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Report of the Federal Courts Study Committee

April 2, 1990

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U.S. Department of Justice
National Institute of Justice

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Part I

Overview

RESPONDING TO MOUNTING PUBLIC AND PROFESSIONAL CONCERN WITH the federal courts' congestion, delay, expense, and expansion, this committee of diverse membership appointed by the Chief Justice at the direction of Congress has conducted a fifteen-month study of the problems of the federal courts and presents in this report its analysis and recommendations. The report is in three parts. In this first part we indicate the problems and sketch our proposed solutions. Part II describes the proposals in greater detail, and Part III is the detailed analysis undergirding a number of the diagnostic and prescriptive parts of the report. Not all the recommendations made in the report are supported by all members of the committee; dissents will be found in Part II. And not all the recommendations in Part II are summarized in this part, which is a synopsis and overview.

Our study and recommendations are directed to institutional rather than substantive concerns; and since the institutional arrangements (embracing organization, jurisdiction, and procedure) governing the federal courts are prescribed primarily by Congress, it is to Congress that most of our major recommendations are addressed, although a number can be implemented without congressional action by the Judicial Conference of the United States, by other agencies, and even by individual federal judges.

We were not asked to propose changes in substantive law. With this important qualification noted, it is nevertheless the case that the committee has conducted the most comprehensive examination of the federal court system in the last half century—a period of unprecedented growth and change in federal law and federal courts. The breadth of our mandate has required us to consider a number of matters that are within the bailiwicks of particular committees of the Judicial Conference of the United States, or particular offices within the Administrative Office of the United States Courts. We have given careful consideration to the views of these groups, as of all groups and individuals having specialized knowledge of particular areas within the scope of our study. However, our perspective must be broader than the view from the judge's bench or the attorney's window. Especially since most of our recommendations are addressed to Congress, we must assess the total social impact of any suggested change in—or refusal to change—the status quo.

Any human institution is improvable, and the federal courts are no exception. Many of our recommendations are in the spirit of this observation, and their merits are independent of the current crisis of the federal court system. In places we have recommended an expansion in the jurisdiction of the federal courts. We want a better federal court system, not a smaller one. Our proposals would not make the system smaller, even if all of them

were adopted; they would merely prevent the system from being overwhelmed by a rapidly growing and already enormous caseload; and in doing so they would preserve access to the system for those who most need it.

Our proposals are incremental, not radical; we have explicitly foresworn radical proposals, for reasons to be explained. But, though incremental, many of the proposals are bound to be controversial because they threaten a status quo to which bench and bar have grown accustomed. It is no doubt a compliment to the federal judiciary that so many people are so eager to use its services in preference of 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. We urge Congress to appraise our proposals on the merits and stand fast against opposition from vested interests and pressure groups.

THE CRISIS

To understand the impending crisis of the federal courts, some understanding of history is necessary. Article III of the Constitution ordained the creation of a Supreme Court and authorized Congress to create lower federal courts as well, which the first Congress (1789) did. Article II provided that all federal judges would be appointed by the President with the advice and consent of the Senate, and Article III provided that they would serve “during good behavior” and without diminution of compensation; in effect removal was possible only by the cumbersome process of impeachment. The result was to create a judiciary of unprecedented independence, yet one whose members were carefully selected through the process of presidential nomination and senatorial confirmation.

At first almost all the nation’s judicial business was handled by state courts; there were few federal judges and their jurisdiction was highly circumscribed. Even today, 90 percent of the nation’s judicial business is handled by state rather than federal courts. With the expansion of the federal government—an expansion inaugurated by the Civil War, accelerated by Prohibition and then by the New Deal, and accelerated further during the burst of federal lawmaking that began with President Johnson’s “Great Society” programs and has continued virtually unabated since—the federal courts were bound to grow, both absolutely and relatively to the state courts. And grow they did. But until the late 1950s the growth was extremely gradual (except for a blip during Prohibition), and was easily accommodated by such expedients as making the Supreme Court’s jurisdiction primarily discretionary rather than mandatory (it is

now almost entirely discretionary); creating (in 1891) a tier of regional appellate courts—the federal courts of appeals—in between the federal trial courts and the Supreme Court; and, from time to time, dividing the circuits (i.e., the federal appellate regions) if they became unwieldy by reason of having too many judges.

The number of cases filed in federal courts began to surge as the 1950s drew to a close, and the surge has continued without surcease to this day. The causes are not fully understood but certainly include the continued growth of federal law and in particular the creation of many new federal rights both by Congress and by judicial interpretation of the Constitution, and a variety of procedural developments such as expanded use of class actions and “one-way” shifting of attorneys’ fees. Whatever the causes of the case surge, the magnitude is not in doubt. We do not wish to numb the reader with statistics but we must point out that between 1958 and 1988, following decades of extremely slow caseload growth, the number of cases (both civil and criminal) filed in the federal district courts (i.e., trial courts) trebled, while the number filed in the courts of appeals increased more than tenfold. To cope with this increased workload, Congress more than doubled the number both of district court judgeships and of appellate judgeships. In addition, a host of diverse judicial adjuncts and surrogates was created (federal magistrates, in succession to the old United States commissioners; staff attorneys, to swell still further the expanding ranks of law clerks; circuit executives, to help administer an expanding judicial system) to which judges could delegate some of their work. As a result, the percentage of federal court employees who are judges has fallen from 10 percent in 1958 to 3 percent today. District judges, moreover, have become more aggressive in encouraging parties to explore possibilities for settlement, in granting motions for summary judgment, and in taking other steps to minimize the amount of time consumed by trials (for example, by setting rigid time limits for the presentation of evidence). The reduction in the number of civil jurors from twelve to six is another move in this direction. And court of appeals judges have greatly reduced the length and frequency of oral argument and the percentage of cases decided with a full opinion signed by the authoring judge, as distinct from more summary and less informative modes of disposition. Some of the pressure on the civil docket is, to be sure, due not to the number of cases per se but to the Speedy Trial Act, as a result of which criminal trials receive priority. But the Act is itself a response to a perceived problem of court delay, and court delay is in turn the result of an imbalance between demand for and supply of judicial services.

Through the various expedients that we have mentioned, the federal courts had, until about a year ago, managed to keep abreast of their dockets,

though with some cost in the quality of federal justice and with some slippage in the courts' ability to keep abreast, a slippage evident in the increasing ratio of pending to terminated cases (from .75 in 1960 to .97 in 1989 in the district courts and from .60 to .80 in the courts of appeals). The gradual falling behind of the federal courts is indicated by the fact that whereas in 1960 it would have taken the district courts only nine months to dispose of all their pending cases (if no new cases had been filed) at their then rate of terminations, by 1989 this figure had risen to 11.7 months. The corresponding figures for the courts of appeals are 7.2 months in 1960 and 9.2 months in 1989.

The deterioration in the indices of federal judicial performance has been gradual, but the expanded federal effort to reduce drug trafficking has led to a recent surge in federal criminal trials that is preventing federal judges in major metropolitan areas from scheduling civil trials, especially civil jury trials, of which there is now a rapidly growing backlog. It appears that the long-expected crisis of the federal courts, caused by unabated rapid growth in case filings, is at last upon us.

At first glance it might seem puzzling why a growing, even a rapidly growing, number of cases should spell a "crisis." It might seem that any increase in the number of cases could be accommodated by a proportional increase in the number of judges and supporting personnel. But while adding judges is plainly necessary in the short term—and we recommend it—the federal courts cannot accommodate unlimited increases in the demand for their services by expanding their personnel. In this and other respects the federal courts cannot cope with a surge in the "demand" for its services in the way a business does. When a business firm experiences a surge in the demand for its product, this is cause for joy, not distress, since the firm can raise its price and at the same time begin the process, which may be gradual, of expanding its output to supply the higher demand. In principle, the federal court system could respond similarly to a surge in new cases. It could charge stiff filing or user fees that would discourage new filings, and it could go out and hire, at its leisure, as many more judges and other judicial staff as might be necessary to handle the growing but (by the increase in filing fees) moderated demand for its services. Among the objections that could be raised to the first solution, the most cogent is that it would drastically curtail federal rights. At first the rights holders priced out of the federal courts would turn to the state courts, but the states might decide to set their own stiff fees in order to prevent a flood of new cases; although the Constitution would not allow them to do that in a way that discriminated against federal claimants, a uniform increase in state court filings fees would not be discriminatory yet might have the effect of creating a large class of federal

rights holders who could not find *any* tribunal in which to enforce their rights. Nor should the primary responsibility of the federal courts for resolving questions concerning federal rights be curtailed, notwithstanding the availability of state courts.

The reason that the federal courts cannot accommodate unlimited increases in the demand for their services by expanding their personnel lies both in the character of the federal judiciary and in the limitations of the pyramidal three-tier system within which federal courts now operate. The independence secured to federal judges by Article III is compatible with responsible and efficient performance of judicial duties only if federal judges are carefully selected from a pool of competent and eager applicants and only if they are sufficiently few in number to feel a personal stake in the consequences of their actions. Neither condition can be satisfied if there are thousands of federal judges. The process of presidential nomination and senatorial confirmation would become pro forma because of the numerosity of the appointees; a sufficient number of highly qualified applicants could not be found unless salaries of federal judges were greatly increased; and a judge who felt like simply a tiny cog in a vast wheel that would turn at the same speed whatever the judge did would not approach the judicial task with the requisite sense that power must be exercised responsibly—especially when that judge, by reason of having life tenure, lacked the usual incentives to perform assigned tasks energetically and responsibly.

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 lower federal courts is limited. Even the maintenance of the necessary minimum uniformity of law within a single circuit becomes problematic if there are a great many judges in that circuit, and while this problem can be alleviated by increasing the number of circuits, the result is to increase the number of intercircuit conflicts and hence the burden on the Supreme Court.

Thus the problems of the federal courts, at least as those courts currently are organized, cannot be solved by an indefinite expansion in the number of judges. If there were no appeals, expansion might be a tolerable if not ideal solution. There would be some dilution of quality and responsibility, but there would not be chaos. However, given appeals, continuous expan-

sion of the number of judges at any level (and an expansion in the number of trial judges will lead inevitably to an increase in the number of appellate judges) will lead eventually to paralysis or incoherence, because of the judicial system's three-tier pyramidal structure.

There are subtler problems with indefinite expansion of the federal judiciary. Any such expansion is likely to come at the expense of the states, and thus to impair the fundamental constitutional concept of *limited* federal government. Keeping the federal judiciary relatively small increases the likelihood that federal intervention will be limited to those situations in which it is most clearly necessary. History teaches, moreover, that there are indeed situations where federal judicial intervention is clearly necessary. Many of these situations involve the protection of individual liberty against actions of the political branches of government. Such intervention is more likely to win public acceptance if the federal judiciary is perceived as a small and special corps of men and women whose talents are reserved for issues that transcend local concern, rather than as a faceless, omnipresent bureaucracy.

It becomes critical to assess how near the present federal court system is to the feasible limits on its growth. Perhaps quite near. Although most of the nation's judicial business continues to be handled by the state courts, the federal judiciary is the largest single court system in the nation if traffic and domestic relations cases are excluded. In 1987, for example, the number of appeals filed in Florida, the most in any state, were fewer than half the number filed in the federal courts. California, the state with the most appellate judges, had fewer than half as many appellate judges as the federal courts. The larger the federal court system becomes, the more difficult it becomes to expand it further without compromising the quality of federal justice. It has been 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. There are now some 750 such judgeships, and if urgently needed additional judgeships are included, the number exceeds 800. So we may be approaching the limits of the natural growth of the federal courts, and yet the surge in case filings at both the trial and especially the appellate level continues with no cessation in sight.

We need not belabor the consequences for the nation of a federal judiciary rendered ineffectual by case overload.

We have tried to peer ahead and forecast the federal caseload, but have found the crystal ball opaque. The reasons for our inability to predict future demands for federal judicial services are twofold. First, it is extraordinarily difficult to predict any but the grossest social, economic, political, and

demographic trends more than a few years in advance—if that far. By way of pertinent illustration, when this committee was formed fifteen months ago, the magnitude of the caseload impact of the federal war on drugs was not foreseen. Second, the relationship between those trends that can be foreseen and the caseload of the federal courts is largely unknown. No doubt the American population will continue to age, continue to expand, continue to experience improvements in the standard of living, but what effect these developments will have on the number of federal cases filed or appealed is unknown. The impossibility of responsibly forecasting federal caseload growth is underscored by the fact that, even with the rich benefits of hindsight, it is impossible to “postdict” (explain) the growth of the federal caseload from *known* developments in the past, such as changes in population and in income; these changes have been smaller in the last thirty years—years of rampant caseload growth—than they had been in the previous thirty years, which were years of slow growth for the federal courts. Although the growth of the federal caseload is due in part to the creation of new rights and remedies, this cannot be the whole story because areas of the federal docket controlled by state rather than federal substantive law (mainly the diversity jurisdiction, under which citizens of different states can litigate in federal court disputes over questions of state law) have also grown far more rapidly than population and income. All that is certain is that for thirty years the caseload has been growing rapidly and that there is no reason to expect a sudden abatement. But in a speculative vein we add that the Administrative Office of the United States Courts—whose predictions have been accurate in the past—forecasts that court of appeals caseloads will nearly triple in the next twenty-five years, while filings in the district courts will triple and filings in the bankruptcy courts will more than triple.

What is to be done? We share the view of Edmund Burke that radical social reform is justifiable only as a last resort, because its total impact is so difficult to predict; and Jefferson’s correlate, that “moderate imperfections had better be borne with.” Incremental reform, building on an existing and time-tested structure and changing it as little as seems consistent with the goals of reform, is much to be preferred to a leap into conceptual outer space. So it is incremental reform that we recommend in this report. But should that reform fail, and well it may, it will be necessary to consider radical reform; hence we should begin to think about radical reform even if not prepared to recommend it unless incremental reform fails. Considering radical reform now, moreover, is helpful in designing measures of incremental reform, for one desideratum of such measures is that they yield information bearing on measures for radical reform should it someday become necessary to consider them.

Just as there are two degrees or modes of reform (incremental and radical), so there are two kinds of reform: *structural* and *managerial*. The former implies redesigning the architecture of federal adjudication either to permit the decision of more cases by those courts or to shift cases from the Article III courts to other decision-making bodies, judicial and nonjudicial, state and federal. The latter implies more efficient processing of the federal courts' caseload, given the existing structure of those courts. Both approaches are vital. We begin with the former.

RADICAL STRUCTURAL REFORM AND A PROPOSED EXPERIMENT

The most acute problems of overload are at the appellate rather than trial level—and problems of appellate overload are, as we have seen, more difficult to solve than are parallel problems in the trial courts. Therefore the central path of radical structural reform focuses on appeals, and it is forked. One fork leads to specialized courts, the other to additional tiers of intermediate appellate review. The problems of coordination that bedevil appellate systems of many judges could be eased in the federal court system, at least theoretically, by replacing the present system of generalist courts organized on a regional basis with a system of specialized courts. For example, instead of distributing judicial review of administrative rulings among the twelve regional circuits (though with a concentration in the District of Columbia Circuit), which is the present system, Congress could establish a single court to handle all such review. It would be a large court and might have to have regional divisions, but it would be much smaller than the circuits as a whole. The radical alternative to specialized courts is to retain the present system of generalist courts but to enlarge its appellate capacity. A possibility that has been much discussed is the creation of a new court, intermediate between the regional courts of appeals and the Supreme Court, to resolve conflicts among the regional courts. This would alleviate the burden on the Supreme Court but at the cost of creating additional delay in the appellate process, and it would do nothing to slow the growth of the courts of appeals from small, intimate, collegial tribunals to mammoth organizations of twenty, thirty, or even more judges.

It is not the only possibility. Another would be to create additional federal circuits in order to reduce the unwieldiness of circuits in which there are many appellate judges (such as the Ninth Circuit, with its twenty-eight appellate judgeships), and insert between them and the Supreme Court a small number of regional courts of appeals. This would preserve the pyramidal shape of the federal court system, although, like the previous proposal, it would introduce additional delay into the litigation process. While it seems radical, it resembles the most common method by which

businesses and other institutions respond to increases in the size and scope of their activities—through the creation of additional management layers, so that a manageable number of supervisors report to the next higher supervisory level and so on all the way to the top.

Still another method of creating an additional appellate layer—the germ of which can be found in sources as disparate as the former practice in the English royal courts and the current practice of the bankruptcy courts in the Ninth Circuit—would be to have panels of district judges constitute the first tier of appellate review of district court decisions. Again there would be delays in the appellate process, additional burdens on the district judges, and a possible loss of appellate perspective from using trial judges as ad hoc appellate judges.

The specialization route is attractive in principle, for a variety of reasons: specialization is a salient characteristic of modern life, and has worked by all accounts successfully in the judicial systems of the Continent; there are some examples of successful American specialized courts; and it seems to promise a solution to the problem of coordination that does not involve injecting delay into the litigation process. It has problems, however—the danger of tunnel vision, the danger of “capture” of a specialized court by the interest group most concerned with that court’s specialty, the danger of political imbalance (e.g., a criminal court dominated by one end or the other of the spectrum that runs from the extreme “law and order” position to extreme solicitude for the rights of criminal defendants), the problem of the case that raises issues within the purview of more than one specialized court, the danger of premature suppression of diverse views (intercircuit conflicts enable experimentation with competing solutions to the same problems—while at the same time making law more complex and creating problems of compliance for institutions and individuals that do business or conduct activity in more than one circuit). And for large specialties like criminal and administrative law, a specialized court would entail three tiers of appellate review, rather than the present two: regional specialized courts, a supreme specialized court to resolve conflicts among the regional courts, and finally the Supreme Court. So the specialization route might well entail an additional appellate tier. Beyond all that there are the facts that most American lawyers find the idea of specialized courts repugnant, American experience with judicial specialization is limited to a narrow subset of well-defined specialty fields (such as tax), and the practical problems in creating a comprehensive system of specialized courts in substitution for our present system of generalist courts would be daunting, to say the least. In contrast, the creation of an additional appellate layer, while problematic in its own right, would build on

extensive experience with multi-tiered appellate review. It is the less radical of the two basic forms of radical structural reform.

Either the creation of additional appellate capacity, which would in turn enable a substantial expansion in the number of trial judges, or the replacement of our present system of largely generalist courts with a system of specialized courts, or both, would "solve" the caseload problem, at least for the time being. But both solutions are so fraught with serious problems that we have decided not to recommend any form of comprehensive appellate restructuring. More study and experimentation are needed—both of which we strongly urge. Below we propose a moderate expansion in judicial specialization, in the areas of tax law, Social Security disability law, and bankruptcy law; these proposals are designed in part to provide information on an approach (specialized judges) that, as we have said, is exotic in the American legal culture.

We also suggest an experiment that can at little cost provide much information about a critical problem over which observers are divided: the problem of intercircuit conflicts. Debate over the question whether there are in fact many such conflicts that require resolution has been interminable. The question can only be answered empirically, and an experiment is needed to yield the necessary data. We therefore propose that Congress authorize the Supreme Court, for a period of five years, to refer some or many petitions for certiorari that present intercircuit conflicts to randomly picked federal courts of appeals sitting in banc. The decision of the in banc court to which a particular such case was referred, resolving the intercircuit conflict, would be a binding national precedent just like a decision by the Supreme Court. A court of appeals would not be eligible for reference in a case in which that court had taken sides in the conflict. Of course, the larger the circuit, the more likely it is to have taken sides, and the large circuits would therefore be less likely to receive references than the small ones—unless a scheme for evening out the references among circuits is adopted, which would be easy to do and which we recommend.

The advantage of this proposal is that it does not entail the creation of a new court—a formidable (as well as expensive) undertaking because of the questions of appointment, location, size, duration, and procedures that would be entailed in the creation of a powerful new federal court, and a risky undertaking because the need and merits of expanding the Supreme Court's appellate capacity, and more broadly of reducing the number of persisting intercircuit conflicts, are uncertain. Even if established on an experimental basis, a new court would develop a momentum of its own which might make it impossible to abolish the court even if the results of the experiment were negative. Our proposal avoids that danger.

