19</sup> federal court structure,<sup>20</sup> and governance.<sup>21</sup> Obvious examples of specific issues to be considered are:

a. whether diversity of citizenship jurisdiction should be curtailed, or eliminated;<sup>22</sup>

b. whether the current regional structure of the courts of appeals should be modified, perhaps through the creation of additional special subject matter courts;<sup>23</sup>

c. whether the judiciary's national governance structure should move away from the collegial model exemplified by the Judicial Conference toward a more bureaucratic model led by a chancellor or chief judge for administration.<sup>24</sup>

17. *Id.* at 43-49.

18. *Id.* at 55-56.

19. WILLIAM W. SCHWARZER & RUSSELL R. WHEELER, FEDERAL JUDICIAL CENTER, ON THE FEDERALIZATION OF THE ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE (1994).

20. FEDERAL JUDICIAL CENTER, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS: REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES (1993).

21. FEDERAL JUDICIAL CENTER, FEDERAL COURT GOVERNANCE: WHY CONGRESS SHOULD—AND WHY CONGRESS SHOULD NOT—CREATE A FULL-TIME EXECUTIVE JUDGE, ABOLISH THE JUDICIAL CONFERENCE, AND REMOVE CIRCUIT JUDGES FROM DISTRICT COURT GOVERNANCE (1994).

22. Victor E. Flango & Craig Boersema, *Changes in Federal Diversity Jurisdiction: Effects on State Court Caseloads*, 15 U. DAYTON L. REV. 405 (1990); James C. Hill & Thomas E. Baker, *Dam Federal Jurisdiction!*, 32 EMORY L.J. 3 (1983).

23. 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).

24. *See, e.g.*, FEDERAL JUDICIAL CENTER, FEDERAL COURT GOVERNANCE: WHY CONGRESS SHOULD—AND WHY CONGRESS SHOULD NOT—CREATE A FULL-TIME EXECUTIVE JUDGE, ABOLISH THE JUDICIAL CONFERENCE, AND REMOVE CIRCUIT JUDGES FROM DISTRICT COURT GOVERNANCE (1994).

4. Prioritizing goals in various areas which, if obtained, would allow the judiciary to serve its essential functions.<sup>25</sup> An example of a goal might be improving litigant access to federal courts.

5. Articulating strategies (in the form of specific recommendations) to meet these goals and implementing those strategies.<sup>26</sup> Consistent with the goal of improving access, strategies might be implemented for reducing barriers to meaningful access such as cost, delay, or gender bias.

In short, planning for the federal judiciary requires reflection on what the judiciary is and should be, what current and future challenges it faces, and what can be done now and in the near term to insure that the judiciary continues to be an effective and valuable federal institution over the long term.

### III. EMPHASIS ON A PLANNING PROCESS

The focus of the Committee on Long Range Planning is primarily on planning, and secondarily on formulating a plan. The Eisenhower aphorism, "planning is everything, the plan is nothing,"<sup>27</sup> though exaggerated, is apropos here. While the Planning Committee is charged both with formulating a plan and coordinating judicial branch planning,<sup>28</sup> the success of this experiment probably will be measured by whether the Committee establishes a permanent planning capability within the third branch. As noted in the Report of the Federal Courts Study Committee, in the past the judiciary has been forced to react to changes, such as the caseload explosion in the bankruptcy court, or the increase in district and appellate court caseloads due to drug cases, prisoner filings, and appeals under the sentencing

25. See JACKSON, *supra* note 16, at 2.

26. See JACKSON, *supra* note 16, at 50-51.

27. See JACKSON, *supra* note 16, at 29.

28. The Committee on Long Range Planning has been directed "[t]o coordinate the long range planning activities of the judiciary and propose a long range plan to the Judicial Conference." Included in that charge is responsibility to complete the following tasks:

1. Promote, encourage, and coordinate long range planning activities within the judicial branch.
2. Advise and make recommendations to the Judicial Conference regarding planning mechanisms and strategies, including the establishment of a coordinated judiciary planning process.
3. In consultation with and participation by other committees, members of the judiciary, and other interested parties, coordinate the identification of emerging trends, the definition of broad issues confronting the judiciary, and the development of strategies and plans for addressing them.
4. Evaluate and report on the planning efforts of the judiciary.
5. Based upon advice from other Judicial Conference committees, judges and other interested parties, prepare and submit for Judicial Conference approval, a long range plan for the judiciary and periodic updates to that plan.

