The Federal Courts in the 21st Century

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KEYWORDS: federal, courts, century
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Introduction

In forecasting the future, one should undoubtedly pick a target date far enough ahead to assure that mortality will get here first.¹ My safe selection is the year 2033, which will be the 100th anniversary of FDR's New Deal. Picking that year allows us to conjure up the prospect of a New Deal for the federal courts. If it comes, what sort of new deal will the nation be giving to and getting from its judiciary? That depends on what kind of federal judicial system we ideally would want. This in turn depends, at least in part, on what changes the next 43 years will bring, and especially, what effect the changes will have on phenomena that might shape the work, structure, operations and personnel of the federal courts.

Luckily, this forecasting enterprise can draw upon the results of a recently completed study by a very capable congressionally established committee that set itself a similar goal. Its target was about 25 years out instead of 43, but I see no problem in using its product as a springboard for this discussion on the coming role of the federal courts.

The Federal Courts Study Committee

In November 1988 in response to widespread, though not unanimous, fears that the federal judicial system was in serious and worsening difficulties, Congress enacted the Federal Courts Study Act.² The Act created a Federal Courts Study Committee (FCSC) to be set up


2. STAFF OF SENATE COMM. ON THE FEDERAL COURTS, 100TH CONG., 2D SESS., REPORT OF THE FEDERAL COURTS STUDY COMM. 31 (Comm. Print 1990) [hereinafter REPORT].
within the Judicial Conference of the United States, with 15 members and a 15-month lease on life. The Committee was to "make a complete study of the courts of the United States and of the several States and transmit a report to the President, the Chief Justice of the United States, the Congress, the Judicial Conference of the United States, the Conference of Chief Justices, and the State Justice Institute." It did so. On April 2, 1990, the FCSC delivered a thoughtful, comprehensive and lucid assessment of the problems facing the United States federal courts, and made more than 100 recommendations for their cure or alleviation. Each recommendation was explicitly directed either to Congress, the courts, the Department of Justice, the Executive branch generally, or, in a few instances, to the State Justice Institute and the state courts.

Besides calling for an examination of current federal court problems, Congress required the Committee to develop a long-range plan for the future of the federal judiciary, identifying four subjects on which assessments were needed: (1) alternative methods of dispute resolution; (2) the structure and administration of the Federal court system; (3) methods of resolving intracircuit and intercircuit conflicts in the courts of appeals; and (4) the types of disputes resolved by the Federal courts.

In January 1989 Chief Justice William H. Rehnquist appointed Judge Joseph F. Weis, Jr., of the United States Court of Appeals for the Third Circuit to chair the committee and named as members two other circuit courts of appeals judges, two district judges, two United States Senators, two Representatives, an Assistant Attorney General, several practitioners, a state chief justice and a university president. A small full-time staff and a large number of unpaid advisers and consultants aided the FCSC in the remarkably intensive and expeditious dis-

3. Id.
4. The Report did not deal in a substantial way with problems of the state courts.
5. REPORT, supra note 2, at 172-85. Addressing each recommendation to an identified agency is an excellent way to focus attention. It undoubtedly has shortened the time to implement a number of recommendations. See, e.g., FEDERAL COURTS STUDY COMMITTEE IMPLEMENTATION ACT OF 1990, H.R. 5316, 101st Cong., 2d Sess. (1990).
6. REPORT, supra note 2, at 172-85.
7. Id. at 189-91.
8. Id. at 31, 193-98.
charge of its duties. At its outset the final report of the Committee identifies the flood of incoming cases as a threat to the effective functioning of the federal courts:

It is no doubt a compliment to the federal judiciary that so many people are so eager to use its services in preference to those of other adjudicatory institutions. Many of these people do not realize, however — or do not care — that the demands they place on the system make it less able to serve the needs of other groups, or even their own needs in the long run.

Similarly straightforward is the FCSC's response to the problem of perceived overuse of the federal courts:

The committee believes . . . that the primary and preferred course, while time exists, is to limit the federal judiciary to just those functions that its unique federal role requires, so as to avoid the perhaps overwhelming impact of further unchecked growth. We have therefore concentrated upon incremental reforms that may at least postpone the need for more extreme ones.