Besides replacing our present system of mainly generalist courts with a system of specialist courts, or adding another appellate tier, many other far-reaching solutions to the workload crisis have been suggested, and we will merely list some of them: enlargement of the Supreme Court and decision by panels of Supreme Court Justices, rather than by the entire Court, though presumably with a right to petition the Court for rehearing in banc; division of court of appeals judges into two tiers, with only judges in the higher tier authorized to make decisions having precedential significance; replacement of the appeal of right to the federal courts of appeals with a system of discretionary (i.e., certiorari-type) appeals to those courts; radical curtailment of pretrial discovery and substitution of fact pleading for notice pleading; appointment of federal judges on a national rather than regional basis, thereby enabling them to be moved around the country in response to regional fluctuations in caseload; elimination of signed judicial opinions in favor of per curiam opinions (the Continental practice); creating additional circuits and coordinating their output by a rule of national stare decisis, whereby the decision of the first circuit to be seised of an issue would bind the other circuits; unifying the state and federal court systems (as in Canada and Australia). The controversiality of such possible reforms is self-evident.

INCREMENTAL STRUCTURAL REFORM

Before we embark on such turbulent waters, we should consider most carefully the possibilities for incremental reform, and that is what this report mainly tries to do. In addition, we need studies—more ambitious than the time granted to this committee has permitted us to undertake—of possible reforms that by virtue either of their radicalism or of our lack of knowledge of their probable effects cannot be considered for immediate adoption. Our report is studded with recommendations for studies, but we shall not attempt to summarize them here, nor to summarize our recommendations *against* proposed reforms; these are fully discussed in Parts II and III. Here we shall merely sketch our most important action recommendations, beginning with those that affect the scope or structure of the federal judiciary.

One that deserves urgent attention by the President and Congress is the prompt filling of the many vacancies at the district court and court of appeals levels and prompt action on the pending proposal of the Judicial Conference of the United States for the creation of additional judgeships in a number of districts and circuits. Though it should be plain from our earlier discussion that the appointment of additional federal judges, far from solving the crisis of the federal courts, will in the long run aggravate it, the short term has its own claims. A gap looms, while Congress is

considering the other recommendations in this report, during which the ability of the federal courts to discharge their functions may be seriously impaired as a result of the caseload impact of the federal program to reduce drug trafficking, unless additional judges are appointed.

Our remaining structural recommendations fall into a series of natural groups, of which the first concerns the line separating the domain of state courts from the domain of federal courts. The general (not unvarying) principle of division should be that state courts resolve disputes over state law, and federal courts resolve disputes over federal law. We do not base this principle on a love of symmetry, but on a theory of comparative advantage and on a desire that federal courts remain accessible in a practical as well as theoretical sense to federal claimants. It is no use having a technical legal right to sue in federal court, if the courts are too crowded to give timely, considered, and competent attention to one's claim.

Consistent with this principle we recommend abolishing federal diversity jurisdiction, with limited though important exceptions for interpleader suits, for suits by and against citizens of foreign countries, and for multi-state litigation (arising primarily from large disasters). The diversity jurisdiction permits a citizen of one state to sue a citizen of another even if the claims on which the suit is based arise purely from state law. Diversity cases are a large part of the trial load of the district courts, and their elimination would therefore markedly lighten the burden on those courts. Although the result of abolition would be to increase the workload of the state courts, the increase would be divided among 50 different court systems. The added burden on each would be small, and would be offset by the benefit to the states of reclaiming a legitimate prerogative of state sovereignty: the adjudication of claims arising entirely out of the law of the state. Consistent with this analysis, the Conference of (State) Chief Justices has endorsed the abolition of the federal diversity jurisdiction.

Even if there is some merit to the argument that this jurisdiction is necessary to protect against state court bias in favor of residents, it cannot justify a feature of existing law that accounts for a high percentage of diversity cases: a plaintiff may invoke the federal diversity jurisdiction even though he or she is a citizen of the state in which the federal court sits and the defendant is a nonresident, so that the plaintiff could not possibly fear harmful bias if the suit were brought in state court instead. Therefore as a fallback recommendation in case diversity jurisdiction is retained, we urge that resident plaintiffs not be permitted to invoke the diversity jurisdiction (resident defendants are not permitted to remove a diversity case, and the resulting asymmetry in the treatment of plaintiffs and defendants makes no sense); only nonresident plaintiffs and nonresident defendants should be allowed to do so. By the same token, a nonresident

suing another nonresident should not be allowed to invoke diversity jurisdiction.

In any event we do not agree that retention of the diversity jurisdiction is justified by concerns with favoritism and prejudice. Although there may be bias and prejudice in state courts, as there unfortunately is in many American institutions, it does not fall along state boundary lines. As an example, most of the shareholders of a corporation that is a citizen of one state may live in other states, in which event the citizenship of the corporation may not shield it from prejudice against nonresidents of that state. Then too, federal district courts are local institutions and may not be wholly without a bias in favor of local residents. Finally, and related to these points, a greater tension than the tension between residents and nonresidents is that between urban residents and rural residents of the same state or between poor and rich, or between individuals and corporations or other institutions, in the same state.

If, as we urge, the diversity jurisdiction is repealed, this will free up the time of the federal courts to concentrate on their central task, that of protecting federal rights and interests. It will also make it possible to consider ways of making the federal courts more effective protectors of federal rights. These might include clarifying and tightening up the Anti-Injunction Act (which limits the power of federal courts to enjoin state judicial proceedings); simplifying removal from state to federal court of suits founded on federal law and providing effective judicial review of orders sending removed suits back to state court; codifying the various abstention doctrines; and placing a firm statutory foundation under "pendent party jurisdiction," which enables a federal claimant to name as a defendant a party against whom the claimant has a related claim under state law, in order to be able to present the entire case in one court (and that a federal court). We have made no definitive recommendations along these lines except with respect to pendent party jurisdiction, but we commend them for consideration in a post-diversity era in which federal courts are not preoccupied with the enforcement of rights under state law.

Another recommendation that we make with regard to the line of demarcation between state and federal courts concerns the war on drugs. Trafficking in illegal drugs is a crime under both state law and federal law, and there is an urgent need to determine which drug cases should be handled under which body of law, having due regard for competing demands on the federal courts as well as on the courts of the states. Where the offense arises out of trafficking on a local basis rather than out of the activities of large multi-state or even multi-national rings, the proper jurisdiction to prosecute and try the offense is the state, not the federal government. Unless this division of responsibilities is respected, the fed-

eral courts will be swamped, as they almost were during Prohibition—at a time when the competing demands on the federal courts were much lighter than they are today. We recommend that the Department of Justice formulate policies of demarcation of federal from state responsibilities in the drug area that will conform to the principles of federalism. And to assist the states in shouldering the burdens entailed by our proposal, we urge Congress to appropriate to the states some of the funds that would otherwise have to be spent to expand the federal role in drug enforcement—with the untoward consequences sketched earlier.

The very large class of civil rights litigation initiated by state prisoners is the setting for our next recommendation. We recommend modifying the statute which authorizes the certification by the Attorney General of the United States of state prison remedy systems that, once certified, must be exhausted before a state prisoner can bring a federal civil rights suit. The statute was intended to encourage the states to provide expeditious administrative remedies for prisoners, and thereby alleviate the burden that prisoner civil rights litigation imposes on the federal courts. However, as the statute has been interpreted and applied, almost three-fourths of the states have failed to obtain—and in many instances have failed even to seek—certification. We believe that a new approach is required, the core of which would be that, provided the district court is satisfied that the state prison remedy system is adequate and expeditious, prisoners would be required to exhaust remedies under it before turning to the federal court. Prisoners file well over 20,000 civil rights cases in federal courts every year; if only a small fraction of them could be resolved at the administrative level, the savings in federal judicial resources would be considerable, while at the same time it would mean that prisoners were obtaining relief sooner than if they pressed their lawsuits to completion. (One study found that 56 percent of civil rights suits filed by prisoners were not resumed following compulsory exhaustion by the prisoners of their administrative remedies.) That the relief would come in an administrative rather than a judicial proceeding is not a valid objection, since the important thing is not the form of the proceeding but that it end to the parties' mutual satisfaction. Since prisoners would always be free to sue after exhausting their remedies, the requirement of exhaustion would not forfeit or curtail judicial remedies, but would at most impose a short delay and in exchange give them a chance to obtain swift administrative relief obviating the need to bring suit. We further recommend that any modification of the statute be coupled with a program for encouraging, perhaps with financial assistance, states to institute effective systems of prison administrative remedies.

Habeas corpus is another prolific head of federal litigation instituted (largely) by state prisoners, but we have decided to make no recommendations in this area because another committee recently made comprehensive recommendations relating to the most controversial issues in the habeas corpus field—those relating to habeas corpus applications by prisoners under sentence of death.

Finally, we recommend that the Chief Justice of the United States and the Chairman of the Conference of (State) Chief Justices collaborate in the creation of a National Federal-State Judicial Council, to examine on a continuing basis the relationship between the federal and state judicial systems.

Our next category of structural recommendations concerns the line, not between state and federal courts, but between Article III courts and other federal adjudicative bodies, such as the Tax Court (an Article I court, that is, a court created under Congress's legislative powers rather than under Article III's conferral of a federal judicial power) or the bankruptcy courts. When we described the problems of the federal courts we were describing the problems of the Article III federal courts—the district courts, courts of appeals, and Supreme Court; these are the courts the judges of which are nominated by the President and confirmed by the Senate and serve during good behavior without reduction of compensation. As we have already suggested, the elaborate screening these judges receive, their extraordinary independence, and their role in the protection of essential liberties argue for keeping the Article III courts small and exploring the possibility for alternative systems of dispute resolution. One method of alleviating the problems of these courts, therefore, is by devolution of significant areas of federal judicial business to Article I courts and to administrative agencies, with limited review by generalist Article III courts. The committee has several recommendations along these lines. In approximate order of importance these recommendations are as follows. First, we recommend the creation of a new Article I Court of Disability Claims, to hear appeals from decisions by administrative law judges denying claims for disability benefits under the Social Security Act and possibly under other disability statutes as well; the recently created Veterans Court is a model of what we have in mind—and might eventually become a component of the larger court we envisage, although for now we make no recommendations beyond Social Security disability decisions. At present those decisions are appealed to the Appeals Council of the Social Security Administration (and there are counterpart bodies in other agencies, such as the Labor Department, that administer disability programs), followed by appeal to a federal district court, followed in turn by appeal to a court of appeals. The last tier duplicates the second: both district court and court of appeals are re-

viewing the record compiled in the administrative proceeding and the review by the court of appeals is de novo—that is, no deference is given the decision by the district court. We propose to improve appellate review of disability decisions by creating a new Article I court that will be specialized to the disability field, will offer expert adjudication of intricate regulatory and medical issues, will provide an attractive career path for lawyers (governmental and private) specializing in disability law, and will yield information on the costs and benefits of specialized courts that will be helpful in appraising the pros and cons of across-the-board specialization should continued caseload growth force serious consideration of that radical possibility. Article III appellate review of decisions of the new court will be limited to the courts of appeals (subject of course to further review on certiorari, by the Supreme Court) and also limited to pure questions of law, thus excluding the “mixed” question whether there is substantial evidence in support of the administrative decision.

In part because of the heavy workload of federal judges, in part because the multiple tiers induce a sense that someone else is taking a close look at the case, and in part because of the difficult and technical character of many of the interpretive and medical issues that arise under the Social Security disability statute and its implementing regulations, Social Security disability cases do not receive, on average, as sustained or expert attention from the Article III courts under the present system as they would under a system of expert adjudication concentrated in a single court so that responsibility is not diluted. The interests of a class of vulnerable citizens are promoted, not sacrificed, when a system of adjudication can be tailored to their particular needs, as we propose be done. The fairness of the adjudicative system, as distinct from the factual correctness of particular decisions within it, would remain fully reviewable in the Article III courts.

The bankruptcy courts, rather than being administrative courts, are adjunct institutions to the federal district courts. Nevertheless we believe that a parallel reform to our proposal for disability appeals holds much promise for streamlining the system of bankruptcy appeals and, not incidentally, for reducing the burden of those appeals on the district courts and on the courts of appeals. We recommend that Congress direct the creation in every circuit of a bankruptcy appeal panel, composed of bankruptcy judges who would serve either part time or (as we believe preferable in the long run) full time on the panel, to hear appeals from the circuit’s bankruptcy judges. At present, save in the Ninth Circuit, which has created a bankruptcy appeal panel staffed by bankruptcy judges who rotate between trial and appellate work rather than being specialized appellate judges, appeals from bankruptcy judges go to the district court, with plenary review of the district court’s decision in the court of appeals—just as

with Social Security appeals. This duplicative Article III review makes no more sense in the bankruptcy context than in the disability context. Under our proposal, appeals from the bankruptcy appellate panel would go to the court of appeals, but that court's jurisdiction would be limited to resolving issues of law. Consent of both parties would be required for the appeal to go to the bankruptcy appeal panel rather than to the district court, but would (as in the Ninth Circuit) be presumed; that is, a party not wanting the appeal to be heard by the bankruptcy appeal panel would have to opt out of the procedure.

We recommend a five-year pilot program whereby the Equal Employment Opportunity Commission, with the consent of both parties, would offer binding arbitration of claims of employment discrimination. (The Commission's awards would be enforceable in federal district courts under the provisions of title 9 of the United States Code, like other arbitration awards growing out of disputes that are within federal jurisdiction.) At present, the Commission either files a federal court suit on behalf of the claimant, or, in the vast majority of the cases, waives jurisdiction, thereby allowing claimants to bring their own federal court suits. Employment discrimination suits are a major category of federal litigation, yet in most nations, and in most areas of employment law in this nation, disputes are resolved by arbitrators or by administrative agencies, not by courts and often without judicial review. This is in recognition of the fact that the stakes to the employee in most employment cases, while possibly very great from the employee's own standpoint, may not warrant the employee's incurring the expense of a full-scale judicial proceeding. Our legal system's heavy reliance on such proceedings may have the unintended consequence that many meritorious claims of employment discrimination go unrectified. The time has come to experiment with administrative resolution of discrimination claims.

We emphasize that the proposed experiment, far from curtailing the rights of any employees, would create additional options for them. The EEOC will however require some additional funding to conduct the experiment, since it at present has no adjudicative capability. The small size of many employment discrimination claims leads us to make a further recommendation: that efforts be made to facilitate the obtaining of assistance of counsel in employment discrimination cases, perhaps by Congress's funding the heretofore unfunded provision of title VII of the Civil Rights Act of 1964 (the principal employment discrimination statute) for appointment of counsel in such cases.

The time has also come to experiment with federal small claims procedures. One objection to minimum amount in controversy requirements (i.e., requiring that the plaintiff's claim have a minimum value in order

to be within the jurisdiction of a particular court), now almost completely abolished in the federal court system except in diversity cases, is that they consign the little cases to state courts, making those courts the small claims courts for the federal system. This is a demeaning role in which to cast the courts of sovereign entities and is a retardant to the improvement of the state court systems. The alternative as yet unexplored is to create small claims procedures administered by non-Article III judicial officers who could be located in the federal judiciary, or in the agencies against which the claims are made, or in the Department of Justice, or in an independent administrative tribunal. As a beginning we propose the creation of a small claims procedure for Federal Tort Claims Act cases in which the amount sought in good faith by the plaintiff is \$10,000 or less. The procedure might be made available in every federal district court and administered by a federal magistrate, but we do not exclude alternative possibilities for "siting" the new procedure. (One promising possibility is the United States Claims Court, which will have unused adjudicative capacity if another of our recommendations—for rationalization of tax adjudication—is adopted.) If, wherever located, the experiment proves successful, it could be expanded to other fields in which persons have small legal claims arising under federal law.

We recommend that the two statutes (the Federal Employers' Liability Act and the Jones Act) that allow railroad workers and seamen, virtually alone among American workers—or, for that matter, the workers of any other nation—to obtain full common-law damages for employment-related injuries rather than being subject to workers' compensation schemes be repealed and either be replaced by a federal workers' compensation program or left to regulation by the states.

We also recommend that the Parole Commission's life be extended to enable it to carry out two functions that would otherwise fall to the overworked Article III courts to perform. The first is the conduct of parole release and revocation hearings for persons sentenced for crimes committed before the new federal sentencing guidelines took effect. Such hearings are conducted at present by the Parole Commission, and on the whole the Commission does a good job with them. The second function we recommend for the Commission is the conduct of hearings on revocation of supervised release (the counterpart, under the guidelines, to parole). There will eventually be thousands of such cases, and they can best be handled administratively.

We recommend that remedial orders of the National Labor Relations Board be made self-executing, in place of the anachronistic procedure by which the Board must obtain an order of enforcement from a court of appeals so as to give the Board's order teeth.

The final proposal that we discuss in the category of federal alternatives to Article III adjudication does not fit the category perfectly, because it involves the creation in part of a new Article III court. But in part it envisions a transfer of judicial business from Article III courts to an Article I court. The proposal is that all federal income, estate, and gift taxes cases would be transferred to a reconstituted Tax Court, which would have both trial and appellate divisions. The trial judges would remain Article I judges, as under the present system, but the appellate judges would be Article III judges, in order to preserve the taxpayer's access to an Article III court (besides the Supreme Court on certiorari). At present the Tax Court has no appellate capacity; instead its decisions are appealable to the twelve regional federal courts of appeals and to the Federal Circuit as well. Our proposal would if adopted alleviate the burden that tax cases place on the federal district courts and on the Claims Court in Washington. The present system of tax adjudication is a crazy quilt in which taxpayers have a choice among three forums for litigating their disputes with the government and in which thirteen federal courts of appeals have appellate jurisdiction. Taxation is an extraordinarily specialized area of law, to which generalist judges can contribute little other than confusion, and it is a natural therefore for further experimentation with specialized courts. The combination in the present system of forum-shopping opportunities with opportunities to present highly technical issues for decision by judges lacking the relevant technical expertise creates a field day for lawyers, but disserves the public. The tax bar would be affronted at the suggestion that its specialization in tax law disserves the public; we are at a loss to understand why a fully specialized tax judiciary would disserve it.

MANAGERIAL REFORM

If all of the recommendations thus far discussed, and others discussed in Part II only, were adopted, the workload of the federal courts would be significantly lighter than at present, but it would still be very heavy. Our final set of recommendations concerns ways in which to streamline and otherwise improve the operation of the federal courts within the core areas of their responsibility that would remain after the boundary adjustments discussed in the previous pages were made. Here our first recommendation is the creation of an Office of Judicial Impact Assessment modeled on the law revision commissions which have operated successfully in several states. The functions of the office would be threefold. First would be to predict the impact on the federal courts of proposed statutes—RICO, ERISA, and the Sentencing Reform Act are examples of statutes that have had profound, and to some extent unforeseen, impact on the federal courts—and to advise Congress on ways of mitigating that impact as by

establishing specialized courts, compulsory arbitration as a precondition or alternative to formal adjudication, exhaustion requirements, or short statutes of limitations. The office would provide congressional committees with a checklist to be followed when considering a proposed bill—the checklist to cover such items as provision of a statute of limitations (so that the courts do not have to go through the tedious and uncertain process of “borrowing” an existing state or federal statute of limitations for use with a statute that does not contain its own statute of limitations), specification of whether the statute is enforceable by a private suit, an indication of which statutes are intended to be repealed, modified, or preserved intact by the new statute, an indication of whether the statute should be broadly or narrowly interpreted, in the case of criminal statutes an indication whether specific intent is required for proof of guilt, and avoidance of inconsistency between the text of the statute and the explanation of the statute’s meaning in the committee reports (to which courts will look in interpreting the statute).

The second function of the Office of Judicial Impact Assessment would be to inform Congress with regard to current and anticipated future problems of the federal court system, so that the always time-consuming process of court reform can be set in train well before emergency conditions arise. The office’s third function would be to keep Congress abreast of a statute’s progress through the interpretive process in the courts. That process often reveals ambiguities, gaps, oversights, unforeseen contingencies not provided for in the statute, that, if only known to Congress, could be readily corrected by amendment because they are technical rather than political glitches.

The Office of Judicial Impact Assessment should be located in the judicial branch, where some but not all of the functions described above have for some time been performed by a committee of the Judicial Conference and by the Administrative Office of the United States Courts. Independently of this recommendation, we recommend that the Judicial Conference acquire a staff capability to engage in long-range planning for the needs and structure of the federal courts. Congress may wish to create a parallel entity that will assist it in communicating with the federal judiciary, but we make no recommendation on this score and instead leave the matter to Congress’s own best judgment.

If an Office of Judicial Impact Assessment existed, some of our related recommendations might not be necessary. We give two examples here. First, to head off the large amount of litigation concerning which statute of limitations to borrow for use with federal statutes that do not specify a limitations period, we recommend that Congress enact a back-up federal statute (or statutes, perhaps differing by the subject matter of the claim) of limita-

tions to govern all claims under statutes that do not specify a limitations period.