At its March 1993 session, the Judicial Conference charged the Committee with an interim assignment:

In response to a request from the Ninth Circuit Court of Appeals for ten additional judgeships, the Judicial Conference determined that, without regard to the merits, it would defer consideration of the request until September 1993, because of the potential impact on the federal judicial system of an expansion of that magnitude. The Conference decided that the question of whether to limit the size of the federal judiciary should be examined, and it referred this question to the Long Range Planning Committee, in consultation with other committees as appropriate, for study and report to the September 1993 Judicial Conference.

guidelines.<sup>29</sup> Too often, the judiciary has failed to anticipate change and so its response was reactive, triggered by crisis. The emphasis of the Long Range Planning Committee is on creating a sustained planning process which will allow the judiciary to anticipate change in a systematic way and to be proactive prior to crisis.

This does not mean that the substance of the first plan is unimportant. The Planning Committee, and the various conference committees and others who are contributing to the plan, certainly do not intend it to be so. However, my sense is that the content of the first long range plan, whether all or even any of the Committee's recommendations are in fact implemented, will be less important. In terms of the substance of the first plan, the Committee will likely be criticized by some for attempting to do too much, and by others for attempting to do too little. Surely, some of the Committee's final recommendations may be based on a misapprehension of the importance of specific trends. Normative judgments made in the first long range plan may need to be revisited in subsequent plans. However, ultimate success of this experiment depends on whether the Committee establishes a permanent, workable, institutional capacity within the third branch to anticipate change, and to respond to it, prior to the onset of crisis. The first long range plan, whatever its content, will inevitably need to be reevaluated. However, following the formulation of the first long range plan, the judiciary should have in place the institutional mechanism to reevaluate and reformulate its long range institutional priorities in light of changing conditions.

An emphasis on establishing a process which can deal comprehensively with the issues facing the judiciary requires enlistment of all sectors of the judiciary in planning.<sup>30</sup> This is so for several reasons. Broad participation in the planning process may help overcome some of the institutional limits which the structure of the judiciary poses for planning.<sup>31</sup> Unlike so many private corporations which have had success in planning, the third branch has no rigid corporate hierarchical structure that can support a mandate for centralized plan formulation and implementation. The federal courts have no CEO who could order compliance with plans. Federal courts are hierarchically arranged for the law-deciding function with district court decisions reviewed by courts of appeals, whose decisions in turn are subject to final review by the Supreme Court. However, on the administrative governance side, hierarchy is less pronounced. Individual federal judges enjoy judicial independence through the protections of life tenure and irreducible salary. This independence, which insures that judges will be able to decide cases impar-

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29. See FCSC, *supra* note 8, at 146-48.

30. These sectors include at least the Judicial Conference and its various committees, circuit councils, circuit, district and bankruptcy chief judges, circuit and district executives, and clerks.

31. An example might be the requirements of due process. A goal of disposing of cases faster and with less expense is hampered by constitutional requirements of process. However, no one would suggest that, for the sake of efficiency, due process should be dispensed with.

tially,<sup>32</sup> without fear of retribution (either within or without the judiciary) for unpopular decisions,<sup>33</sup> likewise provides some insulation from the judicial governance hierarchy.

Courts of appeals judges are not the judicial planning equivalent of middle-level managers. Individual judges do not work for, or report to, the Chief Justice, the Judicial Conference of the United States, circuit councils, or circuit or district chief judges.<sup>34</sup> The situation has been described by Chief Judge J. Clifford Wallace as a tribe with only chiefs.<sup>35</sup> While there is some level of administrative intra-branch control over judges, federal judges enjoy, and should enjoy, autonomy over their courts and the process by which they manage their dockets. Of course, inability to force a plan on the courts impedes system-wide planning and decision-making. This organizational reality challenges planners to develop a consensus on contentious issues before attempting to deal with them systematically.<sup>36</sup>

Broad participation in long range planning is important for several other reasons. Foremost is the Planning Committee's need for expertise. Although the members of the Planning Committee have served in various administrative capacities and the Committee is served by an experienced staff, the Planning Committee clearly lacks the in-depth expertise needed to produce a workable plan on all important issues facing the judiciary. Comprehensive planning requires marshalling all of the available expertise within the third branch.