Before examining the recommended reforms we should note briefly how the Committee went about its work. In its early days the FCSC organized itself into three subcommittees corresponding to its main concerns. One was the Subcommittee on Workload, which focused on: the size and mix of the federal courts' civil and criminal caseload; alternative dispute resolution methods; complex multi-district litigation; and improving the courts' capacity to deal with scientific evidence. Another was the Subcommittee on Role and Relationships, concerned with the federal courts' relation to Congress, Article I courts, administrative agencies and state courts. The third, the Subcommittee on Administration, Management and Structure, concentrated on the way the system is organized and run, with emphasis on appellate structure.

9. Id. at 32, 199-203.
10. REPORT, supra note 2, at 4. In part this is due to the nationalization of many areas of the law as a result of the communications revolution and other centralizing forces. However, state-law based diversity suits regularly contribute about a quarter of the civil caseload.
11. Id.
12. Id. at 187.
13. Id. at 31.
To identify specific issues for its agenda the FCSC conducted a survey of federal judges and citizens' groups, bar organizations, research groups, civil rights groups, professors and others. It held public hearings in 13 cities, drawing testimony from more than 250 witnesses. The Committee also had the benefit of written comments from hundreds of sources. In the end, the FCSC produced in a commendably short period of time a report that may well be the most comprehensive and searching study of the federal courts in their 200-year history.

Recommendations of the FCSC

The FCSC grouped its recommendations under eight subject matter headings: (1) reallocating business between the state and federal systems; (2) creating non-judicial alternative forums for some types of cases; (3) enlarging the federal courts' capacity; (4) reducing the complexity and speeding the flow of litigation; (5) mitigating appellate court overload; (6) revising sentencing rules; (7) improving federal court administration; and (8) protecting against bias in the judicial branch and its processes. For present purposes those headings are somewhat diffuse. I find it useful to limit this discussion to a few of the headings, to revise them somewhat and to rearrange the contents. My aim is to highlight several of the large problems.

First, some of the recommendations would reduce the volume and workload of the Article III courts. In part this would be accomplished by diverting whole categories of cases to other tribunals, mainly state courts and non-judicial forums. In part it would be achieved by expediting dispositions through more settlements and simplified litigation procedures.

Drug cases receive extended attention. The Report argues that, in order to protect the federal courts from being capsized by drug cases which the state courts could absorb, federal enforcement officials

14. *Id.* at 32-33.
15. *Id.* at 32.
17. *Id.* at 33.
18. *Id.* at 35.
19. *Id.* at 49.
20. *Id.* at 35.
should target only the relatively few cases (those with international or interstate elements) that state authorities cannot or will not effectively prosecute. 21

Federal jurisdiction based on diversity, now accounting for about one in every four cases in the federal district courts, should be eliminated, the Report urges, except for alienage, interpleader and a new category of multistate litigation involving complex issues, such as mass torts. 22 If near-total elimination of diversity cases is not acceptable, the FCSC falls back to lesser curtailments, such as barring plaintiffs from invoking diversity jurisdiction in their home states. 23

Disability claims, 24 small-size tort claims against the federal government, 25 tax cases, 26 bankruptcy appeals, 27 and claims by railway workers and seamen for job injuries, 28 should all be deflected from the Article III courts to a variety of other tribunals, most of them to be newly created. 29 Another flood-control proposal would authorize the Equal Employment Opportunity Commission to install a five-year pilot program to arbitrate employment discrimination cases with the consent of both parties. 30

Second, there are proposals that deal with the structure of the judicial system, with a heavy emphasis on the appellate courts. 31 The Report opposes creation of a “national intermediate court of appeals” of the kind proposed in 1975 by the Commission on Revision of the Federal Court Appellate System. 32 But, noting that “caseload pressures are inexorable” 33 in the courts of appeals, the Report describes and diagrams five alternative structures that are designed to increase the capacity of the courts of appeals without adding to the potential for intercircuit or intracircuit conflicts. 34 Besides urging serious study of the

21. REPORT, supra note 2, at 37.
22. Id. at 38-40.
23. Id. at 42.
24. Id. at 55.
25. Id. at 81.
26. REPORT, supra note 2, at 69.
27. Id. at 74.
28. Id. at 62.
29. Id. at 55.
30. Id. at 60.
31. REPORT, supra note 2, at 109, 116-17.
32. Id. at 116-17.
33. Id. at 117.
34. Id. at 117-23.
alternative versions of the appellate system presented (none of which it
endorses), the Report calls upon Congress to authorize a five-year ex-
perimental project to deal with intercircuit conflicts.\textsuperscript{35} The Supreme
Court could, if it chooses, refer selected cases to an en banc court of
appeals for a decision that would be a nationwide precedent.