Second, we recommend the abolition of mandatory minimum federal criminal sentences. The purpose of such mandatory minima is to curtail judges' sentencing discretion and is in considerable tension with the federal sentencing guidelines, which provide more flexible minima and avoid a number of technical problems created by mandatory minimum sentences. For example, federal law provides that aiders and abettors shall be punished as principals: does this mean that aiders and abettors must always receive the mandatory minimum prescribed for the principal, even if they are relatively minor participants in the offense? An Office of Judicial Impact Assessment might, by advising Congress of the ramifications of the sentencing guidelines, have facilitated appropriate modifications in the Sentencing Reform Act.

We were urged to recommend changes in the guidelines approach required by the Act and implemented by the Sentencing Commission. Issues of criminal justice and penology to one side (for they are not issues within the scope of the committee), the guidelines have been criticized as likely to increase the workload of the federal courts by reducing the fraction of cases settled by the entry of a guilty plea, by lengthening the plea-negotiation process, and by increasing the number of appeals in criminal cases. Although a number of the criticisms of the guidelines may have merit (including some that have nothing directly to do with judicial workload, such as the impersonal and mechanistic character of the guidelines approach), we have decided, in part because of the newness of the guidelines, not to recommend changes. We do recommend, however, that Congress, the courts, and scholars study the new system carefully, with a view to consideration of any needed revisions. We further recommend that the Judicial Conference create a committee to study the impact of the guidelines on the workload and operations of the federal courts.

A number of criticisms of the guidelines may actually be criticisms of the arbitrary structure of federal criminal laws, a structure made transparent by the guidelines. There are thousands of separate federal criminal prohibitions, enacted at different times, reflecting different penal attitudes, and full of gaps and overlaps. We urge Congress to resume the task, formidable as it is, of recodifying federal criminal law in order to bring about a simplified, rationalized, and coherent system of prohibitions.

The remaining recommendations that we discuss in this part, under the heading of ways to improve the management of the federal court system, relate to organization, procedures, personnel policies, case management, and the understanding and utilization of science and technology. We be-

gin with organization. In recognition of the increased need for administration of a growing federal judiciary, the Judicial Conference of the United States should be authorized to issue administrative regulations having the force of law. Decentralization as well as centralized administration is necessary in a large organization, and to that end we also recommend that the Administrative Office of the United States Courts expand its experiment with devolving budgetary authority on to the individual courts; in the same vein we also recommend that the judicial council of each circuit undertake long-range planning. In recognition of the vital role of public defenders in a system increasingly dominated by criminal matters, we recommend that federal defenders be appointed by independent commissions with specialized knowledge of defender needs and services rather than by the federal judges before whom the defenders will be appearing, and that the compensation of federal defenders be set at a level that will enable competent personnel to be attracted to a demanding and responsible job. We recommend that greater scope be given to federal magistrates, for example in regard to attorneys' fee awards (discussed below). The statute that forbids federal judges to urge parties to consent to trial before a magistrate should be amended to make clear that the judge is free to remind the parties of this option.

Not every civil dispute is best processed by exclusive use of the methods of trial and pretrial prescribed by the Federal Rules of Civil Procedure; Congress should therefore enlarge the existing statutory authorization for federal courts to experiment with both voluntary and mandatory forms of alternative dispute resolution. Several varieties of ADR, such as mediation, early neutral evaluation, and court-annexed arbitration, not only can help the parties to frame, narrow, and settle their dispute, but by doing so can provide speedy and inexpensive access to justice for litigants who might otherwise face formidable barriers of time and cost to the resolution of their cases. The heavy caseload of the federal courts makes it natural to emphasize the potential of ADR to encourage settlement before trial. For example, court-annexed arbitration involves a nonbinding hearing and award well in advance of trial. In general, cases are litigated only if the parties have divergent estimates of the probable outcome of litigation; if their estimates converge, they will have nothing to gain from litigation. In court-annexed arbitration, the arbitrator's award provides a neutral forecast of the likely outcome of litigation, and by thus narrowing the area of uncertainty facilitates settlement. This is the theory; the practice requires thorough empirical testing, because it adds expense and delay to those lawsuits that in the end are not settled, and to some that are. Congress has authorized experimentation with court-annexed arbitration in twenty of the almost one hundred federal district courts; one of our rec-

ommendations is that *all* federal courts be authorized to use and experiment with this and other methods of alternative dispute resolution.

Under the heading of procedure, we recommend among other things that federal judges, whether through the judicial council of each circuit or otherwise, adopt reasonable rate schedules and uniform enhancement factors for determining attorneys' fee awards in cases where such awards are required or permitted by rule or statute. The objective of this recommendation is to begin the process of making the quantification of such awards relatively mechanical, therefore requiring little judge time. This is satellite litigation involving few issues of principle, is increasingly clogging the federal courts because of lawyers' natural interest and expertise in fee questions, and can be streamlined and automated without sacrifice of substantial rights. District judges also should be encouraged to make more use of magistrates and special masters as "taxing masters" to resolve disputed issues concerning attorneys' fees and other expenses of suit. We do not, however, recommend adoption of the English and Continental system of making the losing party pay the winner's legal expenses in all cases. The theoretical and empirical grounding for the popular belief that such a system will reduce the number of cases is thin.

Under the heading of personnel we recommend increased professionalization of federal judicial employment through adoption by each federal court of employee grievance procedures, and through independent review of claims of employment discrimination lodged against judges or other judicial personnel.

Case management and the better utilization of modern science and technology are areas in which the burden of reform falls squarely on the judges themselves. There is much that judges can do to streamline their work without sacrificing quality. The "big" case can be made manageable—and often reduced to a small case—by vigorous case management, involving the early identification of key issues whose resolution may narrow the scope of the litigation, the fixing of a discovery schedule customized to the particular litigation, the trial of dispositive issues first (such as a statute of limitations defense that if meritorious requires dismissal of the entire lawsuit), the classification of cases by size (cases of different size require different management techniques), and the careful training of judges by the Federal Judicial Center in the handling of big cases. "Case management" has a bad name in some circles, where it conjures up images of aggressive judges forcing settlements down the parties' throats. That is not what we have in mind. Large, multi-party, multi-polar litigation must not be allowed to force the rest of the judicial business of the United States outside of the federal courts. Such litigation must be managed, streamlined, expedited; it cannot just be umpired.

The decision of most bench trials, large and small, can be simplified by greater use of the practice employed by many judges of dictating a tentative oral opinion immediately at the close of the case, followed if necessary by the judge's editing of the transcript to remove ambiguities. The practice of some judges of deferring—often by months, sometimes by years—the preparation of the required Federal Rule of Civil Procedure 52(a) findings and conclusions, in order to await the filing of elaborate post-trial briefs, not only ultimately increases the judge's workload because the judge has to relearn a forgotten case, but deprives the decision when finally rendered of freshness and imposes delay on the parties.

Modern technology offers enormous promise for streamlining, expediting, and improving the operation of the federal courts. Two-way closed-circuit television will increasingly be used for the presentation of evidence at trial and arguments on appeal. (Modest precursors are the growing use of videotape depositions and speakerphone oral arguments.) Electronic filing of pleadings and other court papers, including court orders, will expedite the litigation process. Imaging and other forms of electronic mail may eventually eliminate the disadvantages of distance, and permit the concept of local and regional courts to be rethought.

The judge must not, however, be merely the passive consumer of mysterious wonders of modern technology. To cope with the increasing quantity of scientific, economic, statistical, and other technical data that are finding their way into statutes, evidence, and argument, judges must resolve to meet the modern world midway, to make a good-faith effort to understand the tools and style of scientific and technological reasoning, and to throw off unreasoning fear of and hostility to the technical world. We recommend a comprehensive examination of how courts handle scientific and technological complexities in litigation, and, based on that examination, the creation of a manual to assist judges in the management of such cases.

QUANTIFYING OUR RECOMMENDATIONS

The reader is entitled to wonder what the effect would be of our recommendations on the workload of the federal courts. Their intrinsic merit to one side, what would they do to alleviate the caseload crisis? It is not possible to give a precise answer to this question, but we shall take a stab at estimating the effects of those recommendations that lend themselves to at least rough quantification.

The total number of cases filed in the courts of appeals in the year ending on June 30, 1988, was 37,524. Let us assume that all our recommendations had been fully implemented that year, so that:

- (1) All 848 tax cases had been shifted out of the present courts of appeals and into the new Article III appellate division of the Tax Court. (This assumption is slightly exaggerated because some lien-enforcement and related types of suit would not have been shifted under our proposal.)
- (2) Fifty percent of the 992 Social Security cases had been shifted to a new court of disability appeals—our best estimate of the number of such cases that do not raise any pure issues of law.
- (3) All ninety-one FELA appeals had been shifted out of the federal system. (Jones Act cases are to be shifted from the federal district courts to a federal administrative agency, but they presumably would still produce appeals to the courts of appeals.)
- (4) Five percent of 2,957 nonprisoner civil rights appeals had exited the system as a result of the proposed pilot program to allow the EEOC to arbitrate employment cases with the consent of the parties.
- (5) Forty-nine percent of the 2,109 state-prisoner civil rights appeals had disappeared as a result of our proposal to make it easier for states to require exhaustion of administrative remedies. (A study in Virginia suggests that only 44 percent of such cases are resumed if exhaustion is required, implying a 56 percent reduction, which we have multiplied by 88 percent—reflecting the number of states that have *not* adopted grievance procedures that must be exhausted—in estimating the total effect of our proposal. We acknowledge that this extrapolation from the Virginia experience may be overly optimistic.)
- (6) No diversity appeals (3,198) had been filed. (This estimate is on the high side because under our proposal interpleader, alienage, and certain multi-party cases would remain within federal jurisdiction.)
- (7) Forty percent of all bankruptcy appeals to the courts of appeals (outside the Ninth Circuit) had disappeared, this being the experience of the Ninth Circuit; this estimate may be on the low side because under our proposal only cases raising pure issues of law would be appealable from the bankruptcy appeals panels to the courts of appeals.

These assumptions imply the elimination of 6,192 cases from the court of appeals' caseload in 1988—16.6 percent of those courts' caseload that year (37,524). In the same period, 283,137 cases were filed in the district courts.

Making the identical assumptions as before (with a few modifications, about to be noted), we estimate that our recommendations would eliminate 105,314 cases, equal to 37.2 percent of the current filings. The district court figures, unlike those for the courts of appeals, break out the number of employment discrimination cases against nonfederal defendants—the cases to which our proposed pilot program would apply. Assuming that the program would eliminate 10 percent of those cases, we come up with a savings of 717 cases. We have subtracted all bankruptcy and all Social Security cases from the district courts' filings, because under our proposals the district courts' jurisdiction in these areas (an appellate jurisdiction) would be largely eliminated (totally in the case of Social Security, barring perhaps the very occasional class action seeking injunctive relief). It is of course possible that some of these cases would show up in increased appeals to the courts of appeals. We likewise eliminate all the 241 Jones Act cases. And, with the assistance of the Department of Justice, we have estimated a reduction by 328 in the number of Federal Tort Claims Act cases as a result of our proposal to divert the smaller such cases into a small-claims facility.

We have used 1988 statistics, because they are complete. Although in 1989 there was a small decrease in district court filings, filings in the courts of appeals grew by 6 percent, and in the bankruptcy courts by 8 percent.

The estimates are rough but they do strongly suggest that our proposals, in the aggregate, would generate significant workload savings. If the estimates err, it is probably on the side of underestimating the savings. Only a handful of the proposals lend themselves even to crude quantification, and the cumulative effect of the remaining proposals in reducing the caseload could well be substantial. Many of those proposals have not been discussed in this very brief overview of the report, but all of them will be found in Parts II and III together with a more detailed analysis of the recommendations sketched in this part.

Here we have sought merely to lay out the basic problems, to categorize and explain the major solutions, to indicate the constraints that have determined our approach—and to plead for a sympathetic hearing for a program of ambitious but incremental reform of a major public institution that is facing critical challenges. Even if all our recommendations are adopted and promptly implemented, they will not solve all the problems of the federal courts. But they will ameliorate some of them, place others on the way to eventual solution, and generate the knowledge needed to design more radical reforms, should such reforms someday become necessary.

Part II

Chapter 1

Committee Authority, Structure, and Procedures

A. Creation of the Committee

In November 1988, the 100th Congress created within the Judicial Conference of the United States a fifteen-member Federal Courts Study Committee and directed it, by April 2, 1990, 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 on such study.” The statute specifically directed the committee to analyze alternative dispute resolution, federal court structure and administration, intra- and inter-circuit conflicts in the courts of appeals, and the types of disputes currently embraced by federal jurisdiction. More broadly, it directed the committee to “recommend revisions to be made to laws of the United States as the Committee, on the basis of such study, deems advisable,” to “develop a long-range plan for the judicial system,” and to “make such other recommendations and conclusions it deems advisable.” (Appendix A contains the text of the statute creating the committee.)

In December 1988, Chief Justice William H. Rehnquist appointed the committee members, who were, in the words of the statute, “representative of the various interests, needs and concerns which may be affected by the jurisdiction of the Federal courts.” The committee includes members of the federal executive, legislative and judicial branches and representatives from state governments, universities and private practice. (Appendix B contains brief biographies of the committee members.)

B. Organization and Structure

To review the many issues before it, the committee divided itself into three working subcommittees, each with a broad topical heading:

- The Subcommittee on Administration, Management and Structure concentrated on the courts’ organization, including appellate structure and procedures, personnel matters both as to judges and staff, and the courts’ administration and their management structure.

- The Subcommittee on Role and Relationships focused on the federal courts' relationships with Congress, with state courts, and with Article I courts and administrative agencies within and outside the federal judicial branch.
- The Subcommittee on Workload examined such matters as civil and criminal caseload problems, alternative dispute resolution, complex multi-district litigation, and science and technology in the courts.

Each subcommittee was supported by reporters and associate reporters from universities, private practice and government service. Expert advisory panels and individual consultants—all of whom donated their services—provided research and commentary on the subcommittees' draft recommendations. A small professional staff coordinated the work of the committee from the United States courthouse in Philadelphia, Pennsylvania. (Appendix B contains brief biographies of the reporters and the committee's senior staff.)

C. Process and Public Access

From its inception, the committee has sought advice from a broad spectrum of individuals and groups—those who work daily in the federal court system and representatives of those affected by its work. Soon after its creation, the committee sent an open-ended request for ideas to all members of the federal judiciary, senior court personnel, and the leadership of the Administrative Office of the United States Courts and the Federal Judicial Center. It also sought suggestions from citizen groups, bar associations, research organizations, university scholars, judicial improvement organizations, and numerous groups with specific policy interests.

In addition, print and electronic media coverage stimulated hundreds of written comments. Seventy-eight witnesses testified at public hearings in Atlanta, Boston, Chicago, and Pasadena during the third month of the Committee's existence. In some instances, cable television coverage precipitated additional inquiries and suggestions. More specific questionnaires on particular workload issues went to all Article III judges in the late summer, yielding response rates of almost 90 percent. The chairman's Progress Report presented the state of the committee's work and summarized the issues as the committee saw them in August.

On December 22, 1989, one year after its appointment, the committee distributed 5,000 copies of a compendium of tentative recommendations in order to solicit comments and suggestions on proposals that had evolved from subcommittee and committee deliberations throughout the fall. In January 1990, the committee held public hearings in Dallas, Des Moines,

Madison, Miami, New York, Salt Lake City, Seattle, San Diego, and Washington, D.C. More than 270 witnesses testified at these hearings.

D. Report

With the testimony from those hearings and extensive additional written commentary from many more people, the committee has refined and reshaped its earlier proposals. Chapter 10 lists the committee's recommendations by topic. Because of its short life span and the lack of major funding, the committee was unable to accomplish all of the tasks assigned to it. For example, we could not meaningfully study the courts of the fifty states (but we have recommended the establishment of a state-federal judicial council that can work with the federal courts, state courts, and existing judicial improvement organizations to promote additional analysis of important issues in this area). We also lacked the time and resources to study various discrete problems called to our attention, and—in respect to matters we did study—to commission focused research. Nonetheless, in spite of these limitations, we have covered an enormous territory. We hope that our report will not only lead to immediate reform but also stimulate further analysis required in those areas in which we could not propose recommendations. We have identified at least twenty-three discrete areas for further study.

Most of the federal court caseload data come from the various reports published by the Administrative Office of the United States Courts, mainly the *Annual Report of the Director*.

Chapter 2

Reallocating Business Between the State and Federal Systems

This chapter mainly presents recommendations to improve the allocation of business between state courts and the federal courts established under Article III of the Constitution. One purpose of these recommendations is to improve the federal courts' capacity to resolve disputes that most need federal court attention by relieving them of some functions that involve federal rights or interests only marginally if at all.

Not all of our proposals would shift business from federal to state courts, however, and none of our proposals carries any inference that the state courts are inferior to the federal courts and should thus be a repository for cases federal judges prefer not to decide. Rather, our goal is a *principled* allocation of jurisdiction. For that reason, some of our proposals would expand federal jurisdiction to cases that involve both federal and state law and for which the federal forum is more appropriate.

If implemented in toto, these proposals would curtail the growth in the federal judicial budget and reduce federal caseloads noticeably, but the corresponding increases would not unduly burden the state courts, which collectively dwarf the federal judicial system. We have suggested, though, some temporary budget transfers to the states to assist in implementing our recommendations. We also propose a joint state-federal judicial council to monitor judicial federalism and to suggest specific steps to improve it.

A. Federal and State Prosecution of Narcotics Violations

Federal prosecuting authorities should limit federal prosecutions to charges that cannot or should not be prosecuted in the state courts and should forge federal-state partnerships to coordinate prosecution efforts. Congress should direct additional funds to the states to help them to assume their proper share of the responsibilities for the war on drugs, including drug crime adjudication.

The federal courts' most pressing problems—today and for the immediate future—stem from unprecedented numbers of federal narcotics prosecutions. The committee cannot overstate the urgency of Congress's authoriz-

ing the judgeships requested by the Judicial Conference since 1984, including those in the consolidated proposal of October 1989. Nor can it overstate the importance of the executive and legislative branches' filling the vacancies that exist today.

More judgeships are essential. But they are not the ultimate solution to the federal courts' caseload crisis. Both the principles of federalism and the long-term health of the federal judicial system require returning the federal courts to their proper, limited role in dealing with crime. Many of the new drug cases now flooding the federal system could be prosecuted just as effectively in state courts, under state laws. Over-reliance on federal courts for drug prosecutions will either force Congress to bloat the federal courts beyond recognition or force the federal courts to stop meeting their other constitutional and statutory responsibilities.

It is well to understand how much things have changed. Since 1980, federal criminal filings have risen by well over 50 percent, outpacing civil filings. Drug filings have fueled this increase, growing 280 percent in the same period. In fact, drug filings increased more than 15 percent in 1987 and again in 1988, while other criminal filings decreased. The Chief Justice noted in his 1989 year-end report on the judiciary that drug filings now constitute more than a quarter of all new criminal filings, and, in some districts, almost two-thirds. Drug cases now account for 44 percent of the federal criminal trials, and almost all of these are jury trials. Roughly 50 percent of federal criminal appeals are drug cases. And the Judicial Conference last year reported to Congress that by 1991 drug filings will increase from 20 to 50 percent over 1988 levels.

Drug filings not only increase the federal court workload; they distort it. The Speedy Trial Act in effect requires that federal courts give criminal cases priority over civil cases. As a result, some districts with heavy drug caseloads are virtually unable to try civil cases and others will soon be at that point. And when courts cannot set realistic trial dates, parties lose much of their incentive to settle and civil cases drag on in limbo.

At some point, moreover, the federal civil docket will not be the only casualty of the war on drugs. At some point, the war on drugs will be a casualty of itself. Overload causes backlog. Backlog threatens timely prosecution and, under the Speedy Trial Act, can lead to dismissals. The Chief Justice has warned against "an hour-glass-shaped law enforcement system." It will have increased prosecutorial and correctional resources; "but without the judge-power to handle the added workload there will be a bottleneck in the middle of the system substantially lessening our ability to win the war on drugs."

We recognize the magnitude of the drug problems now facing our nation, and the significant role that federal prosecutions must play in a comprehensive solution to these problems. But we urge the Department of Justice to exercise greater selectivity in bringing drug prosecutions in the federal courts and to develop clear national policies governing which drug cases to prosecute in the federal courts. We concur in the President's January 1990 drug control strategy, which acknowledges that state and local law enforcement have primacy in drug control and which would provide a substantial increase in Bureau of Justice Assistance funds for state and local law enforcement efforts. The federal system must not be overwhelmed with cases that could be prosecuted in the state courts. Federal drug enforcement strategy should target the relatively small number of cases that state authorities cannot or will not effectively prosecute—cases, for example, that involve international or interstate elements. We recognize that there are occasions when small drug cases appropriately appear in federal court. Such a case might, for example, be the first stage in the prosecution of a large multi-state drug organization. Unfortunately, at the present time minor cases that lack such a connection are being brought in many districts.