Second, the planning process should integrate the various segments of the policy-making apparatus in the judiciary. Trends affecting one area of the judiciary probably will affect others. Currently, most caseload forecasting in the judiciary is done as part of space and facilities planning. Clearly, trends in caseload, and shifts in numbers of specific cases being filed, will affect more than just the need for more courthouses, chambers, and equipment. For example, caseload trends may hasten the need for alternative mechanisms for case processing in the district courts or in the courts of appeals. Trends may affect specific areas of the country and specific circuits differently. The Planning Committee seeks not only to improve caseload forecasting over time, but also to make forecasts available to all sectors of the judiciary. This might allow policy makers throughout the judiciary

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32. See generally Sam J. Ervin Jr., *Separation of Powers: Judicial Independence*, 35 LAW & CONTEMP. PROBS. 108 (1970); Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671 (1980); Philip B. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665 (1969); J. Clifford Wallace, *Judicial Administration in a System of Independents: A Tribe with Only Chiefs*, 1978 B.Y.U. L. REV. 39; Martha Andes Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135.

33. Judges enjoy what Professor Covington has described as "decision autonomy." The amount of time a judge takes to reach a just decision is subject only to regulation in extreme cases. How a judge manages individual cases, and her calendar generally, is thought to be a matter properly within the judge's discretion.

34. Obviously, judges do not work for the Planning Committee.

35. Wallace, *supra* note 32.

36. There are, of course, other possible responses to the lack of strong hierarchical structure in federal courts. Assuming the lack of governance hierarchy hinders planning, is planning so important that the governance hierarchy should be strengthened (and the autonomy of judges lessened) in order to support planning? Although there may be sound reasons to modify the current system of judicial governance, I believe planning should accommodate the diffuse governance structure (and the independence of judges therein entailed), and not vice versa.



to be "on the same page" in terms of assumptions necessary to support long range policy formulation.

Third, as noted above, planning for the federal judiciary requires setting priorities. This task is made more manageable, and the resulting priorities should be more acceptable, if the Committee receives and considers input from a broad spectrum of persons both within and without the judiciary.

Fourth, while formulation of a national plan for the judiciary is necessary on issues of system-wide importance, equally important is planning in all areas of the judiciary. Individual circuits face discrete problems which may not be addressed in a system-wide plan. The Ninth Circuit already has developed a plan for the circuit and is proceeding to produce plans for its district and bankruptcy courts.<sup>37</sup> A permanent planning capability in the judiciary requires that various segments of the judiciary continually anticipate change, establish and prioritize goals, and set strategies to achieve those goals.<sup>38</sup> The Planning Committee does not intend to "do planning" for all levels of the judiciary. Issues facing specific circuits or districts, over which the claim for regional or local court autonomy is most strong, should be addressed on a circuit-wide or district-wide level, rather than in a national long range plan.<sup>39</sup>

Fifth, planning requires implementing proposed strategies. Plan implementation within the branch is complicated by its independence. Plan implementation is further complicated by the fact that implementing some recommendations may require action by others outside the judicial branch, such as by Congress, state judiciaries, the Department of Justice, lawyers, and litigants. Change in the judiciary is driven by a variety of agents and forces. For example, in part, the continued support for diversity of citizenship jurisdiction in federal courts is driven by perceived insufficiency of selected state courts to handle existing dockets. Shifting judicial business from federal to state courts probably cannot be accomplished unless state judiciaries are strengthened and provided sufficient resources to meet existing and any increased burdens.<sup>40</sup>

As such, the Planning Committee, in addition to trying to build broad participation in planning within the judicial branch, has likewise tried to obtain input and consultation from various outside stakeholders in the judicial system, federal legislatures, state judges, lawyers, and interest groups. This consultation has been and will be obtained through a variety of formal and informal mechanisms including retreats,<sup>41</sup> surveys, formal liaison with Judicial Conference Committees and

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37. U.S. CT. OF APP. FOR THE NINTH CIR., LONG RANGE PLAN (May 1992).