Third, there are recommendations to increase available judge-
power: "More judges are essential. But they are not the ultimate solu-
tion to the federal courts' caseload crisis."\textsuperscript{36} In this category is the pro-
posal to limit incoming tax cases to the Article I trial division of the
Tax Court and to create an Article III appellate division with exclusive
jurisdiction over appeals in all tax cases.\textsuperscript{37}

An Office of Judicial Impact Assessment is proposed.\textsuperscript{38} It would
act in liaison with Congress by advising on the impact on the courts of
contemplated legislation. The Committee also recommended that when
drafting laws, Congress use a checklist to eliminate the need for post-
enactment litigation and judicial interpretation. The checklist would in-
clude issues such as the applicable statute of limitations, whether the
statute means to preempt state law, whether the statute created a pri-
ivate cause of action, and similar recurring questions.\textsuperscript{39}

Some of the FCSC's recommendations have already been put into
effect or into the legislative hopper. For instance, the Federal Courts
Study Committee Implementation Act of 1990 calls for a study by the
Federal Judicial Center of Intercircuit Conflicts and provides a fall-
back 4-year statute of limitations for future federal legislation that
omits to specify a limitations period.\textsuperscript{40}

The Role of the Federal Courts

Not all observers accept the FCSC's premise that it is essential "to
limit the federal judiciary to just those functions that its unique role
requires, so as to avoid" the harmful effects of unchecked growth. Nev-
nevertheless, the premise has a venerable pedigree. As far back as 1954,
Professor Henry M. Hart, Jr., said that the "time has long been over-
due for a full dress examination by Congress of the use to which [the

\textsuperscript{35.} \textit{Id.} at 126.
\textsuperscript{36.} \textit{REPORT, supra} note 2, at 36.
\textsuperscript{37.} \textit{Id.} at 69.
\textsuperscript{38.} \textit{Id.} at 89.
\textsuperscript{39.} \textit{Id.} at 91.
\textsuperscript{40.} \textit{FEDERAL COURTS STUDY COMMITTEE IMPLEMENTATION ACT OF 1990, H.R.}
\textit{5316, 101st Cong., 2d Sess. (1990).}
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Federal courts are being put." The reexamination is sure to spark a fiery debate, for there are deep differences of opinion regarding the basic functions of the federal courts in American society. In my view, a fair delineation goes something like this:

The federal courts' central purposes and functions are to protect the individual liberties, freedoms and rights of these people; to give definitive interpretation and application to constitutional provisions and federal laws, and to assure the continued vitality of democratic processes of government. These are vital functions for the welfare of the nation and its people. No other agency or institution of government can perform these duties as effectively as the federal courts. 2

Because the question of which disputes belong in the federal courts and which ones do not is so sensitive, any recommendation to pare their jurisdiction must be approached with utmost caution. The decision must rest on principled criteria that are as free as possible from political or ideological agenda. A good example is the address of this subject by the late Judge Henry J. Friendly in his 1972 Carpentier Lectures at Columbia University. He described both a "minimum" and a "maximum" model of federal jurisdiction. Those who espouse the minimum model, he pointed out, proceed on the theory that the best course is to trust the state courts, subject to appropriate federal appellate review. In the hypothetical minimum model he identified many types of cases that were excluded from federal jurisdiction, but not cases where "everything is to be gained and nothing is to be lost by granting original jurisdiction to inferior federal courts." 3 The following categories of actions were in the minimum model: (1) cases where the United States is seeking to enforce its own laws; (2) civil claims by the United States; (3) suits against the United States; (4) civil cases in the admiralty and maritime jurisdiction; (5) bankruptcy cases (but he went on to say there is no reason why bankruptcy laws could not be confided to state courts, since they involve only private rights). 4

Judge Friendly observed that the minimum model of federal jurisdiction would be broader than that of the First Judiciary Act, with the

44. Id. at 10.
notable exception that diversity jurisdiction would not be present.\textsuperscript{45} The
minimum model would also eliminate general federal question juris-
diction. Vindicating federal rights would be a job for the state courts, with
review by the Supreme Court or, if needed, by intermediate federal
appellate courts.