We realize that the Department of Justice has initiated programs to build relationships with local prosecutors and has established drug task forces that include federal, state and local prosecutors. We also endorse a Department policy that gives due credit to agents of the Federal Bureau of Investigation when their work results in successful state prosecutions, just as it does when the work results in successful federal prosecutions. We applaud these efforts but are convinced that they have not solved the critical problem identified here: too many prosecutions that do not require the unique resources of the federal judicial system are still finding their way into federal court. We are told that state prosecutors often ask their federal counterparts to begin prosecutions that lack interstate or foreign elements. Given the current overload within the federal system, federal prosecutors must resist the urge to dedicate the scarce resources of the federal judicial system to problems that can be dealt with effectively at the state and local level.

Minor drug cases also find their way into federal court because Congress has provided funds for federal and not for state prosecutions. We urge Congress to provide additional resources to enable the federal courts to process the drug cases that belong in those courts. But federal funding should no longer serve as an incentive to bring cases into federal courts that could and should be prosecuted in the state courts. Some of the funds that Congress has approved for drug enforcement should be used to provide

assistance for drug enforcement at the critical state and local level, including resources for state courts, public defenders and assigned counsel.

In Part II, see also Chapter 7, on the impact of various changes in sentencing law and procedure, and Chapter 8, § C.1.a, at p. 160, on increasing federal judicial resources for the war on drugs.

Part III contains additional material on this subject.

Dissenting statement of Mr. Dennis, in which Congressman Moorhead joins:

Drug abuse and drug trafficking are severely taxing the resources of many of our government institutions. Police, prosecutors, courts and prisons are hard pressed to satisfy the steadily increasing demands of a society facing this threat to its fundamental well-being. Our society is looking to its law enforcement agencies to be vigorous in bringing to justice those who are violating our drug laws, because the future of our nation is at stake.

The federal judiciary must not shrink from its critical responsibility to lobby for an adequate capacity in the federal courts to judge drug cases brought into the federal forum. The role of the federal courts is crucial to drug law enforcement, for without their authority federal law enforcement loses its nationwide subpoena power, its electronic surveillance authority, its contempt and immunity powers, and its forfeiture authority to name a few. The federal judiciary must not neglect assuming its share of the workload for fear that the federal judiciary will become too large. The state courts are not substitutes for the federal judiciary and tinkering with the budgets of federal and state law enforcement agencies will not change that reality.

The Federal Courts Study Committee should be recommending more federal judgeships to create a greater capacity in our federal judiciary to meet its responsibilities and leave the choice of forum to the prosecutors.

B. State and Federal Court Jurisdiction

1. Business to Allocate to State Courts

- a. **Congress should limit federal jurisdiction based on diversity of citizenship to complex multi-state litigation, interpleader, and suits involving aliens. At the least, it should effect changes to curtail the most obvious problems of the current jurisdiction.**

Although unknown to the great majority of the United States population, federal diversity of citizenship jurisdiction is a major source of the federal courts' caseload. It accounts for:

- almost one of every four cases in the 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.

As currently codified in 28 U.S.C. § 1332, diversity jurisdiction essentially authorizes federal courts to decide cases that do not involve federal law if those cases are between citizens of different states or between United States citizens and aliens, and the amount in controversy is over \$50,000. Federal jurisdiction is not exclusive in such cases, and federal courts apply state law.

Diversity jurisdiction has been controversial since the Constitution authorized it and the 1789 Judiciary Act first implemented it. Henry Friendly's seminal 1928 analysis documented its early justification: that state courts, many on short tethers to debtor-oriented state legislatures, would be unable to provide the legal stability necessary for commercial growth and might be prejudiced against out-of-state litigants. To limit federal court intrusion into everyday lawsuits, the first Congress established a jurisdictional minimum of \$500. Federal court decisions in diversity cases provided a vital instrument of national development in the nineteenth century, fostering conditions that a young commercial republic needed for its growth. Much has changed since the republic was young. The state courts are fundamentally different organizations from those of earlier years, and the federal courts have a lot more to do. Diversity jurisdiction, though, is still with us, and still controversial among bench and bar. The committee's deliberations reflected that controversy.

After extensive discussion, a substantial majority of the committee strongly recommends that Congress eliminate this basis of federal jurisdiction, subject to certain narrowly defined exceptions. If Congress elects not to make this wholesale change, the committee recommends that it enact a variety of more modest restrictions. We believe that diversity jurisdiction should be virtually eliminated for two simple reasons: On the one hand, no other class of cases has a weaker claim on federal judicial resources. On the other hand, no other step will do anywhere nearly as much to reduce federal caseload pressures and contain the growth of the federal judiciary. Given all the demands on the federal courts, there is little reason to use them for contract disputes or automobile accident suits simply because the parties live across state boundaries—especially when litigants who do not live in different states must bring otherwise identical suits in state courts.

NEED FOR THE FEDERAL FORUM

The basic criterion for creating federal jurisdiction is that a particular kind of dispute needs a federal forum. Accordingly, we do not propose the

total elimination of diversity jurisdiction. Suits in which aliens are parties and suits of or in the nature of interpleader (e.g., when a stakeholder seeks to bring competing claimants into court to avoid inconsistent liabilities) also have special characteristics that support preserving the federal jurisdiction now available to them. Indeed, for such cases, minimal diversity—when any plaintiff is diverse from any defendant—should suffice. Later in this chapter, we also recommend that Congress make the federal forum more readily available in certain complex cases—some product liability litigation, for example—involving scattered events or parties and substantial claims by numerous plaintiffs. In such cases, the national reach of a federal court would enable a single forum to resolve disputes involving multiple parties from many states. And we discuss broadening federal jurisdiction in certain cases that present both federal and state claims, such as cases with pendent state law claims.

In most diversity cases, however, there is no substantial need for a federal forum. Federal courts offer no advantage over state courts in interpreting state law; quite the reverse. Federal rulings on state law issues have little precedential effect. Proponents of diversity jurisdiction say that these litigants need access to federal courts because of local bias in state courts. We concede that this may be a problem in some jurisdictions, but we do not regard it as a compelling justification for retaining diversity jurisdiction. After the Civil War, Congress required a showing of bias as a justification for removing diversity cases to federal court, but the 1948 revision of title 28 removed all references to such bias, finding them inappropriate and noting that the removal-for-bias provisions were seldom employed.

The current law already recognizes that diversity cases dissipate federal judicial resources—at least if the claim is for no more than \$50,000. Diversity is one of the few areas in which Congress has retained a minimum jurisdictional amount-in-controversy requirement. This is a pragmatic but essentially arbitrary attempt to limit the diversion of federal courts from their primary role of litigating federal constitutional and statutory issues. Similarly, the well-established requirement for *complete* diversity—that all plaintiffs be citizens of different states from all defendants—has the effect of containing the excesses of diversity jurisdiction. But these attempts to confine diversity jurisdiction create their own problems, as parties seek to inflate their claims to come within the \$50,000 minimum, split related cases between state and federal courts, or maneuver to defeat federal diversity jurisdiction.

RESOURCES

The problem is not merely that diversity cases misuse federal judicial resources. It is that they they misuse a lot of federal judicial resources. Since

the early 1970s, diversity cases have consistently constituted from 20 to 25 percent of the district court caseload and 10 to 15 percent of the appellate caseload. And the volume of filings understates diversity jurisdiction's impact. Diversity cases account for about half the civil trials in federal court, and they frequently generate complex procedural and jurisdictional problems, making them more time-consuming and expensive to process than similar claims in the state courts.

The cost of this jurisdiction is high. A study by the Federal Judicial Center estimated that adjudicating diversity cases in 1988 (when the jurisdictional minimum was \$10,000) consumed the equivalent of the workload of 193 district judges and 22 court of appeals judges. Total costs to the federal court system, including juror fees and subsidiary costs, were estimated to be \$131 million annually, more than one-tenth of the federal judicial budget.

STATE-FEDERAL FRICTION

Diversity is a source of friction between state and federal courts, particularly when a party commences an action based on diversity that is identical to an action pending in state court. Lack of consistency between federal interpretations of state law and subsequent pronouncements by a state's highest court can lead to contrary results in similar cases. Moreover, eliminating diversity jurisdiction will stimulate political pressure for state court reform.

STATE COURT CAPACITIES

State courts, of course, have serious problems themselves with growing caseloads. A National Center for State Courts study concludes, however, that total abolition of diversity jurisdiction would, on average, generate about eleven more cases for each state court judge of general jurisdiction, and, most important, suggests that these cases would generally be evenly distributed and so would not overwhelm courts in a few areas. In short, what is a heavy burden to the federal system would represent an insignificant addition to the work of most state courts because the state court system is so much larger in the aggregate than the federal court system. The Conference of Chief Justices has expressed the willingness of the state courts to accept responsibility for adjudication of this state law litigation. Should the state courts be concerned, however, we note that Congress has established the State Justice Institute and appropriated funds for it as a mechanism through which an examination of this subject could be made. If diversity jurisdiction is eliminated, in whole or in part, Congress could provide funds to the state judiciaries for a reasonable period to help them

adjust to the increased workload and absorb the cases that had been handled by the federal system.

A BACK-UP PROPOSAL

Should Congress decide not to effect the broad elimination of diversity that we recommend, we urge it to consider the following changes to remove the more extreme dysfunctions of the current jurisdiction. At a minimum, Congress should:

- prohibit plaintiffs from invoking diversity jurisdiction in their home states. The only colorable argument supporting diversity jurisdiction—fear of state court bias against out-of-state litigants—has no force when in-state plaintiffs invoke it.
- deem corporations to be citizens of every state in which they are licensed to do business. The same reason that justifies barring diversity jurisdiction to in-state plaintiffs justifies prohibiting it to corporations in places where they are licensed to do business.
- specify that the jurisdictional floor does not include non-economic damages, such as pain and suffering, punitive damages, mental anguish, and attorneys' fees, which litigants use to skirt the jurisdictional minimum.
- raise the jurisdictional minimum from \$50,000 to \$75,000 and index the new floor amount.

In Part II, see also Section B.2, at pp. 44–48, on business to allocate to federal courts.

Part III contains additional material on this subject.

Partially dissenting statement of Senator Grassley:

Senator Grassley is opposed to the complete abolition of diversity of citizenship jurisdiction but he supports some of the alternative proposals, such as barring the in-state plaintiff from invoking diversity, an increase in the minimum amount in controversy, and excluding non-economic damages from the decisional floor. He does not favor the proposal regarding corporate citizenship.

Dissenting statement of Mr. Harrell and Mrs. Motz:

Congress created diversity jurisdiction 200 years ago to avoid possible discrimination against out-of-state parties by providing a forum free of political influences and entanglements. A number of recent, well-publicized cases unquestionably demonstrate and affirm that diversity jurisdiction is still necessary to guard against this very problem,

whether the out-of-state party is a plaintiff or defendant. The availability of the alternative federal forum is often an important element of justice well worth its minor costs.

Moreover, experience shows that diversity jurisdiction, rather than being, as the report suggests, a "source of friction" between state and federal courts, is an important part of Our Federalism. Federal judges are kept abreast of state law and in touch with the real concerns of local citizens and businesses. Without diversity cases, the "cross-fertilization" and flow of ideas in each direction (e.g., the Federal Rules of Evidence, and of Civil and Criminal Procedure have drawn many changes over the years from state rules and many states have adopted changes originating in the federal rules) would undoubtedly diminish.

Further, the report's conclusion that diversity cases, which it describes as requiring "a lot" of time of the federal courts, can easily be shifted to state courts is, in our view, unrealistic. Although a majority of state chief justices have stated that they would not object to the abolition of diversity jurisdiction, if supplied with additional resources to handle those cases now tried in federal court, there is no assurance that they will ever be provided with these resources. Just as significantly, the majority of chief justices and other state court judges in the most populous states, like New York, which would feel the additional burden most keenly, vigorously oppose the shift of diversity cases to them. Because in a number of the state courts it takes five years or more to bring a case to trial, the effect of eliminating diversity jurisdiction would be less, rather than more, efficient administration of justice.

In our view, the recommendation to abolish diversity jurisdiction, which relies on statistics which concededly may be unreliable (see *infra* pp. 111-12, recommendation that the Judicial Conference adopt a reliable appellate caseload formula), vastly overstates the cost incurred by the federal courts in retaining diversity jurisdiction. However, whatever those costs are, they are not nearly significant enough to justify the abolition of diversity jurisdiction. Moreover, the "back-up proposal," which would make corporations citizens of every state in which they are licensed to do business, is not a limited alternative at all, but would abolish diversity for most corporations and is thus equally objectionable.

b. Congress should amend the Employee Retirement Income Security Act (ERISA) to forbid removal from state to federal court of cases in which the amount in controversy is less than \$10,000.

ERISA provides benefits and protections with respect to employee benefit plans. Dissatisfied beneficiaries of pension and welfare plans may sue to enforce their rights in either state or federal court without regard to the amount in controversy. Where beneficiaries assert their rights in state court, however, defendants often remove the cases to federal court. Many of these removed cases involve claims for relatively small sums of money. Persons asserting small claims often have limited means, and removal of their cases may sometimes be a strategic maneuver to deprive plaintiffs of the opportunity to proceed in the local state courts where they filed their

suits. Thus we recommend that Congress allow removal of ERISA cases only when the amount of controversy exceeds \$10,000.

We recommend, however, that Congress preserve plaintiffs' right to *sue* in federal court without regard to the amount in controversy, thus giving plaintiffs the unilateral option of suing in either state or federal court.

2. Business to Allocate to Federal Courts

Eliminating or substantially curtailing diversity of citizenship jurisdiction would provide added capacity to let federal courts resolve additional disputes when the unique characteristics of the federal courts are pertinent. A principal focus of the committee's work has been to preserve the ability of the federal courts to decide questions of federal law. Thus, several of our proposals—most prominently our recommendation for substantial elimination of diversity jurisdiction—will place more of the responsibility for deciding issues of state law in the state courts. But our concern is not simply with alleviating federal court workload. Federal courts are only part of our national judicial system, and their workload is only one piece in the mosaic of relevant concerns. Our overriding concern, rather, is promoting the most rational possible allocation of jurisdiction between state and federal courts.

a. Complex litigation

Complex, multi-party disputes often give rise to litigation in both state and federal courts. The committee supports a statutory amendment, and proposes two steps the courts should take, to facilitate the processing of complex litigation in federal court.

- (1) **Congress should amend the multi-district litigation statute to permit consolidated trials as well as pretrial proceedings and should create a special federal diversity jurisdiction, based on the minimal diversity authority conferred by Article III, to make possible the consolidation of major multi-party, multi-forum litigation.**

The past few decades have witnessed a considerable increase in complex litigation in which litigants press related claims concurrently in several federal and state courts. Airplane crash and product liability cases are two examples. There is partial federal court authority to deal with such cases, but it does not go far enough. For cases already in federal court, 28 U.S.C. § 1407(a) permits consolidated proceedings in cases involving common questions of fact—but only for pretrial proceedings. As a practical matter, to be sure, cases often settle, or liability questions are tried together by con-

sent. Many parties to these national cases, however, cannot have their state law claims tried in federal court because they are citizens of the same state as one of their adversaries and thus do not meet the long-standing requirement of complete diversity among parties.

We believe, though, that the federal trial forum should be available to ensure the economy of one court's resolving disputes involving multiple parties from many states. Thus we recommend that Congress broaden § 1407(a) to allow for consolidated trial as well as pretrial proceedings and adopt a new jurisdiction based on minimal, rather than complete, diversity so that parties to a multi-state, multi-party state law litigation can be included even if they are citizens of the same state. This jurisdiction would permit more efficient handling of cases that are already partly before the federal courts, thus minimizing any workload increase. (And any increase would be more than offset if Congress eliminates most current diversity jurisdiction.)

We do not take up numerous difficult subsidiary issues in complex litigation, such as choice of law, statutes of limitations, single-event or related-matter jurisdiction, removal, possible revision of joinder and class action rules, and remand for trial on damages. The American Law Institute and the American Bar Association Commission on Mass Torts have conducted major studies of these questions, and the House of Representatives is considering legislation to create a special federal jurisdiction for mass disasters.

(2) The *Manual for Complex Litigation* should include guidelines for consolidation and severance.

Generally speaking, federal district judges should consolidate separate cases and sever common issues for combined disposition if they can do so efficiently and fairly. Opportunities for consolidation and severance will become more common, especially if Congress adopts our preceding recommendation. Consolidation, though, is not always desirable. It may not be economical, and trial on liability issues alone may skew results. Thus, while it is important to make consolidation possible for cases in which it could be desirable, guidelines for its use could reduce its misapplication when consolidation might be inappropriate. Case law and commentary provide few guidelines for the judiciary, and this committee is not the body to devise them. But either the Board of Editors of the *Manual for Complex Litigation*, 2d, should include such guidelines in future editions, or they should be reflected in the Federal Rules of Civil Procedure.

- (3) For the small number of instances in which extraordinarily high numbers of injuries may have been caused by a single product or event, the courts should explore, and the Federal Judicial Center should analyze and disseminate information about, tailored procedures to avoid undue re-litigation of pertinent issues and otherwise facilitate prompt, economical and just disposition of claims. Congress should be alert to the need for statutory change to facilitate resolution of such mega-cases.

Some products or events—asbestos injuries, for example—give rise to thousands of claims that swamp several federal districts and state courts with the task of re-litigating similar issues and resolving individual issues. Courts have determined that alternative procedures to reduce re-litigation are essential for some of these cases. They have managed asbestos caseloads through mass trials or certification of all pending cases in the district as a class action. Heavy judicial involvement in the Agent Orange litigation led to a class-wide settlement. Congress designed an administrative process for black lung victims to cope with similar problems. But some alternatives have created their own problems. For example, the black lung scheme led to heavy judicial burdens. And the Asbestos Claims Facility and the Center for Claims Resolution (established by prospective defendants and their insurers, after negotiations with plaintiffs' lawyers) have not enjoyed great success.

Thus the committee does not recommend such alternatives for situations that do not present the great problems of the mega-cases. And the pertinent characteristics of mega-cases are likely to differ enough to make any generic approach unsuccessful. Rather, courts facing an outburst of such litigation should consider alternatives to traditional methods (claims-processing mechanisms, for example) once traditional litigation has established liability. If they have the authority, they could require or provide the option of simplified administrative processing with surer, though possibly lesser, compensation.

The Federal Judicial Center should collect and analyze data on the new methods and, as it thinks best, disseminate information to judges before whom such litigation is pending. Studies of such alternatives might suggest wider applications for them, and at some point, Congress may wish to facilitate the resolution of mega-cases by altering the substantive terms for relief or establishing alternative remedy schemes. Such legislation might aid not only the federal courts but also state systems, which sometimes carry the lion's share of mega-case burdens.

In Part II, see also Chapter 4, § C, at pp. 81–87, on alternative dispute resolution; Chapter 5, § C, at p. 97, on procedures in scientific and technical litigation.

Mr. Harrell dissents from the recommendation in § B.2.a, on complex litigation.

b. Congress should expressly authorize federal courts to assert pendent jurisdiction over parties without an independent federal jurisdictional base.

The terms “pendent” and “ancillary” jurisdiction refer to the authority of federal courts to hear and determine, without an independent basis of federal jurisdiction, claims related to matters properly before them. These supplemental forms of jurisdiction, which may be exercised in the discretion of the federal courts, enable them to take full advantage of the rules on claim and party joinder to deal economically—in single rather than multiple litigation—with matters arising from the same transaction or occurrence. Pendent and ancillary jurisdiction may be used with respect either to additional claims between parties already before the courts (as with compulsory counterclaims) or to claims bringing in new parties (as with impleader of a third-party defendant).

Recent decisions of the Supreme Court raise doubts about the scope of pendent party and ancillary jurisdiction under existing federal statutes. As a result, a litigant with related claims against two different parties—one within and one outside original federal jurisdiction—may have to choose between (1) splitting the claims and bringing duplicative actions in state and federal courts; (2) abandoning one of the claims altogether; or (3) filing the entire case in state court, thus delegating the determination of federal issues to the state courts. The first alternative wastes judicial resources. The second is unfair to the claimant. The third forces litigants to bring a wide variety of federal claims into the state courts and in some cases is unavailable because federal jurisdiction over the federal aspect is exclusive.