38. See JACKSON, *supra* note 16.

39. Otto R. Skopil, Jr., Framework for Long-Range Planning in the Federal Judiciary, Speech Presented at the Meeting of the Judicial Council of the Ninth Circuit (May 1992), in LONG-RANGE PLANNING FOR CIRCUIT COUNCILS, 1992, at 29-34.

40. Sol Wachtler, *Judicial Lawmaking*, 65 N.Y.U. L. REV. 1 (1990).

41. The dates of the retreats were May 17-18, 1993; July 8-9, 1993; and Mar. 3-4, 1994.

with the Department of Justice,<sup>42</sup> and public hearings.<sup>43</sup> Continual dialogue with these external stakeholders, and consideration of their legitimate interests in and expectations for our judicial system, should help build a sense of broad ownership in and support for the long range plan ultimately produced by the Planning Committee for submission to the United States Judicial Conference.

#### IV. FORMULATING POLICIES FOR THE LONG RANGE PLAN: THE PROCESS IN PRACTICE

In selecting long range issues for the plan, the Planning Committee formally and informally obtained input from various sources. The Committee formally asked each committee of the Judicial Conference to identify issues which the committee thought merited treatment in a long range plan. The Committee staff catalogued proposals made by previous study groups, including the Federal Courts Study Committee.<sup>44</sup> The archive of the Federal Courts Study Committee contained correspondence which was reviewed and catalogued. Meetings were held with members of Congress. Requests were made to the bar and to bar associations for suggestions and assistance. Also, as news of the planning effort spread, each Planning Committee member began to receive suggestions from colleagues and other interested persons within and without the judiciary.

Committee staff then compiled a list of issues on which action might be indicated. The list contained around one thousand suggestions organized under general topics to improve federal courts.<sup>45</sup> Not every good idea for improvement of the federal judiciary belongs in the national long range plan. Some issues are short-term, in that they can be effectively dealt with in two budget cycles. The Committee obviously had to select a few key long range topics on which action may be required in order to allow the judiciary to continue to serve its core functions in our society and in our constitutional order.<sup>46</sup>

The Committee's treatment of issues related to the topics of court structure and court governance provide a good example of how the Planning Committee has operated, and perhaps, how it should operate in the future. An initial extensive study on the issues of court structure and governance was undertaken by the Committee on Court Administration and Case Management, the Judicial Conference Committee with jurisdiction over these issues. The Court Administration Committee was then chaired by Judge Robert Parker, who is a contributor to this symposium.

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42. Letter from Chief Justice William Rehnquist, to the Honorable Janet Reno, U.S. Attorney General (Sept. 13, 1993) (on file with the *Mississippi College Law Review*).

43. The dates and locations of the hearings included Oct. 12, Philadelphia; Oct. 25, New Orleans; Nov. 3, Chicago; and Nov. 16, Phoenix.

44. LONG RANGE PLANNING OFFICE, ADMINISTRATIVE OFFICE OF THE U.S. CTS., COMMITTEE ON LONG RANGE PLANNING OF THE JUDICIAL CONFERENCE OF THE U.S. II. C. (June 18-19, 1992).

45. *Id.*

46. It is imprecise to say that the Planning Committee selected only issues on which action is required. On some key issues, the Planning Committee may recommend no action, but continuation of the status quo. The purpose of planning is not to force action for the sake of action. It is to recommend action where necessary, and to recommend continuation of existing policies where those policies are serving the judiciary well.

A subcommittee of Judge Parker's committee studied these issues, held a public meeting on structure and governance proposals, and produced a detailed report for the Planning Committee's consideration. That report, now generally referred to as the Parker Report,<sup>47</sup> contained detailed proposals regarding the size of the federal bench,<sup>48</sup> the maximum number of courts of appeals judges,<sup>49</sup> the number and size of circuits,<sup>50</sup> mechanisms for handling cases on appeal,<sup>51</sup> the boundaries of district courts,<sup>52</sup> and the nature of and relation between circuit and district governance.<sup>53</sup>

Although the Planning Committee obviously must rely on the expertise of its other conference committees in formulating the long range plan, the Planning Committee intends to make an independent assessment of the proposals submitted for inclusion in the plan. The Planning Committee role is not limited to assembling the plan or to rubber-stamping what other conference committees recommend.