In contrast, the maximum model would go to the full extent of
constitutional judicial power. It would place considerable reliance on
the argument that federal courts provide a "juster justice" than state
courts; thus, the more cases in the federal system the better.\textsuperscript{46} Al-
though the issue of the proper allocation of jurisdiction to the federal
courts is today debated frequently on ideological lines, with conserva-
tives calling for studies of the proper division of federal-state judicial
competence and liberals opposing any such studies as likely to lead to
restrictions on the federal courts' jurisdiction, this was not always so.
The American Law Institute's landmark "Study of the Division of Ju-
risdiction Between the Federal and State Courts" (1969) originated in
a suggestion of Chief Justice Earl Warren in an address to the Institute
at its annual meeting in 1959. He said, "[I]t is essential that we
achieve a proper jurisdictional balance between the federal and state
court systems, assigning to each system those cases most appropriate in
the light of the basic principles of federalism."\textsuperscript{47}

Forecasting The Federal Court's Future

As already noted, forecasting the far-off needs and problems of the
federal courts is risky business. A sure way to be wrong is to project
present trends. Former Attorney General Griffin Bell was fond of
pointing out that based on the trend in Georgia's prison population, by
the year 2016 every inhabitant of the state would be in prison.\textsuperscript{48}

Judge J. Clifford Wallace of the Ninth Circuit Court of Appeals
has observed that: "Not only do changing conditions affect the trend
lines, but sometimes the trends themselves result in a counteraction."\textsuperscript{49}
Yet, with all their unreliability as predictors, trends can stimulate the
imagination. A decade ago it was calculated that if trends for the pe-

\textsuperscript{45} Id. at 11.
\textsuperscript{46} Id. at 12.
\textsuperscript{48} Wallace, Working Paper — Future of the Judiciary, 94 F.R.D. 225, 227
\textsuperscript{49} Id. at 227.
period 1975-80 were to continue to the year 2000, the number of district court judgeships would increase by about 50%, district court filings by 37%, appellate court filings by 223%, and appellate court judgeships by 25%.50

To some extent, both the nature of the work the federal courts do and the structure of the federal judicial system will depend upon the demands for judicial time and energy. This requires translating the data on the quantity of filed cases into more realistic dimensions — that is, by assigning weights to the various components of the caseload in order to reflect the work demands they will make. The result will be to purge the caseload figures of statistical fluff in the form of thousands of pro forma actions such as the student-loan collection cases brought by the United States Government. These almost never produce opposition, let alone a trial. They require very little judicial energy and should not be assigned statistical parity with antitrust and other complex lawsuits. Determining the impact of intake volume on the courts requires analyzing the nature as well as the number of filed cases.

Today there are about 835 authorized federal judgeships.51 Should there be any resistance to continuing to expand the size of the federal judiciary? How many more federal judges would it be desirable to have? The FCSC suggested that 1,000 is the practical ceiling on the number of judges if the Article III judiciary is to remain capable of performing its essential functions without significant degradation of quality.52 The FCSC offered this argument for limiting the number:

Even if a highly competent federal judiciary consisting of thousands of judges could be created and maintained, the coordination of so many judges would be extraordinarily difficult. The more trial judges there are, the more appeals judges there must be; the more appeals judges there are, the higher the rate of appeal, because it becomes more difficult to predict the behavior of the appellate court; the more appeals there are, the more difficult it is for the Supreme Court to maintain some minimum uniformity of federal decisional law, because its capacity to review decisions of the

50. Id. at 228.
51. The Federal Judgeship Act of 1990 (H.R. 5316), which passed both houses of Congress on October 26, 1990, established 11 new court of appeals judgeships and 74 district court judgeships for a total of 85 new judgeships. As this article goes to press, the authorizing legislation awaits President Bush’s action.
52. REPORT, supra note 2, at 8.
lower federal courts is limited.\textsuperscript{53}