Abolishing or radically curtailing pendent and ancillary jurisdiction would eliminate some cases and claims from the federal courts, but this is a situation in which it is unwise to do so. Rather, we recommend that Congress expressly authorize federal courts to hear any claim arising out of the same “transaction or occurrence” as a claim within federal jurisdiction, including claims, within federal question jurisdiction, that require the joinder of additional parties, namely, defendants against whom that plaintiff has a closely related state claim. In order to minimize friction

between state and federal courts, however, Congress should direct federal courts to dismiss state claims if these claims predominate or if they present novel or complex questions of state law, or if dismissal is warranted in the particular case by considerations of fairness or economy.

Part III contains additional material on this subject.

Judge Campbell, Mr. Harrell, and Mrs. Motz dissent from the recommendation concerning pendent party jurisdiction.

- c. **We recommend for further study, but take no position on, proposals concerning the Anti-Injunction Act, abstention, and removal (except for the limited recommendations on removal in this chapter and in Chapter 5).**

In this section we call attention to, without endorsing the full particulars of, several possible statutory amendments concerning cases that involve questions of both federal and state law. These amendments would place the responsibility of deciding such cases in the federal courts when considerations of efficiency, fairness to the parties, and consumption of total state and federal judicial resources weigh arguably in favor of federal court jurisdiction.

Thoughtful proposals for implementing this general principle with respect to the rules of law governing abstention, removal, and the Anti-Injunction Act have been prepared by some of the committee's members and reporters, and may be found in Part III. We recommend them to the Congress for further study.

In Part II, see also Chapter 2, § B.2.b, at pp. 43-44, on removal of ERISA cases, and Chapter 5, § B.3, at pp. 94-95, presenting a more limited recommendation on removal.

Part III contains additional material on this subject.

C. Prisoner Civil Rights Suits

Congress should amend 42 U.S.C. § 1997e to direct federal courts in state prisoner suits brought under 42 U.S.C. § 1983 to require exhaustion of state institutional remedies for a period of 120 days, if the court or the Attorney General of the United States is satisfied that the remedies are fair and effective; Congress should delete § 1997e(b)'s minimal standards for state institutional remedies. The State Justice Institute and the proposed National

State-Federal Judicial Council (see E, *infra*) should provide incentives to states to enhance their institutional remedies, including funding pilot projects for ombudsmen and counsel in administrative proceedings.

In 1958, petitions from state prisoners complaining about the conditions of their confinement constituted about 1 percent of federal civil filings. By 1989, there were almost 25,000 such filings, representing 11 percent of all civil filings. Many of these suits probably are amenable to administrative resolution. For that reason, in 1980 Congress authorized district courts to require state prisoners filing under 42 U.S.C. § 1983 to exhaust the prison's administrative grievance procedures, if the United States Attorney General has certified, or the district court has determined, that the procedures are in "substantial compliance" with statutory "minimum standards" (42 U.S.C. § 1997e).

Section 1997e has failed to encourage administrative resolution of state prisoner § 1983 claims. For whatever reason, Justice Department regulations and procedures for certifying a state's system are slow. Moreover, some states evidently regard the substantive standards as onerous (especially those requiring inmate participation in the system's design and administration). Consequently, few states have sought and obtained certification under this statute.

State inmates should be required to exhaust adequate administrative remedies before pursuing federal law suits. Exhaustion is required before federal prisoners may file civil rights cases, and it has not proved an onerous burden on such prisoners even though there is no time limit for the Bureau of Prisons to act on prisoners' claims, as there would be under the committee's proposal for state prisoners. The committee also agrees that the state remedies must first be approved by an independent agency, such as a federal court, if exhaustion is to be required. But the statute should provide greater flexibility in the requirements for approved administrative remedies. Federal prisons are not required to meet the standards that § 1997e imposes on the states, and several states have adopted effective administrative remedies that do not conform to § 1997e.

We recommend that Congress allow a state to persuade either a federal court or the Attorney General of the United States that a remedy is fair and effective. The state should have the burden of making this showing. A prisoner in an institution whose administrative procedures have been found adequate should be required, for a period not to exceed 120 days, to exhaust these remedies before proceeding with the lawsuit. Because these are rarely "fast track" cases, the 120-day period should cause no substantial hardship to the prisoner. Where it would, the hardship would be grounds for the district judge's declining to order exhaustion.

Effective administrative resolution is in the prisoner's best interests. And, because of the enormous volume of these filings in federal court, resolving even a small fraction of the complaints administratively would save substantial judge time—time for federal courts to deal with those complaints that exigently need judicial resolution. Disputes not settled at the administrative level would come to the court with a record—albeit informal and not preclusive—that might assist the district judge in identifying the issues and deciding the case.

We stress, however, the need for *fair and effective administrative remedies*. Anything less will neither serve the prisoners' interests nor reduce the federal caseload. Consequently, we urge the State Justice Institute, working with the proposed National State-Federal Judicial Council, to provide concrete and specific encouragement to the development of such remedies in state correctional institutions. Ombudsmen and counsel for inmates who file grievances are two obvious possibilities.

Part III contains additional material on this subject.

Separate statement and dissent by Mr. Aprile:

The premise of this recommendation is that "the substantive standards" of 42 U.S.C. § 1997e are "onerous" from the states' perspective and this burden has precluded states from enacting "administrative remedies" which comply with the statute. The five minimum standards require nothing more than: (1) "an *advisory role* for employees and inmates" of the correctional institution "in the formulation, implementation, and operation of the system"; (2) "specific maximum time limits for written replies to grievances with [supporting] reasons at each decisional level"; (3) "priority processing of grievances which are of an emergency nature"; (4) "safeguards to avoid reprisals against any grievant or participant" in the grievance resolution; and (5) "*independent review* of the disposition of grievances . . . by a person or entity not under the direct supervision or direct control of the institution" (emphases added).

Under the committee proposal, the prisoner would be required to exhaust state administrative remedies as long as a federal court decided that the remedies provided by the state were both "fair and effective" without resort to any minimum standards. From a legal and pragmatic perspective, the failure of a state administrative remedy to contain any one of the minimal standards delineated in 42 U.S.C. § 1997e would appear to be fatal to a judicial finding that the remedy in question is "fair and effective," when the administrative litigation must occur within the context and confines of an adult correctional facility. The absence of any one of the present statutory minimum standards or its substantial equivalent would undoubtedly deprive the state prisoner of an "opportunity to fully and fairly litigate" his claim in the state's administrative process.

In the event that any change in 42 U.S.C. § 1997e is warranted, the committee should recommend only that, where the state administrative remedy is not "in substantial compliance" with the minimum standards of 42 U.S.C. § 1997e (b), there will be a rebuttable presumption that the administrative remedy is not "plain, speedy, and effective." To overcome this presumption, the state will be allowed to persuade either a federal court or the Attorney General that its remedy contains alternate procedures which accomplish the same objectives as those addressed by the minimum standards and is, in fact, a "plain, speedy, and effective" administrative remedy which the prisoner must exhaust prior to federal resolution of the § 1983 claim.

Dissenting statement of Congressman Kastenmeier:

I support the committee's recommendation that the states be encouraged to develop meaningful plans providing administrative remedies that would satisfactorily resolve prisoner grievances and thereby diminish the need for such prisoners to have their grievances litigated in the federal courts. I am unconvinced, however, that deficiencies in the the Civil Rights for Institutionalized Persons Act (CRIPA) are responsible for the relative absence of state plans now in place. Arguably, CRIPA has never been properly implemented by the United States Department of Justice. In my home state of Wisconsin, for example, a plan was developed but never implemented, solely because the United States Department of Justice never acted on Wisconsin's proposed plan. It may be that Congress needs to reassess the Act in light of the committee's criticisms, but I do not believe that the solution necessarily lies in Congress relinquishing to the courts all responsibility for ensuring the adequacy of the state plans.

D. State Prisoner Habeas Corpus Petitions

Habeas corpus petitions, particularly those from state prisoners, constitute a substantial portion of the federal courts' caseload. The writ of habeas corpus is the means by which state prisoners challenge their state convictions on federal constitutional grounds. This matter is therefore of central concern to the nation and to its federal courts. Simultaneously with this report, Congress is considering several wide-range recommendations for revising habeas corpus procedures in death penalty cases. Proposals relating to non-death cases are in various stages of development. Given the research and activity already in progress, we have decided to make no recommendations on habeas corpus law or procedure. We are bound to note, however, that the 537 habeas corpus petitions filed in 1945 grew to 10,521 in 1989—an increase of over 1,800 percent.

Part III contains additional material on this subject.

Separate statement and dissent by Mr. Aprile:

I regret that the committee has elected to retreat from its initial public position on state prisoners' federal habeas corpus petitions. I remain unconvinced that the present proposals before Congress for revising habeas corpus procedures in death penalty cases should in any way limit this committee's need to address the oft raised contention that the federal courts are subjected to unnecessary and overwhelming numbers of successive habeas corpus petitions and evidentiary hearings in non-death penalty cases brought by state prisoners. The information brought before this committee in my opinion did not support either that contention or the need to impose new limitations on either successive petitions or evidentiary hearings in these actions. Indeed the primary assumption of the Powell Committee report is that the present federal habeas corpus procedures employed to adjudicate constitutional claims of state prisoners are inherently sound even in death penalty cases and will continue to remain a viable option in states which do not opt into the alternate "fast track" procedure.

In reality the federal courts have little difficulty under existing law disposing of improper successor petitions and little need in most cases to conduct evidentiary hearings except where state courts have either denied the petitioner a necessary hearing or have provided a deficient hearing under federal law.

I continue to support two of the original three tentative recommendations of this committee which addressed federal habeas corpus petitions by state prisoners. The committee should recommend in accordance with our tentative recommendations that: (1) Congress should make no change regarding the standards for hearing state prisoners' successive habeas corpus petitions under 28 U.S.C. § 2244, and (2) Congress should make no change in the law respecting fact-finding procedures in habeas corpus cases.

E. The Chief Justice and the Chair of the Conference of Chief Justices Should Create a National State-Federal Judicial Council

The committee endorses the suggestion of the chairman of the Conference of Chief Justices for the creation of a national state-federal council, composed of an equal number of state and federal judges, to study and submit recommendations to ease friction and promote cooperative action between the two court systems. Areas in which it might offer recommendations are readily apparent. We have recommended that such a council work with the State Justice Institute to encourage effective state prison grievance procedures. The council might explore possibilities for alternate, innovative procedures for habeas corpus cases and make recommendations to the courts, Congress and state legislatures for implementation. Problems of trial scheduling often create friction. Attorney discipline in state and federal courts is often uncoordinated. These are but a few of the areas in which the proposed council might offer recommendations in the interests of healthy judicial federalism. Implementation of such projects might be

of interest to the State Justice Institute in keeping with the congressional intention in establishing the Institute.

In Part II, see also Chapter 1, § D, at p. 33; Chapter 2, § C, at p. 50, on developing, with the State Justice Institute, more effective prison grievance mechanisms.

Chapter 3

Creating Non-Judicial Branch Forums for Business Currently in the Federal Courts

Some current aspects of federal court business could be handled more effectively and expeditiously through new or reorganized judicial or administrative procedures outside the third branch, subject to appropriate Article III review. This chapter contains recommendations to that end, as well as recommendations *against* other proposals for shifting business from the judicial to the executive branch.

A. Administrative Law Judiciary—Disability Claims

- 1. Congress should create a new structure for adjudicating disability claims under the Social Security Act: hearings before administrative law judges with adequate institutional independence, whose decisions could be appealed to a new Article I Court of Disability Claims, with review in the courts of appeal limited to constitutional claims and to pure issues of law.**

Four successive stages of executive and judicial branch review are currently available to a Social Security disability claimant dissatisfied with the determination of the state agency:

- a hearing before an administrative law judge employed by the Social Security Administration;
- review by the Appeals Council of the Social Security Administration;
- review in the district court on the administrative record, and
- de novo review of the district court's decision by the court of appeals.

This arrangement is widely criticized on at least two grounds. First, recent experience suggests that the process is vulnerable to unhealthy political control. The Social Security Administration has made controversial efforts to limit the number and amount of claims granted by the administrative law judges, leading to widespread fears that the judges' proper independence has been compromised. (And the Appeals Council of the Social Security Administration lacks even the protection that the Administrative Procedures Act gives the administrative law judges.) Second, the appeals procedure is cumbersome and duplicative. The district judge usually performs the purely appellate function of reviewing the agency's

order on the record compiled before the agency. The court of appeals, in turn, subjects the district court decision to plenary review. In sum, there is inadequate administrative review followed by duplicative review by Article III courts.

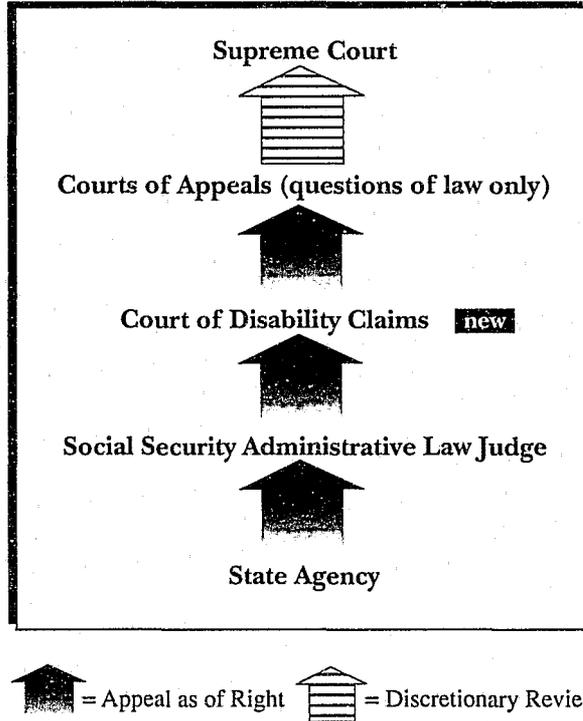
The principal issues in most Social Security disability cases are factual and technical. Thus it is best to concentrate adjudicative resources at the administrative level and create a new appellate court that will attract competent specialists in disability law. We propose a three-step process:

- initial administrative hearings before administrative law judges with sufficient institutional independence to avoid the reality or appearance of an administrative judiciary under the political control of the Social Security Administration;
- appeals from these judges' orders denying claims to a new Article I Court of Disability Claims (which might also be vested with jurisdiction to review some or all orders granting or denying disability claims under other statutes);
- appeals from the Court of Disability Claims to the federal courts of appeals limited to constitutional claims and questions of law. Decisions about the sufficiency of evidence require no review beyond the Court of Disability Claims, and hence are not questions of law under this recommendation. We therefore envision relatively few appeals to the courts of appeals, although those courts will still be available in appropriate cases.

Figure 1 depicts the committee's proposal.

We believe that these new Article I bodies will provide a more thorough and expert examination of the facts than federal district courts can provide, given the other demands on their time. To ensure the administrative law judges' independence, Congress may wish to consider creating an independent agency in the executive branch to employ all administrative law judges in the federal government. Such an agency would need a disciplinary process to prevent individual judges from abusing their independence. Alternatively, Congress may prefer to develop further safeguards within the agency itself, to insulate the administrative law judges' decisions from the influence of agency superiors.

FIGURE 1
Proposed Structure for Review of
Social Security Disability Claims



At some point, Congress might wish to authorize the Court of Disability Claims to adjudicate appeals from *all* administrative law judge decisions under federal disability programs, including claims now handled by the newly created Court of Veterans Appeals. (That court may, in fact, provide a model for the proposed Court of Disability Claims.) The enhanced authority and prestige of such a court would attract the ablest specialists in the field of disability law, and the broader the court's jurisdiction, the more it will alleviate the Article III judiciary's disability caseload.

Finally, we propose reconstituting the understaffed Appeals Council for the Social Security Administration as an agency to promulgate and revise the regulations that guide the adjudication of Social Security disability cases. Its relationship to the administrative law judges and the Court of Disability Claims would resemble that between the Occupational Safety

and Health Act and the Occupational Safety and Health Review Commission.

Part III contains additional material on this subject.

Senator Grassley dissents from this recommendation.

Dissenting statement by Judge Weis, in which Mr. Dennis and Mr. Harrell join:

I dissent from the majority's recommendation that would create a new Article I court. I propose instead that the Appeals Council be abolished and in its place a Benefits Review Board be constituted to provide thorough administrative review of decisions by ALJs. A Social Security Benefits Review Board could be constructed on the model of the administrative entity that reviews findings by ALJs in black lung as well as Harbor and Longshore Workers cases—also instances where disability claims are evaluated. The Benefits Review Board model has been generally considered successful, providing for more effective review with greater participation by claimants than the existing Appeals Council process.

I also propose that appeals from decisions of the Benefits Review Board be taken to the district court. The district court would retain all of the review power it presently has, including, most importantly, the right to examine the record and determine if substantial evidence supports the decision of the Social Security Administration. Appeals from the district court's ruling could be taken to the court of appeals by leave, but would be limited at that point to questions of law.

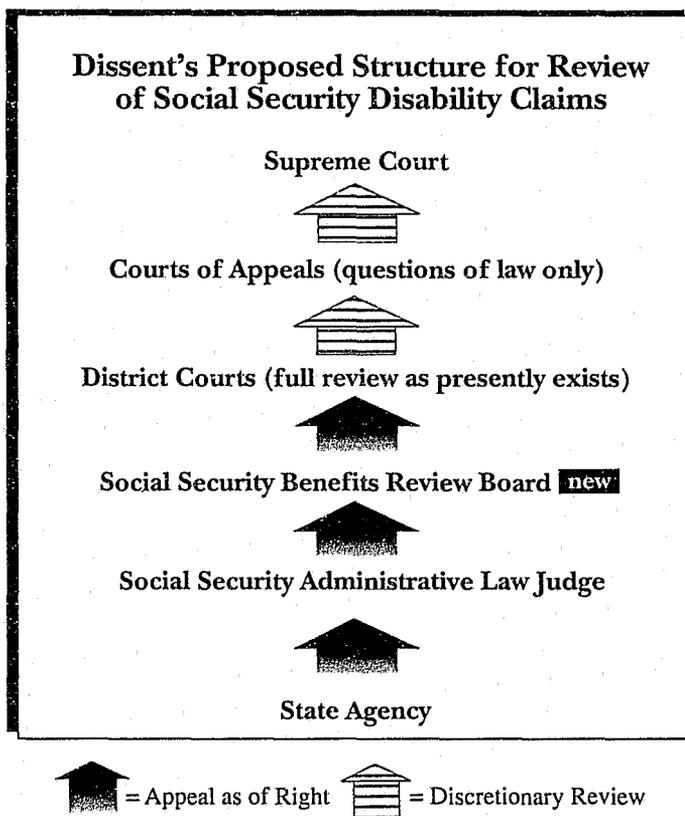
Establishing a Benefits Review Board rather than the proposed Article I court has a number of advantages:

- The proposal does not contravene the general policy against creating specialized courts, particularly ones with a very narrow focus.
- Establishing a system for administrative appellate review would not increase the number of courts.
- Review by a Benefits Review Board could be expected to be less formal and less expensive than traditional court procedures.
- The Benefits Review Board model has been thoroughly tested.
- The existence of a Benefits Review Board would offer a career track to ALJs to make their positions more attractive.

Any proposal for Article III court review must recognize the critical problem of overwhelming caseloads in the courts of appeals. The district courts are also struggling with heavy dockets, but the total number of district judges far exceeds the number of three-judge panels that could be constituted in the appellate courts. Thus, directing ap-

peals to district judges would result in a far lighter burden per judge than providing for initial review in the courts of appeals as the majority recommends.

Under my proposal claimants would have the right to appeal not only questions of law but also continue to have the benefit of district court review of the record on substantiality of the evidence. This is a critical element in Social Security claims, one that particularly calls for Article III review. Thus, my proposal would give claimants two opportunities for review on substantiality of the evidence—first in the Benefits Review Board setting, and then in the district court.



2. Congress should prohibit the so-called policy of “non-acquiescence” by amending the Social Security Act, 42 U.S.C §§ 301–1397e, to require the Secretary of Health and Human Services, in all administrative proceedings, to abide by the holdings of the court of appeals in the circuit in

which a claim for benefits under the Act is filed. But Congress should exempt from this requirement any case that the Solicitor General has determined is appropriate to use as a test of the existing law. The exemption should apply only to the case so designated and should expire when the judgment in that case becomes final.