Planning Committee assessment of the proposals of the Parker Report included the following. A subcommittee of the Planning Committee extensively studied the proposals.<sup>54</sup> The Report was circulated for comment throughout the committees of the Judicial Conference and more broadly within the judiciary. Portions of the Report were considered as part of the circuit judicial conference.<sup>55</sup> More recently, the Planning Committee considered the governance issues in a retreat which included members of the judiciary and selected academics.<sup>56</sup>

The Planning Committee has not completed its assessment of the structure and governance proposals contained in the Parker Report. Whether the Parker Report proposals are adopted in whole or in part, the Parker Report has focused the policy debate on court structure and governance. There is disagreement on whether the current regional organization of the courts of appeals, which includes my own

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47. REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT TO THE JUDICIAL CONFERENCE COMMITTEE ON LONG RANGE PLANNING (Feb. 16, 1993) [hereinafter PARKER REPORT].

48. *Id.* at 2.

49. The Report suggested limiting the number of circuit judges to 120. *Id.* at 7.

50. The Report recommended reducing the number of circuits to ten, and limiting the number of judges on each circuit to twelve. *Id.*

51. The Report recommended two distinct case tracks for appellate cases. On one track, cases would be submitted on brief, on specified limits, and decided without oral argument. *Id.* at 8. Cases on the second case track may receive oral argument. *Id.*

52. The Report recommended that district court boundaries should be co-extensive with those of the courts of appeals. *Id.* at 9. This would provide flexibility for moving district judges within the enlarged district to those areas in greatest need of judge power.

53. The Report recommended uncoupling district court governance from the courts of appeals, and included recommendations regarding formation and selection of councils for district and circuit governance. *Id.* at 10-11. Uncoupling the governance of the district courts from the courts of appeals would increase the administrative autonomy of the district bench, perhaps at the expense of accountability.

54. The proposals on court structure were considered in a Federal Judicial Center report to Congress. FEDERAL JUDICIAL CENTER, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS: REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES (1993). The Federal Judicial Center has also produced a monograph on governance issues. FEDERAL JUDICIAL CENTER, ORIGINS OF THE ELEMENTS OF FEDERAL COURT GOVERNANCE (1992).

55. LONG RANGE PLANNING OFFICE, ADMINISTRATIVE OFFICE OF THE U.S. CTS., MATERIAL FOR SMALL GROUP DISCUSSION LEADERS AND REPORTERS (Apr. 15-18, 1993).

56. The date of the recent retreat was March 3-4, 1994, held in Washington, D.C.

larger circuit, is working well now, and whether that organization will continue to work well. However, the Parker Report has forced those who would alter or defend the current organization of the courts of appeals to articulate the standards by which court organization should be measured in light of the values of federal courts.<sup>57</sup> That articulation of standards is basically a charting of the course for court organization and governance, and is essentially what federal judicial planning should do if it is to succeed.

Once the Planning Committee completes its work on a proposed plan, and following a period for comment within and without the judiciary, the long range plan will be submitted for approval to the United States Judicial Conference. The Planning Committee circulated a draft plan in the fall of 1994 for public comment,<sup>58</sup> and will submit a final proposed plan to the Judicial Conference in March of 1995. Working papers which memorialize the various alternatives considered by the Planning Committee will be collected for Conference consideration. Obviously, the Judicial Conference will make its own assessment of the merits of the recommendations contained in the proposed plan. Again, whatever plan is developed will have to be revisited. Success in this effort, however, depends less on adoption or rejection of individual recommendations, and more on establishing a workable, integrated, long range policy-making process which will allow the judiciary to articulate a vision of the essential role of federal courts, and to achieve that vision in a society which will surely make new and increased demands on its federal courts.

#### V. CONCLUSION

The United States Judicial Conference did not originate long range judicial planning when it created its Committee on Long Range Planning. What it did do was for the first time to charge a single intra-branch committee with establishing a permanent, comprehensive long range planning capability within the judiciary. Planning always is a work-in-progress. This may be so for judicial planning because many of the forces which affect the judiciary are either difficult to foretell, or outside of the direct control of the third branch, or both. However, the establishment of a permanent planning capability can assure that the federal judiciary remains rooted in the values which have allowed it, and should continue to allow it, to serve its essential role in our changing society.

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57. See PARKER REPORT, *supra* note 47.

58. Both written comment and public testimony were requested. Public hearings were held in Washington, D.C., and Phoenix.