Although this is a reasonable argument, it does not persuade the large constituency that admires and trusts the federal courts above all other agencies of government, state or federal. Members of that constituency hold fast to the view that every federal right must be heard by an Article III judge. If there are not enough federal judges, they say, "Get more!" And, they add, there are thousands of qualified persons among the three quarters of a million lawyers in America. In effect, they say: "If we need more, we can afford more, and we can find more." Thus, the dilemma: systemic limits are on a collision course with substantive expansion. Congress has been legislating new rights at a merry and unchecked pace. Courts have been recognizing more and more federal rights and some new federal defenses. Neither Congress nor the courts are likely to stop legislating or creating rights and defenses. That means that there will be more and more litigation. If we can forecast anything about 2033, it is that barring some major change in the psychology, economics or utility of litigating, Americans will continue to litigate in huge numbers.

What factors in American society will affect the nature of legal rights and the desire to litigate them in federal courts in the decades ahead? That is a question futurists, jurists, and lawyers have been energetically discussing in recent times. Among the frequently mentioned factors of change that may affect the courts are demography, science-technology, and economics. How these amorphous phenomena may make their effects felt on the work of the federal courts involves undisciplined speculation, not prediction. So be it.

Among demographic problems: As the population gets grayer — even white-haired — will there be contests between the younger, more productive, and the older, more affluent, segments of the society for scarce goods and services? As the population gets more heterogeneous, will more than the English language be standard in the courts of the United States? Will briefs have to be written in two languages? Or perhaps we will return to the innocent idea of esperantist days — that there ought to be a world-wide tongue.

Science and technology offer myriad possibilities of generating great volumes of federal litigation. Environmental issues are a prime example. In just a few centuries human beings have progressed from garbage in the streets to garbage all over the globe — in land, water

\textsuperscript{53} Id. at 7.
and in the atmosphere. The environment is here to stay, not only as a resource but as a problem. Indeed, I see it as the major problem of the twenty-first century. How shall we keep civilization from strangling in its own waste, and what is the role of the federal courts in vindicating the rights of people with conflicting views and priorities regarding environmental issues?

With genetic engineering advancing at a feverish pace, the shape of looming legal issues is apparent. Competing claims to replacement parts for worn-out limbs and organs and the use of fetal tissue for medical purposes are two such issues. Is the day coming when human beings who give up the ghost, or who never get that far because they were never born, are used for spare parts?

Communication advances have certainly not run their course. Exploding communications technology will not be without problems. Once it becomes possible to see or hear activities behind closed doors and thick walls, what happens to privacy? How will Congress and federal courts deal with those issues?!

Conclusion

If trends are unreliable predictors and if the advent of a Gorbachev, an asbestos-case deluge, or a crack-cocaine epidemic is totally unforeseeable — in short, if we are at the mercy of the unexpected — how can we forecast what needs and problems the federal courts face in 40-odd years? I fear we cannot do even a poor job of prophesying. That means we cannot program the federal judiciary to be elite or populist, bureaucratic or individualistic, restricted in jurisdiction or expansive, proceeding by general rules or by case management, concerned with systemic fairness as well as case-by-case fairness, etc.

What we can and should do, in my opinion, is to prepare for whatever the future holds by three steps. The first need is for a planning capability for the federal judicial system. It is certain the work of the federal courts will continue to change rapidly and substantially. The course of responsibility is to anticipate problems and develop possible responses before the problems reach a crisis stage. A long-range planning capability within the Judicial Conference was proposed by the FCSC. Although opinions may differ as to the exact structure and makeup of the planning agency, the need seems clear and its location in the third branch reasonable.

A second need is for built-in flexibility in the federal judiciary. This can only come by understanding, through research and analysis,
the dynamics of case flow, the indicia of case durability, and the weighted judicial-time requirements of the caseload at both the trial and appellate level. This will prepare the judiciary for dealing with court problems of the future, whatever form they take.

A final need is to appreciate that the federal courts, like the state courts, are part of a dispute resolution system that includes many alternatives to full-blown litigation as ways of resolving disputes. If that concept can be absorbed and acted upon, the chances of a better deal for the courts in 2033 will be much improved.