The Secretary of Health and Human Services claims the right to disregard the precedential holdings of the courts of appeals if the Secretary determines that the relevant court decisions are not in accord with agency policy. Thus if a claimant applies for benefits through administrative channels, and the court of appeals for the claimant's circuit has established precedent on a procedural or substantive issue favorable to the claimant, the Secretary sometimes denies benefits, refusing to comply with the relevant precedent. The claimant must then litigate in federal court in order to gain the advantage of the judicial precedent. Claimants who pursue benefit claims without counsel are unlikely even to know of advantageous judicial precedents.

This "non-acquiescence" policy is unfair to the Social Security disability claimant, and the continuing litigation it necessitates consumes scarce judicial resources. It repudiates the obvious and fundamental principle that an appellate court's decision on a particular point of law is, in the absence of special circumstances, controlling precedent for other cases raising the same issue. (One committee member, a former Solicitor General, characterized this "non-acquiescence" policy as "lawless.") It weakens the concept of the "law of the circuit." And it creates unnecessary tension between the executive and judicial branches.

Requiring the Secretary to abide by the rulings of the relevant court of appeals will eliminate such inequities and reduce the federal court caseload. The Tax Court has followed a similar requirement for years without apparent adverse effect, although the Commissioner of Internal Revenue still asserts a "right of non-acquiescence."

In connection with consideration of this issue with respect to the Social Security Administration, Congress should explore whether "non-acquiescence" policies in other executive branch agencies are in need of legislative control.

B. Congress should authorize a five-year test program to allow the Equal Employment Opportunity Commission to arbitrate employment discrimination cases with the consent of both parties.

It is important that the federal courts remain available to vindicate rights of workers aggrieved under title VII of the 1964 Civil Rights Act, the

Equal Pay Act, and the Age Discrimination in Employment Act. Cases under these statutes, however, may present their own special problems, especially when the aggrieved worker sues without counsel. In order to facilitate expedited judicial resolution of employment discrimination cases, Congress, in 42 U.S.C. § 2000e-5(f)(5), has authorized district judges to appoint special masters in title VII cases if the case has been pending for more than 120 days after issue has been joined. In some districts referral of such cases to magistrates has been used often; this procedure deserves serious study and, perhaps, more frequent use. Elsewhere we present some other recommendations to improve the litigation process in employment discrimination cases.

One measure to assist these workers may lie outside the federal judiciary: voluntary arbitration by the EEOC. Arbitration would benefit those employers and employees who would prefer to try to settle their dispute before the agency rather than—or before trying—federal court litigation. And it might provide some caseload relief to the federal courts. Since 1969, the number of private employment discrimination cases filed in the federal courts has increased by more than 2,000 percent—from under 400 cases in 1970 to almost 7,500 in 1989. We urge Congress to authorize such arbitration, perhaps on a five-year test basis, and to provide for enforcement of the arbitration award under the United States Arbitration Act. Adjudication of similar cases between private parties (by employee and employer) by the National Labor Relations Board may provide a useful model. The Commission will need additional appropriations to enable it to perform this additional task.

In Part II, see also Chapter 5, § E.2, at pp. 100–01, on the need for study of 42 U.S.C. § 2000e-5.

Part III contains additional material on this subject.

Dissenting statement by Judge Weis, in which Mr. Dennis, Senator Grassley, and Mr. Harrell join:

I do not agree with the majority's proposal to confer jurisdiction on the EEOC to adjudicate employment discharge cases. These cases differ substantially from entitlement claims under government programs, such as Social Security payments. Quite in contrast, employment discharge claims present the type of dispute between private parties that is typically resolved by an impartial judicial body—and not an administrative agency.

The adjudication of private disputes has always been a core function of courts, which have broad powers to resolve the cases fully. An administrative agency, on the other hand, has limited authority. One example of the difficulties that result from this re-

striction of power is that most employment discrimination claims under federal statutes, e.g., title VII, are coupled often with state law claims that cannot be decided by the EEOC. Another illustration reveals that cases under the Age Discrimination in Employment Act may be tried to a jury, a function alien to an administrative agency.

The EEOC itself expresses severe misgivings about the committee's proposal, acknowledging forthrightly that it has an affirmative role to act against discrimination, rather than to act as a neutral adjudicator. The agency points out that it has neither the structural framework nor the necessary resources to handle the assignment. In its letter to this committee, the EEOC suggested that we give consideration to alternative dispute mechanisms within the district courts, such as arbitration. This thoughtful proposal would provide aggrieved employees a less expensive option, while yet preserving their existing rights to litigate in traditional fashion in the district courts. That recommendation presents an alternative quite superior to the majority's plan, which would foist additional burdens on an already overtaxed agency that is understandably reluctant to undertake more and unfamiliar work.

C. Congress should repeal the Federal Employers' Liability Act and Jones Act. Claims by railway employees should be subsumed under state or federal workers' compensation systems, and claims by seamen should be brought under an amended Longshore and Harbor Workers' Compensation Act.

The Federal Employers' Liability Act (FELA) allows railway employees to recover damages for injury resulting from the negligence of the railway or its employees if the injury was sustained in interstate commerce. The Jones Act—reflecting the responsibility that the federal government has historically assumed for maritime workers—extends the cause of action created in the FELA to seamen injured in the course of employment. When enacted, both statutes provided greater benefits to injured workers than did the common-law or statutory alternatives. Today workers' compensation schemes for claims of this type deliver benefits in less time, are less costly than court actions, save attorneys' fees, and are no-fault, i.e., they do not require the claimant to prove negligence. Studies that suggest that awards may be smaller under workers' compensation plans do not consider the zero judgments for workers who are unable to prove negligence under the FELA or similar statutes. Eliminating FELA and Jones Act cases would reduce the district courts' civil docket by 2 percent and the courts of appeals' docket by 1 percent. Furthermore, those cases go to trial, and require a jury, more often than the average federal filing. FELA and Jones Act cases accounted for about 5 percent of all civil trials in 1987 and 1988, and about 8 percent of civil jury trials.

FELA (1908)

This Act has its origins in late nineteenth-century federal subsidizing of the railroads, which led to federal tort legislation in response to a public outcry over the high injury rate among railroad employees. Congress enacted precursor legislation in 1893 and 1906 and then the FELA in 1908. As amended in 1938, the FELA abolished assumption of risk and the fellow-servant rule and replaced contributory with comparative negligence. The Supreme Court has held that the FELA provides railway employees their exclusive remedy for covered injuries. Were Congress today to establish a program to provide compensation for injured workers, it would undoubtedly adopt a workers' compensation program. But there were no workers' compensation programs in 1908, and the constitutionality of such programs long remained in doubt. We believe that today's state workers' compensation laws are—or a federal system created by Congress would be—adequate to cover injuries to railway employees. Such mechanisms have compensated workers in every other form of interstate transportation.

THE JONES ACT (1920)

Prior to the Jones Act, Congress attempted to place injured seamen under the emerging state workers' compensation laws, but the Supreme Court held this early legislation unconstitutional on the ground that the claims of injured maritime workers and seamen were exclusively matters of federal law. The Jones Act thus supplements the seamen's traditional actions for maintenance and cure and for the breach of unseaworthiness. Congress has since 1920 created a federal workers' compensation scheme in the Longshore and Harbor Workers' Compensation Act. We recommend that Congress amend it to include seamen.

In Part II, see also Chapter 2, at pp. 38–44, with various proposals for shifting federal judicial business to state forums.

Part III contains additional material on this subject.

Dissenting statement by Congressman Kastenmeier:

Considerable opposition to the committee's FELA recommendations was voiced by a number of railway unions around the country. It is their view that the railroad has been and continues to be a uniquely dangerous industry that historically has paid insufficient attention to employee safety. Because an employer's potential liability for employee injury under FELA is significantly greater than it would be under state worker compensation programs, the unions argue that FELA provides a necessary incentive for

the railroads to operate safely. The railroads, on the other hand, have submitted statements to the committee arguing that they are no different than any number of industries subject to worker compensation programs, and that damage recoveries under FELA are excessive.

Regardless of one's view on the merits of abolishing FELA, it is clear that the arguments for and against turn on substantive issues irrelevant to the work of this committee. Granted, by abolishing federal jurisdiction over railroad employee injury cases, federal court caseload would be reduced to that extent, but the same may be said of proposals to revise the RICO statute, which this committee has declined to adopt precisely because they were substantive in nature, and thus outside the scope of the committee's jurisdiction.

As recently as last November, the House Energy and Commerce Subcommittee on Transportation and Hazardous Materials held oversight hearings on FELA, and earlier in the year, the Senate Commerce Committee considered an amendment to the Rail Passenger Service Act that would have suspended the application of FELA to Amtrak employees for a test period of three years. These bodies in the House and Senate have the necessary expertise on transportation issues to properly evaluate the merits and demerits of amending FELA, and it is there, not here, that substantive recommendations as to the future of FELA should be developed.

D. Congress should extend the life of the United States Parole Commission, or create a successor agency, to set parole release dates and conduct parole revocation hearings for "old law" prisoners, and to conduct supervised release revocation hearings for "new law" prisoners. Hearing officers for supervised release revocation should be lawyers.

These recommendations concern (1) parole release and revocation for "old law" inmates (persons in federal prisons for offenses committed before November 1, 1987, the effective date of the Sentencing Reform Act of 1984) and (2) revocation of supervised release for "new law" inmates (persons sentenced pursuant to the Sentencing Reform Act).

The Sentencing Reform Act of 1984, as amended, abolished parole and created the concept of "supervised release" for persons convicted of crimes committed after the Act's effective date. It also provided for the abolition of the United States Parole Commission in 1992. Thus, there are now, and will be for some time, two categories of federal inmates in respect to their post-imprisonment status.

For prisoners who committed "old law" crimes, the United States Parole Commission determines parole dates and may release those prisoners before completion of the full term. Individuals alleged to have violated their parole conditions are entitled to a hearing before one or more Parole Commission hearing examiners. Those whose parole has been revoked

can seek review in the district court after exhausting administrative remedies.

For those sentenced for offenses committed on or after November 1, 1987—"new law" prisoners—the Act created the sentence of supervised release in lieu of parole. The sentencing judge imposes any supervised release term at the time of sentencing, and the individual begins serving it only after serving fully the sentence of incarceration. (By contrast, the Parole Commission determines parole release dates for "old law" prisoners, and may release an individual before the completion of the prison sentence.) Individuals who violate the terms of their supervised release may be re-imprisoned for all or part of the authorized term of supervised release (without credit for the time already served on post-release supervision). For offenses in title 18, both supervised release and re-imprisonment upon its revocation may be for as long as five years, although under other titles re-imprisonment upon revocation can be longer, in some instances significantly so.

RELEASE ON PAROLE

Long after the abolition of the Parole Commission, now scheduled for 1992, some federal inmates will still be serving sentences that were imposed under the preexisting law, which provided for parole. Thus, the Sentencing Reform Act directed the Parole Commission, prior to its expiration, to set a release date for all prisoners, in sufficient time to allow appeals. But the Act made no provision for any agency to consider "old law" prisoners' parole release dates after the Parole Commission expires. At least three classes of prisoners will have an interest in the parole release dates after that expiration: (1) those who seek a redetermination of the presumptive date set by the Commission; (2) those who commit infractions that may nullify the initial parole date; and (3) those sentenced after the Commission's abolition (i.e., for crimes that entailed long investigative times and statutes of limitations of at least five years). Unless Congress authorizes some agency to determine the parole release dates for these "old law" prisoners, they will probably seek release by filing habeas corpus petitions or actions under 28 U.S.C. § 2255, based on the Constitution's *ex post facto* clause, arguing that they were sentenced under a statutory scheme that assumed the availability of parole.

REVOCATION OF PAROLE

Under the Sentencing Reform Act, responsibility for parole revocation hearings (for "old law" prisoners) will shift to the district courts upon the Parole Commission's scheduled 1992 abolition. The burden will be substantial, even though it will decrease over time as "old law" prisoners

finish their sentences. The Parole Commission estimates that in the first year following the Commission's abolition, from 16,000 to 20,000 "old law" prisoners will be on parole and will generate approximately 1,300 revocation hearings. There is no persuasive reason for shifting these hearings to the already overburdened district courts. At some point, of course, the number of prisoners on or eligible for parole will decrease to a point at which a separate agency is no longer required.

REVOCATION OF SUPERVISED RELEASE

The Sentencing Reform Act authorizes district courts to conduct supervised release revocation hearings (18 U.S.C. § 3148). The number of those hearings will soon be substantial—4,500 a year by 1995, estimates the Parole Commission. We believe that the consequences of revoking supervised release are sufficiently similar to the consequences of revoking parole as to justify Congress's shifting that task from the federal courts to the Parole Commission or a successor agency. (As just explained, we also propose that the Commission or successor agency should also set parole release dates as needed, and conduct parole revocation hearings, for "old law" prisoners.) The committee encourages any such agency to employ lawyers as hearing examiners because supervised release should not be revoked by officials who are not familiar with the principles of due process of law.

Part III contains additional material on this subject.

E. Congress should *not* remove post-conviction supervision from the judicial branch.

The probation office in each judicial district has two functions: presentence investigation, and post-sentence supervision of persons on probation, parole, and supervised release. Some observers have suggested that the post-sentence supervision function be transferred to the executive branch. That work, they argue, is similar to other executive branch correctional functions.

The Federal Probation Service, however, functions well within the judicial branch. Indeed, its position there enhances its effectiveness. Probation officers' dual function offers two advantages. First, the officers can move freely between investigation and post-conviction supervision, providing flexibility and variety that has helped to attract and retain an excellent probation staff. Second, officers can readily use information gathered during the presentence investigation during their supervision work. Third, the crucial role played by probation officers ought not to be organizationally commingled with prosecution of crimes or incarceration of convicted

persons. Finally, transferring the Probation Service's post-conviction functions to the executive branch may centralize what is now an effectively decentralized system of offices in each judicial district. These offices are familiar with local conditions and can adapt quickly to changed circumstances (such as the availability of additional places in a particular treatment program).

We also received suggestions in favor of reversing the current policy of separate offices for probation and for pretrial services (i.e., developing recommendations on such matters as the defendant's eligibility for release on bail or personal recognizance). We were unable to consider this matter, given our reporting deadline, but note it as a matter that others may wish to study further.

Chapter 4

Creating Additional Capacity Within the Judicial Branch

The federal judiciary is composed most importantly of “Article III” judges—judges selected by the political branches but who serve with the secure tenure that Article III provides. Since 1793, however, with the fore-runners of today’s United States magistrates, Congress has authorized Article III judges to appoint other decision makers, who serve for terms or at the Article III judges’ pleasure, to help exercise federal jurisdiction. This chapter contains a recommendation for an additional court composed partly of Article III judges, and several recommendations concerning the resolution of disputes by non-Article III decision makers, subject to review by Article III judges.

A. Article III Courts

In this section, we suggest vesting near-exclusive tax jurisdiction in the United States Tax Court, in which we propose creation of a new, Article III appellate division. Also, we recommend against the creation of a special Article III court for administrative appeals, and we recommend the abolition of the Temporary Emergency Court of Appeals.

1. **Congress should rationalize the structure of federal tax adjudication by (1) creating an Article III appellate division of the United States Tax Court with exclusive jurisdiction over appeals in federal income, estate, and gift tax cases and (2) restricting initial tax litigation to the trial division of the Tax Court (staffed by the current Article I judges).**

The present system of federal tax adjudication is irrational, fosters conflict in the interpretation of the tax laws, can be unfair to some taxpayers, encourages forum shopping, and provides additional incentives for taxpayers to play the “audit lottery.” Tax claimants may sue for refunds in their local district court or the United States Claims Court. Or they can decline to pay and contest the resulting deficiency in the Tax Court. The Tax Court is an Article I court of nineteen judges who serve fifteen-year terms after presidential nomination and Senate confirmation; its headquarters is in Washington but its judges ride circuit, hearing cases around the country. Appeals from district court refund actions and Tax Court decisions go to

the regional federal courts of appeals. Appeals from the Claims Court go to the Federal Circuit.

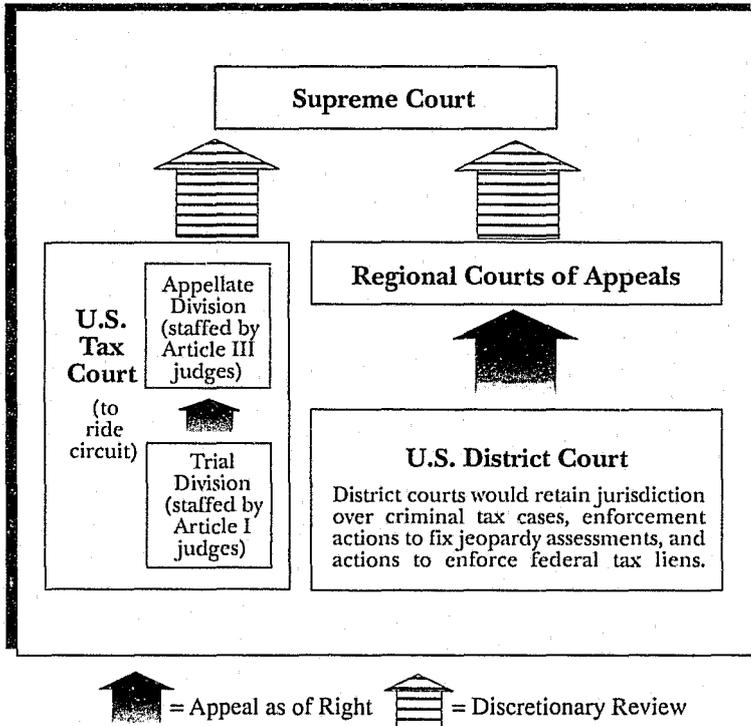
Of these courts, only the Tax Court has the time and sufficiently substantial volume of tax litigation to develop expertise in one of the most specialized and technically demanding fields in American jurisprudence. We recommend giving that court exclusive jurisdiction over federal tax litigation at both the trial and appellate levels, except that district courts should retain jurisdiction over criminal tax cases, enforcement actions to fix jeopardy assessments, and actions to enforce federal tax liens, and appeals from these decisions should go to the courts of appeals as they do now. We further recommend that Congress channel all tax appeals into a new appellate division of the United States Tax Court, this division to be staffed by Article III judges.

These changes—depicted in Figure 2—would not provide major workload relief to the district and appellate courts (the total volume of tax litigation is not high), but they would rationalize federal tax adjudication, reduce forum-shopping, relieve workload pressures on the existing Article III appellate courts, and reduce the pressure on the Supreme Court to grant certiorari in tax cases to resolve intercircuit conflicts. Above all, they would increase the quality and uniformity of tax adjudication by shifting it from overworked judges sitting in a large number of diverse courts to a single court of highly trained specialists. Because most tax practitioners have a broad practice, there will be little loss in terms of generalists' experience and knowledge. Moreover, although issues of general law are sometimes important in tax cases, these are usually not difficult and virtually never more important than the tax issues for which specialization is enormously beneficial.

As to specifics: We estimate that the Tax Court would need only one or two more judges at the trial level, and five additional judges to hear appeals. There would be no right to jury trial (there is none now in the Tax Court). The Tax Court presumably would continue to ride circuit for trials (and possibly appeals as well), thus providing access to it on a local basis. Depending on the distribution of cases, it may be desirable to establish regional courts, so that the judges could ride smaller circuits.

Should Congress elect not to adopt this recommendation in full, we recommend that it establish the Article III appellate division in the Tax Court, with exclusive appellate tax jurisdiction, but provide taxpayers two fora for initial tax litigation: the Tax Court and the federal district court.

FIGURE 2
Proposed Tax Adjudication Structure



In Part II, see also Chapter 6, § B.2, at pp. 116–24, with non-endorsed examples of alternate appellate structures, to stimulate study.

Part III contains additional material on this subject.

Dissenting statement of Mr. Dennis, joined by Senator Grassley, Mr. Harrell, Congressman Moorhead, and Judge Weis:

The committee's proposal would consolidate judicial review of most tax controversies in a single specialized court. All segments of the bar intimately connected with the tax litigation system—the Internal Revenue Service, the Treasury Department, the Justice Department, the Tax Court, the Claims Court and the American Bar Association—have voiced their opposition to this proposal.

There is ample evidence that the existing system of tax litigation is performing well. Disputed issues are resolved timely, are resolved without imposing an undue burden on either the district courts or the courts of appeals, and, most importantly, are resolved in the framework of a system which ensures that they are decided correctly. The majority's proposed reform cannot be justified in terms of relieving the workload of the federal judiciary. Nor can it be rationalized as a needed response to the "uncertainty" purportedly bred by unresolved intercourt conflicts in the tax field—by all estimates, there are only two or three such conflicts each year. The reasons stated by the majority in support of the proposal thus find little basis in reality.

The genius of the existing system is its effective blending of specialist and generalist features, producing a system that is remarkably efficient and perceptively fair. This blending of generalist and specialist qualities would be destroyed if most civil tax cases were consigned to a single, specialized court. The proposed system, moreover, would deprive taxpayers of the valuable option of having their cases heard by a jury.

Most importantly, we are gravely concerned that centralizing substantive tax disputes in a specialized trial and appellate court would leave the American taxpayers with the impression that the judicial system is remote and unresponsive. Such a belief could profoundly undermine the voluntary compliance with the nation's revenue laws that all concede is the cornerstone of the most effective system of taxation in the world. The majority's proposal would run this risk while making no improvement in the current system.

We, therefore, dissent.

2. Congress should not consolidate review of federal administrative agency orders in a specialized court of administrative appeals.

Many proposals for specialized federal courts suggest creating an Article III "court of administrative appeals" with exclusive jurisdiction to review the orders of federal administrative agencies. These proposals recognize that administrative law is becoming increasingly technical, that review of agency orders seldom overlaps other fields of law, and that much federal administrative review already is concentrated in the Court of Appeals for the District of Columbia Circuit. The committee has examined these proposals with care and recommends that Congress adopt none of them. The main reason is that a court with a monopoly over review of agency cases would necessarily be too large to be effectively administered.

The number of direct review appeals from administrative agencies to the federal courts of appeals is not overwhelming—about 3,000 a year—but that low number belies the amount of judicial work these cases require, because many of them are more demanding than other federal appeals cases. Moreover, the approximately 3,000 cases filed directly in the courts of appeals do not reflect the full range of Article III appellate review of agency orders. Many other administrative cases are filed first in the district

courts, with a right to appeal to the courts of appeals. These cases involve challenges to administrative actions that are sufficiently final to be reviewable under the Administrative Procedure Act but are not within the scope of any statute vesting jurisdiction directly in the courts of appeals. To achieve centralized administrative review, however, these appeals also would have to go to the new court—and administrative law experts estimate that there may be five to eight times as many of these cases as there are direct appeals.

A court with enough judges to decide agency cases now filed directly—plus those appealed from district courts—would necessarily be a large, multi-divisional court. The gains of such centralization are not worth these costs. The committee also rejected two other proposals: (1) establishing the existing Court of Appeals for District of Columbia Circuit as the administrative court, and (2) authorizing it to review the administrative decisions of other circuits in banc with the results nationally binding subject to Supreme Court review. Either would require a greatly enlarged court of appeals, and establishing it as an intermediate court would provide only incremental gains in uniformity.

In Part II, see also Chapter 6, § B.2, at pp. 116–24, with non-endorsed examples of alternate appellate structure, to stimulate study.

Part III contains additional material on this subject.

3. Congress should abolish the Temporary Emergency Court of Appeals (TECA) and vest its small remaining caseload in the Court of Appeals for the Federal Circuit.

Congress created TECA in 1971 as part of the Economic Stabilization Act Amendments, which established price controls long since abolished. The court has jurisdiction over appeals arising from that statute and regulations issued under it. The Chief Justice assigns judges for temporary service on the court from the roster of active and senior Article III judges. Whatever may have been the value of the court in earlier years, its caseload is now so small as to justify its abolition; since 1987, the Judicial Conference has endorsed legislation to that end. TECA's remaining caseload should be reassigned to the Court of Appeals for the Federal Circuit.

B. Non-Article III Forums

In this section, the committee recommends a variety of statutory changes, and other steps, for more effective use of non-Article III decision makers within the judicial branch.

1. Bankruptcy

The system for adjudicating bankruptcy cases is an example of successful specialized adjudication. The committee offers four recommendations, three dealing with bankruptcy appeals and one dealing with the trustee program, to make the system even more effective. The growing volume of bankruptcy litigation, however, has become a cause for concern and merits more attention in the future.

- a. **Congress should amend 28 U.S.C. § 158 to require each circuit to establish bankruptcy appellate panels, with an opt-out provision, and Congress should authorize small circuits to create multi-circuit panels. Congress should also provide necessary funding to implement this requirement.**

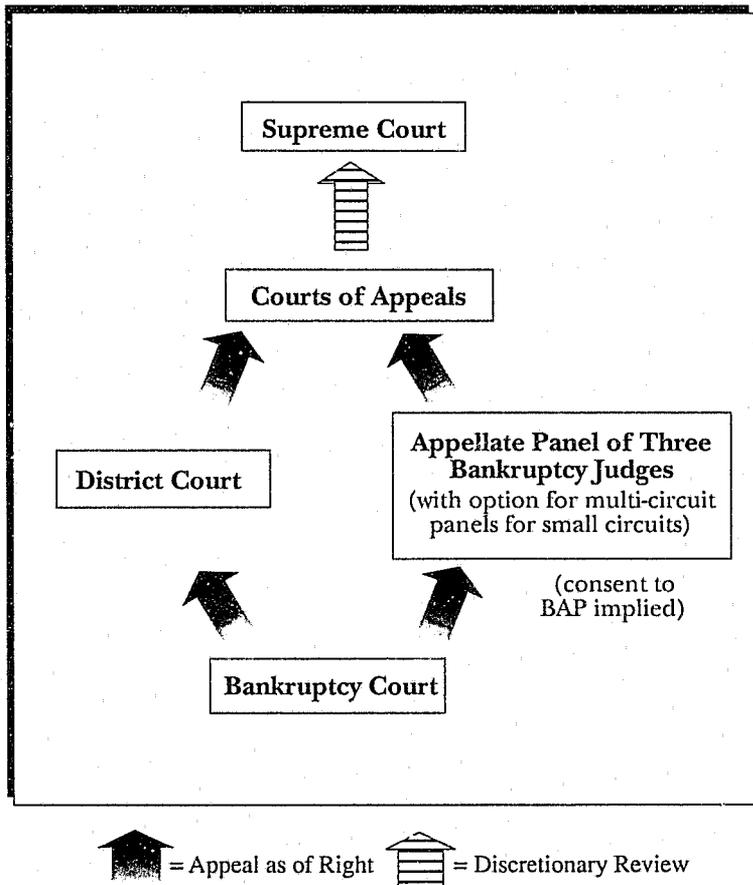
Title 28 provides two appellate options for bankruptcy judges' judgments and orders: One is review by the district court and then by the court of appeals. Or the circuit council may establish "bankruptcy appellate panels" (BAPs) to hear appeals from bankruptcy judges' decisions. Panels consist of three bankruptcy judges; their decisions may be appealed to the court of appeals (28 U.S.C. § 158).

Only two circuits have established BAPs: the Ninth Circuit in 1979 to hear appeals from two of the thirteen districts within the circuit—extended to six in 1980—and the First Circuit in 1980 to hear appeals from all districts in the circuit except the District of Puerto Rico. The First Circuit BAP ceased to operate in 1982 because with a small number of bankruptcy judges, the circuit had difficulty staffing panels at locations convenient to the parties.

The BAPs' well-studied success in the Ninth Circuit warrants their use nationwide, and we urge Congress to require each circuit to establish them and to provide that parties' use of the panels is implied; it need not be express. (Parties, that is, would have to opt out of the BAP procedure.) (See Figure 3.) Congress should also amend 28 U.S.C. § 158 to allow small circuits to form multi-circuit bankruptcy appellate panels to avoid the problems that impeded the First Circuit's effort. The Ninth Circuit BAPs disposed of 902 appeals in 1987 and 664 in 1988, reducing the workload of both district and appellate courts, and have received favorable reviews from both bench and bar. They foster expertise, and increase the morale, of bankruptcy judges, in part by offering them an opportunity for appellate

work. (In fact, it may eventually be best to have bankruptcy judges serve on BAPs on a full-time basis.) Appeals from BAPs to the courts of appeals would be limited to constitutional issues and questions of law, as in our proposal in Chapter 3, § A, for Social Security disability adjudication. The bankruptcy appellate structure in the other circuits resembles the system used in Social Security disability cases and is subject to some of the same weaknesses.

FIGURE 3
Proposed Structure for Bankruptcy Appeals



Part III contains additional material on this subject.

Dissenting statement of Judge Weis, in which Mr. Harrell and Mrs. Motz join:

The Bankruptcy Appellate Panel concept is an interesting one that can be implemented readily in some parts of the country. Nevertheless, testimony at the committee's public hearings demonstrated that in many circuits the bankruptcy judges are already overtaxed and unable to assume increased duties. Moreover, some district courts are strongly opposed to structural changes that will weaken their ability to oversee the work of the bankruptcy courts.

b. Congress should amend 28 U.S.C. § 157(c)(2) to provide that a bankruptcy judge's findings in "non-core" proceedings become final unless a party objects within thirty days.

Title 28 distinguishes between "core" and "non-core" bankruptcy proceedings. "Core" proceedings are matters centrally related to administering the bankruptcy case or involving rights arising under the Bankruptcy Code. By contrast, "non-core" proceedings are those that would be separate lawsuits in a non-bankruptcy setting. In core proceedings, the bankruptcy judge conducts hearings and enters final orders subject to appellate review. In non-core proceedings, the bankruptcy judge conducts hearings but the judge's findings become final only if the parties consent. In the absence of such consent, the findings must be submitted to the district court and have no force unless the court adopts them after de novo review.

The statutory language ("with the consent of all the parties") does not say whether the consent must be express or may be implied, but Bankruptcy Rules 7008 and 7012 interpret it to require express consent. We recommend amending the statute to provide that a bankruptcy judge's findings become final unless a party objects within thirty days, thus eliminating the need for de novo district court review in non-core proceedings where no timely objections have been filed. The rule might also reduce litigation over whether a proceeding is core or non-core, because the question will be moot if no party makes timely objection to the bankruptcy judge's findings. Finally, implied consent will eliminate problems in default cases where the plaintiff often finds it difficult to obtain express consent.

The amendment would allow district courts to treat a bankruptcy judge's findings the way many such courts already treat a magistrate's findings—a procedure the Supreme Court held constitutional in 1985. Furthermore, the Second, Sixth, and Ninth circuits have held that a bankruptcy judge may appropriately enter a binding order in a non-core proceeding in the absence of either express consent or express objection.

Part III contains additional material on this subject.

- c. **Congress should amend 11 U.S.C. § 305(c) and 28 U.S.C. §§ 1334(c)(2) & 1452(b) to clarify that they forbid only appeals from the district courts to the courts of appeals, not from bankruptcy courts to the district courts.**

These statutes provide that bankruptcy judges' orders deciding certain motions (motions to abstain in favor of, or remand to, state courts in various bankruptcy claims) are unreviewable "by appeal or otherwise." Because bankruptcy judges may enter trial orders only if there is appellate review in an Article III court, one result of this limitation is that bankruptcy judges cannot make final judgments in such cases even though they clearly involve "core" proceedings. The proposed amendment would authorize bankruptcy judges to enter binding orders subject to review in the district court. Speeding the disposition of such motions will better serve the purpose of the limitation on appeals from the district courts to the courts of appeals.

Part III contains additional material on this subject.

- d. **Congress should reconstitute United States trustees as independent statutory officers in the judicial branch.**

The United States trustee program reflects a congressional intent to separate judicial and administrative functions in bankruptcy cases, make bankruptcy judges primarily responsible for adjudicating factual and legal disputes, and establish United States trustees to oversee the administration of estates and supervise trustees and other fiduciaries. The Bankruptcy Reform Act of 1978 established a pilot United States trustee program in the Department of Justice, and the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 created a permanent, nationwide entity in the Department, with a jurisdiction that now embraces districts in all but two states.

June 1989 oversight hearings on the United States trustee program before the House Judiciary Subcommittee on Economic and Commercial Laws revealed conflicts of interest, duplication of clerical and administrative efforts, excessive costs, interference with case management efforts, improper political influence on the selection of United States trustees and in the administration of estates, and potential erosion of the separation of powers (because the courts and the executive branch trustees are both responsible for the same cases). Bankruptcy judges and clerks, moreover, report continuing disputes with the United States trustees and complain about their failure to supervise case trustees adequately and to perform several of the other statutory duties transferred to them by the 1986 legislation. A staff report by the Senate Permanent Subcommittee on Investigations later in

1989 criticized conflicts of interest in the trustee program and recommended that the General Accounting Office review the operations of the Executive Office for United States Trustees. The report concluded that “the system can be manipulated, resulting in the potential for biased handling of bankruptcy filings.” It suggested two avenues for correction—either removing the trustee program from the executive branch to preclude the possibility of special treatment to any department, agency, or office in the executive branch or a statutory requirement for trustee recusal in cases in which the Department is a creditor.

Congress can transfer the United States trustee program to the judicial branch with minimal disruption and still maintain the necessary separation of judicial and administrative functions in processing bankruptcy cases, and it should do so. Reestablishing the program as an independent office within the judicial branch would ensure more efficient administration of the bankruptcy system by correcting the problems cited above and providing a means, through the circuit judicial councils and the Judicial Conference, to resolve jurisdictional and procedural differences between the courts and United States trustees.

Dissenting statement of Mr. Dennis, in which Senator Grassley joins:

I dissent from the recommendation of the committee that the United States trustee program be transferred from the Department of Justice to the judiciary. Under legislation enacted in 1978 and 1986, Congress’s clear intent was that the United States trustees have an important role in the appointment and monitoring of private trustees and examiners, in ensuring that Chapter 11 procedures are not abused, in overseeing of the day-to-day business and financial operations of firms in reorganization (particularly those in which creditor interests are not effectively represented), and in discovering and acting upon cases of fraud, corruption, and conflict of interest in the bankruptcy system. It was clearly Congress’s view, and I concur, that these are preeminently administrative or executive functions, which are properly the responsibility of the executive branch of the federal government.

Inevitably, the establishment of the United States trustee program, by introducing a new element and a new agency, created certain tensions: tensions with bankruptcy judges, clerks, private trustees and professionals who render services to debtors, creditors, and fiduciaries. These tensions occur because all those participants have critical, sometimes overlapping, roles in the bankruptcy system. I think that these circumstances are heightened by the historical involvement of the courts in matters now the responsibility of the United States trustees. Though I recognize that some tension will be inevitable, the Department is seeking to work closely with others involved in the bankruptcy system and to avoid unnecessary conflict.

At the time of the enactment of the 1986 legislation, Congress fully considered the issue of combining adjudicative and administrative responsibilities in the judiciary, and

chose to keep those functions separate. I agree, and urge that a transfer of the program to the judiciary is inappropriate.

2. Magistrates

United States magistrates play a vital role in the work of the district courts. Each federal court employs magistrates in different ways, but their efforts help keep the system afloat. Magistrates' duties include initial proceedings in criminal cases, pretrial matters referred by judges, trials of misdemeanors and petty offenses, and the trial of civil cases upon the consent of the parties and the reference of the judge.

The committee received many proposals about the role that magistrates should perform. Some magistrates, believing that they are under-utilized, desire more diversity in the work they are assigned by the district court (sometimes little more than Social Security and prisoner cases). To this end, some magistrates propose statutory changes that would bestow more judicial duties on them and, in effect, make them an autonomous class of judicial officers.

The committee encourages the adoption of procedures that will make efficient and appropriate utilization of magistrates as auxiliary officers of the district court. However, as the Administrative Office of the United States Courts stated in a report on this subject, we must also recognize the need to "safeguard against undermining the institutional 'supplementary' role of magistrates [and the] unintentional creation of a lower-tiered judicial office with separate and distinct responsibilities." The district courts clearly need the assistance of the magistrates in order for the judges to focus on those matters that require Article III attention. If the position of magistrate becomes an autonomous judicial office, magistrates will no longer be able to assist the district court judges.

In sum, we conclude the role of the magistrate must continue to be supportive and flexible. To that end, the committee suggests a statutory change to allow the district courts to take fuller advantage of the magistrates, and a thorough study of the constitutional range of duties that magistrates may exercise.

- a. **Congress should amend 28 U.S.C. § 636(c)(2) to allow district judges and magistrates to remind parties of the possibilities of consent to civil trials before magistrates.**

The Magistrates Act provides that, if the district court designates a magistrate to exercise civil jurisdiction, "the clerk of the court shall, at the time [an] action is filed, notify the parties of their right to consent to the exer-

cise of such jurisdiction. . . . *Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate*" (emphasis supplied). We recommend that Congress replace the italicized language with: "Thereafter either the district judge or the magistrate may again advise the parties of that right but, in so doing, shall also advise the parties that they are free to withhold consent without fear of adverse substantive consequences." We assume that such an amendment's legislative history would note the sensitivity that should be accorded to the rights of the parties to have their disputes resolved by Article III judges.

b. The Judicial Conference should authorize a study of the constitutional limits of United States magistrates' possible jurisdiction and catalog their duties.

Some district courts have been reluctant to expand the role of magistrates because of confusion over magistrates' constitutional and statutory authority. The Supreme Court's decisions in the *Northern Pipeline* and *Granfinanciera* cases raise serious questions about what matters non-Article III judicial officers may handle. Both were bankruptcy cases, but their discussions of Article III appear applicable to magistrates. And in *Gomez v. United States* the Court raised questions about the statutory duties that magistrates may properly perform, holding that the Magistrates Act's "additional duties" provision does not allow a magistrate to preside over jury selection in a felony trial without the defendant's consent. The Court looked, in part, to the legislative history of the Magistrates Act to determine the types of duties magistrates may perform.

District judges should have available an analysis of the legislative history of the Magistrates Act and a list of those duties which bear "some relation to the specified duties," as *Gomez* dictates. The study—conducted in cooperation with a broad range of persons interested in the magistrates system—should also analyze magistrates' future role and propose principles for defining that role's proper limits. This study should include all cases and statutes (in addition to 28 U.S.C. § 636) that discuss duties magistrates may perform, so that the district court will have a full compilation of the magistrates' statutory jurisdiction, with a description of the presumption of validity and standard of review by the district court. De novo review can be so time-consuming and costly for both court and litigants that in many cases referral of a matter ultimately requiring such review may be inefficient. On the other hand, if a magistrate's ruling is subject to the clearly erroneous or abuse of discretion standards, then reference of a matter to a magistrate would be more efficient.

Further, as a second part of the inquiry, the Judicial Conference should determine whether to propose statutory amendments to give the magistrates authority necessary to provide the requisite auxiliary support to the district court.

3. Congress should establish a \$10,000 minimum jurisdictional amount for federal tort claims (and possibly federal contract and debt cases) and establish a small-claims procedure for claims below the minimum.

The Federal Tort Claims Act allows suits against the United States to recover damages for torts caused by its employees. The Act requires no minimum amount in controversy. Thus, for example, a simple suit for damage to a mailbox caused by a mail carrier may be litigated in federal court. Or a federal prisoner (after exhausting administrative remedies) may demand a full-scale trial before an Article III judge over the loss of a comb because of a guard's negligence. Cases that involve routine application of common-law tort principles, and contain no constitutional, civil rights, or civil liberties overtones, do not warrant the attention of the Article III judiciary.

We believe Congress should impose a \$10,000 minimum amount-in-controversy requirement for Federal Tort Claims Act cases and perhaps other small monetary claims against the federal government as well. We do not propose, however, to shift these cases to the state courts, so as to make them the federal small-claims courts. That was the result when Congress established minimum amount-in-controversy requirements for particular classes of federal litigation. (Most such requirements were abolished in 1976.) Although we do not recommend a specific procedure at this time, we suggest that Congress adopt a procedure from the following alternatives:

- Create an independent administrative tribunal, or one in the agency against which the claim is made, or in the Department of Justice.
- Authorize the United States Claims Court, which already adjudicates claims against the United States under the Tucker Act, to assume jurisdiction over these claims.
- Establish divisions in the district court administered by magistrates.

Part III contains additional material on this subject.

C. Alternative Dispute Resolution

For the past decade and more, federal and state courts have adopted and adapted supplemental and alternative techniques to standard procedures

for processing civil litigation. The stated objectives of these techniques are to reduce cost, delay, and antagonism, and at the same time to preserve the time of judges for the disputes that most need their attention. Examples include:

- “court-annexed arbitration,” which usually requires a non-binding hearing and award some months after filing and before the parties may proceed to trial (if they do not accept the award or settle);
- the less formal “early neutral evaluation” procedure, in which an experienced attorney meets with the parties and counsel fairly soon after filing to discuss issues in a case and possible claim values;
- intensified trial-level settlement mediation by a magistrate or judge (perhaps other than the one who would try the case), or mediation at the trial or appellate level by professionals on the court’s staff;
- optional “fast track” proceedings that provide for limited discovery and early trial;
- special masters for discovery and other matters in complex cases; and
- summary jury and bench trials, to provide the parties a nonbinding estimate of the case as a means of facilitating settlement.

“Alternative methods of dispute resolution,” the term used in the statute creating this committee, is broad and has many and conflicting meanings. The methods referenced above and covered in this recommendation are those that federal courts might either require, or make available to litigants, during the pretrial stages of civil litigation or on appeal before full briefing and argument. They do not include arbitration, conciliation, mediation, and negotiation, and other procedures as they operate outside the judicial system.

Although some may regard alternative dispute resolution as a relative newcomer to the judicial scene, the procedures that the committee seeks to foster are not new to judicial dispute processing, and they are not alternatives in any strict sense. A 1983 amendment to Federal Rule of Civil Procedure 16 specifically authorized judges and litigants, at the pretrial conference, to “consider and take action with respect to . . . the possibility of settlement or the use of extrajudicial procedures to resolve the dispute.” In 1988, the legislation that created this committee authorized the continuation of mandatory court-annexed arbitration programs that had begun in ten judicial districts between 1977 and 1986. It also authorized consensual programs in ten additional districts and imposed detailed requirements for reports by the Administrative Office of the United States Courts and the Federal Judicial Center on the operation of these programs. Many state jurisdictions have made various ADR mechanisms regular parts of their

procedures, which seem to be quite broadly accepted by courts, lawyers, and litigants.

Studies of different ADR systems report satisfaction by participants and, in some cases, favorable effects on litigation cost and delay. Alternative or supplementary procedures may enhance the operation of traditional civil judicial procedures, fostering the classic role of pretrial proceedings of helping prepare cases for trial or identifying grounds for settlement. In other cases, they may resolve disputes without recourse to traditional procedures, and, depending on the dispute, do so better than those traditional procedures. In so doing, they provide litigants an opportunity to resolve their disputes without recourse to judges, thus enhancing access to justice.

Experience to date provides solid justification for allowing individual federal courts to institute ADR techniques in ways that best suit the preferences of bench, bar, and interested publics. The movement to infuse these techniques into the federal courts no longer need be limited to local experiments. But the variations in local conditions make equally inappropriate the imposition of uniform national ADR rules, or even a requirement that all courts adopt any ADR rules. Congress should allow federal courts—constrained by the checks in the rule-making process and additional restraints Congress may wish to impose—to adopt techniques that appear most likely to succeed, and it should authorize and fund empirical research to refine our knowledge of the operation and effects of these procedures. Accordingly:

1. **Congress should broaden statutory authorization for local rules for alternative and supplementary procedures in civil litigation, including rules for cost and fee incentives.**

More specifically, Congress, subject to any sunset provisions it believes desirable, should:

- eliminate any doubt that all federal courts may adopt local rules establishing dispute resolution mechanisms that complement or supplement traditional civil pretrial, trial, and appellate procedures. The enabling legislation should require participation by the local bar, dispute resolution professionals, and the public in the drafting of these local rules;
- permit (but not require) district courts to include in their local rules mandatory mechanisms such as mediation, early neutral evaluation, and court-annexed arbitration, with limitations on types of case subject to mandatory reference, and authorization for motions to exempt cases from an otherwise mandatory procedure; and

- forbid the creation of financial incentives in mandatory initial ADR proceedings (except as a sanction for misconduct), but permit experimental use of cost and fee incentives for parties who reject arbitration hearing awards and fail later to improve on them, or who reject and fail to improve on formal post-award settlement offers.

It is not premature to broaden ADR authorization soon after the limited statutory permission granted in 1988. The studies called for by that legislation are either nearing completion (with respect to existing court-annexed arbitration programs) or are several years off (with respect to newly authorized programs). The existing forms and resources of the federal courts are under increasing pressure, and the experiences in, and several studies of, federal and state ADR programs reflect generally favorable results.

We recognize the legitimate concerns that ADR techniques may be perceived to promote a system of second-class justice, whereby litigants with modest resources are either shunted aside to inferior alternative procedures or left as the main users of traditional forums while wealthier litigants opt for streamlined but costlier alternatives. We understand that settlement too forcefully encouraged can deprive litigants of rights to which they are entitled, and we appreciate the dangers of eliminating cases from regular judicial proceedings when doing so can mask wrongdoing and inhibit the development of important public norms.

We believe, though, that the legislative and rule-making processes afford ample protection against rules that would allow encroachment upon substantive rights or invidious discrimination against classes of litigants. Local rules are now subject to statutory notice and comment requirements and possible modification and abrogation by the circuit judicial council. We suggest the additional legislative requirement of participation by the local bar, dispute resolution professionals, and the public in the drafting of these particular local rules. Congress, obviously, may lay down whatever guidelines it believes are appropriate in authorizing expansion and experimentation with these procedures. It could rule certain ADR devices or practices off limits or impose additional limitations beyond those currently governing federal court-annexed arbitration.

Financial incentives to encourage parties to accept the results of an alternative procedure are not essential, but they encourage parties to take the procedure or its results seriously. We believe, however, that cost and attorney fee consequences are sufficiently important—and, in the case of possible attorney fee liability, have enough substantive overtones—that decisions about which incentives are permissible should be made by Congress and not left simply to local rules. We suggest, furthermore, that cost and fee

incentives become more appropriate as the alternative procedures move from early, informal pretrial hearings toward more formal proceedings, with significant discovery and more extensive hearings. For example, alternative *pretrial* hearings should carry no threat of added costs other than sanctions that may be imposed pursuant to the Federal Rules of Civil Procedure. On the other hand, proceedings after court-annexed arbitrations that provide some discovery, a significant hearing, and an award, may be the best context in which to conduct limited experimentation with the offer of settlement device. By that device, either party may make a formal offer that the adversary must either accept, or do better than at trial (absolutely or within a specified percentage), or lose an otherwise applicable entitlement to post-offer fees or assume at least some liability for the offerer's post-offer attorney fees.

Because cost incentive provisions can be complex and impose serious consequences, we believe that for now they should be authorized solely within the controlled experimentation we recommend below, and perhaps only in a few districts. Congress should consider other protections, such as granting judges discretion to deny or limit an otherwise required fee award, rules specifying that plaintiffs' recoveries may be reduced but not exceeded by fee liability, or deducting fees not from the verdict but from the rejected offer. Legislation authorizing experiments with fee-affecting offer rules should require local rule provisions that avoid Draconian effects on those least able to face them.

Given the importance of the United States government as a regular litigant in civil cases in the federal courts, there also needs to be consideration of the extent to which the federal government would be covered by ADR rules. For most purposes, the federal government should be treated like other litigants, subject, of course, to sensible general exceptions such as not requiring an arbitration hearing when there is a dispositive threshold motion. Legislation now pending in both houses of Congress would provide one means of retaining a degree of executive control over agency use of ADR. It would permit an agency to elect or authorize arbitration within the limits of the agency's authority to settle cases without prior approval of the Attorney General.

Mr. Harrell dissents from the recommendation as to mandatory ADR procedures.

- 2. Congress should authorize and provide funds for sustained experimentation with alternative and supplementary techniques, subject to the**

guidelines recommended below and any other limitations Congress may deem advisable.

Like much else in the law, alternative devices are at the same time established and evolving. Rigorous empirical analysis might reveal these techniques' unanticipated consequences or their failure to provide the benefits promised by their promoters. Accordingly, Congress should authorize and fund sustained research on the ADR techniques adopted as a result of the recommended legislation—as well as in areas other than ADR where controlled experimentation may be valuable. The authorization should extend to controlled experimentation—research that subjects one group to the rule or procedure under analysis and subjects a similar group to the existing system. Such research, if kept in place long enough to produce sufficient data for meaningful comparative analysis, is the most powerful social science research technique available, and published reports on such experiments are essential to advancing our knowledge about the results that alternative procedures may provide.

We recognize the legitimate ethical and equal protection concerns that parties and lawyers may have about being treated differently from others similarly situated. And we know that those concerns are unlikely to be fully satisfied by references to the eventual system improvement that the experiments may foster. Informed consent, or opt-in and opt-out provisions, can sometimes allay these concerns, although they may compromise the validity of an experiment's results. We trust, however, that courts, working with experts in research design in universities and the committee we recommend below, can devise experiments that respect basic rights and still yield the knowledge that only controlled experimentation can provide.

3. The Judicial Conference should establish a committee to provide advice and guidance to courts about alternative dispute resolution.

Such a committee, operating under the auspices of the Federal Judicial Center, can provide advice to federal courts on alternative and supplementary civil litigation procedures, guidelines for the operation of such techniques, and help in avoiding failed approaches. The committee might also monitor the experiments called for above. Its membership should include practitioners experienced in such alternative devices, dispute resolution specialists, and thoughtful skeptics. The committee should not, however, have any veto power over court proposals for alternative and supplementary procedures; checks built into the rule-making process and recommended for the enabling legislation are sufficient. Moreover, it should not be the sole permissible source of advice for federal courts; indeed, one

of its functions might be as a clearinghouse for information on the many organizations and individuals who can provide assistance to federal courts setting up alternative procedures.

In Part II, see also Chapter 2, § B.2.a(3), at pp. 46–47, on alternative procedures for mega-cases; Chapter 3, § B, at pp. 60–62, on EEOC arbitration; Chapter 4, § B.3, at p. 81, on small claims procedures for some federal tort claims.

Part III contains additional material on this subject.

Chapter 5

Reducing Litigation's Complexity and Expediting Its Flow

The recommendations in this chapter cover diverse topics but have a common core: to reduce unnecessary litigation, to simplify unnecessarily complex litigation, and to help federal courts process litigation as effectively as possible.

A. The Legislative Process

Our principal concern in this section is legislation that increases judicial workload, inadvertently or otherwise—legislation, for example, that creates new causes of action, or contains ambiguities or technical errors. What legislation to pass is, obviously, the prerogative of Congress. The two recommendations that follow are designed to improve and increase information available to Congress when it considers legislation that affects the judicial branch.

- 1. An Office of Judicial Impact Assessment should be created in the judicial branch to advise Congress on, inter alia, the effect of proposed legislation on the judicial branch and legislative drafting matters likely to lead to unnecessary litigation.**

Congress has long directed the Chief Justice to “submit to Congress an annual report of the proceedings of the Judicial Conference and its recommendations for legislation.” As a practical matter, however, the judiciary’s legislative review and clearance activities, require year-long attention by the Conference and the Administrative Office of the United States Courts. The Conference has developed a strong legislative support capability, which functions through its Executive Committee and that committee’s legislative liaison group and the Administrative Office’s Legislative and Public Affairs Office.

Their efforts necessarily focus on those bills that are sponsored by the judiciary or that directly affect the operations or budget of the judiciary. Legislation, however, also affects the judiciary when it creates new causes of action, or contains ambiguities or technical problems that lead to litigation. The Conference’s legislative-liaison machinery does not ignore such leg-

islation, but the realities of the legislative process in the late twentieth century make it impossible to recognize, much less monitor, every bill that might affect the judiciary and that has a plausible chance of passage.

The committee believes the judiciary should do more to assist Congress in assessing the impact of legislation on the courts and in calling its attention to problems in draft legislation that might cause unnecessary or unintended litigation. Although the Judicial Conference and the Administrative Office have previously engaged in such a process, we believe the matter is of such importance as to warrant creation of a special office. Accordingly, the committee recommends the establishment of an Office of Judicial Impact Assessment within the federal judiciary to provide advice on pending legislation to the Judicial Conference that it may in turn provide to Congress.

The Office of Judicial Impact Assessment would provide two major types of technical assessments of proposed statutes:

- forecasting additional judicial branch resources necessary to dispose of the litigation the bill would create; and
- spotlighting drafting defects that might breed unnecessary litigation, such as the omission to provide a statute of limitations or uncertainty as to whether a private right of action was intended. (Some statutory ambiguities are, of course, intentional, required by the realities of the legislative process. But many are not.)

Additionally, the office could assist the Judicial Conference on long-range planning (discussed in Chapter 8) by advising it of the possible impact of legislation the Conference may be considering. The office could call Congress's attention to possible drafting problems in existing legislation that are pointed out in judicial opinions. Finally, the office could perform the same resource-requirement assessments on executive branch actions and on judicial decisions that represent a trend in the case law. The recognition of a private cause of action by several circuits, or an executive interpretation dramatically reducing eligibility for a federal program, both have resource implications for the judiciary. The office could call these matters to the attention of the Conference, but it would not judge the policy wisdom of legislation or speak independently to Congress.

The Congress may also find it helpful to develop its own resource for committees and staff seeking information on the impact of potential legislation on the federal judiciary.

In Part II see also Chapter 8, § C.1.b, at p. 160, on Office of Judicial Impact Assessment analyses of proposed legislation's resource implications.

Part III contains additional material on this subject.

2. Congress should consider a “checklist” for legislative staff to use in reviewing proposed legislation for technical problems.

This proposal supplements the recommendation for an Office of Judicial Impact Assessment. Obviously, that office could not review all legislation. The press of legislative business demands additional steps to avoid statutory problems. One reasonable step is a checklist that could be used by the staffs of substantive committees of the Congress, and the Office of Legislative Counsel in the Senate and the House (and counsel and solicitors in executive branch agencies) reminding them to include items such as these in their review of legislation:

- the appropriate statute of limitation;
- whether a private cause of action is contemplated;
- whether pre-emption of state law is intended;
- the definition of key terms;
- the *mens rea* requirement in criminal statutes;
- 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 jurisdiction and, if so, whether 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 of private arbitration and other dispute resolution agreements under enforcement and relief provisions; and
- whether any administrative proceedings provided for are to be formal or informal.

The list could also provide for consideration:

- of whether any deadline for judicial action appearing in proposed legislation is necessary and, if so, reasonable;
- in the case of proposed legislation providing for judicial review by a multi-judge panel, whether the same policy objectives could be achieved by providing for single-judge review; and
- of whether the statute applies to the territories, the District of Columbia, and the Commonwealth of Puerto Rico.

These items reflect the judgment of committee members, who have had considerable experience in dealing with statutes before and after passage.

In Part II, see also Chapter 8, § A.1.a(2), at pp. 146–48, proposing that the Judicial Conference establish a long-range planning capability.

Additional views of Congressman Kastenmeier, joined by Judge Keep, President Lee, Congressman Moorhead, and Judge Posner:

I believe that the judicial and legislative branches lack appreciation of each other's problems and processes. As has been aptly observed by Judge Frank Coffin, legislators and judges do not satisfactorily communicate with each other. This problem is complicated by the fact that communications are a two-way street with messages flowing both ways. Each end of the process needs improvement. (*See* R. Katzmann, *Judges and Legislators: Toward Institutional Comity* (Brookings Institution 1988)).

A radical restructuring of the relationship between the branches is not necessary, but each branch should give priority to institutional reforms. If the judiciary and the Congress are to interact intelligently, each has to understand the activities of the other. And, by necessity, this understanding must incorporate improved channels of communication which contribute to rational decision making and to reasoned listening.

The committee has missed a golden opportunity to recommend institutional reforms in both branches. The report only suggests the creation of a Judicial Impact Assessment Office in the federal judiciary and the establishment of a "checklist" for legislative drafting purposes. The former, even if properly implemented, will only stimulate one-way communications from the courts to the Congress. A checklist may be of some value but really does not do justice to the complexity of the legislative drafting questions that must be answered. What is required is a trained drafter who is acquainted with both the conventions of drafting and the substantive issues presented. This exists in the Legislative Counsel's Office of the United States House of Representatives.

We have a problem and we need to do more than the committee suggests to solve it. At the very least, we should have recommended that an entity be created within the Congress modeled on the Office of Technology Assessment to serve three

distinct functions: (1) to assist congressional committees to assess the impact on the federal judiciary (and perhaps the federal prisons) of proposed litigation; (2) to call to the attention of the Congress decisions by the courts and the executive branch that have important consequences on the courts or the Congress; and (3) to facilitate communications between the branches by providing a contact point for judges and other officials.

B. Statutory Clarifications and Amendments for Procedural Issues

This section contains recommendations for amendments and clarifications (some of which, we are bound to note, might well have been offered by an Office of Judicial Impact Assessment, or avoided through the use of the checklist recommended above).

1. **Regarding statutes of limitations, Congress should (1) adopt limitations periods for major congressionally created federal claims that presently lack such periods, and (2) adopt fallback limitations periods for federal claims (such as those implied by the courts) not explicitly created by Congress and for any other federal claim not specifically covered by a limitations provision. Before the adoption of such legislation, existing federal statutes of limitations should be surveyed for any guidance they may provide as to lengths of periods for various types of actions, and to determine whether existing limitations provisions are inconsistent enough to warrant revision.**

Statutes of limitations provide a specific time period after the contested event within which a case must be commenced. At present, the federal courts "borrow" the most analogous state law limitations period for federal claims lacking limitations periods. Borrowing, while defensible as a decisional approach in the absence of legislation, appears to lack persuasive support as a matter of policy. It also creates several practical problems: It obligates judges and lawyers to determine the most analogous state law claim; it imposes uncertainty on litigants; reliance on varying state laws results in undesirable variance among the federal courts and disrupts the development of federal doctrine on the suspension of limitations periods. The present approach may promote uniform limitations periods between related state and federal claims, but that is a relatively minor benefit, especially given the uncertainty surrounding which statute will govern and the possibility of filing in different states with different time periods.

The committee does *not* recommend abandoning the sometimes troublesome fraudulent concealment doctrine, which plaintiffs can use to argue for effective extension of the limitations period. Fairness argues against rewarding wrongdoers who succeed in concealing their misdeeds long

enough, and the difficulties of making out a case of fraudulent concealment protect against widespread abuse of the doctrine.

Part III contains additional material on this subject.

2. Congress should clarify 28 U.S.C. §§ 1391(a) & (b), the general venue statute.

The general venue statute includes “the judicial district . . . in which the claim arose” as one of the districts where civil actions may be brought. The implication that there can be only one such district encourages litigation over which of the possibly several districts involved in a multi-forum transaction is the one “in which the claim arose.” We suggest that Congress replace that phrase with: “any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated.” Congress used the same phrasing in a 1976 amendment designating venue in actions against foreign states.

Congress should also eliminate the century-old anomaly, now codified in the venue statute, providing for venue in diversity but not federal question cases “in the judicial district where all plaintiffs . . . reside.” There is no good historical or functional reason for this distinction, which perversely favors home-state plaintiffs in diversity cases. The American Law Institute’s 1969 *Study of the Division of Jurisdiction Between State and Federal Courts* proposed eliminating plaintiffs’ residence as a basis for venue and providing for venue in a judicial district in which “any defendant resides, if all defendants reside in the same State.” The moderate broadening of venue suggested immediately above means that if a litigation has a significant relation to a plaintiff’s home state, it may be brought there; if it has no such relation, the plaintiff’s residence alone should not suffice for venue.

Part III contains additional material on this subject.

3. Congress should repeal 28 U.S.C. § 1441(c) (concerning removal of separate and independent claims).

This provision permits removal of a “separate and independent claim or cause of action” that would have been “removable if sued upon alone” when “joined with one or more otherwise non-removable claims or causes of action.” A principal purpose is to keep a defendant’s right of removal to federal court alive when a state court plaintiff joins an unrelated, non-removable claim. Most commonly, such situations arise in diversity

cases when the separate claim is against another, non-diverse party. For complex reasons, however, the statute causes much litigation apart from the merits as defendants try and mostly fail to qualify for separate-claim removal. As one court has said of § 1441(c), this field “luxuriates in a riotous uncertainty.”

In the small number of federal question cases in which the statute might apply, however, it can work fairly well as a backstop to the general removal provisions (§§ 1441(a) & (b)). Hence we recommend its repeal only if Congress retains the general diversity jurisdiction, in which most of the difficulties with § 1441(c) arise.

In Part II, see also Chapter 2, § B.2.a, at p. 48, referencing broader removal recommendations on which the committee takes no position.

Part III contains additional material on this subject.

- 4. To deal with difficulties arising from definitions of an appealable order, Congress should consider delegating to the Supreme Court the authority under the Rules Enabling Act to define what constitutes a final decision for purposes of 28 U.S.C. § 1291, and to define circumstances in which orders and actions of district courts not otherwise subject to appeal under acts of Congress may be appealed to the courts of appeals.**

The state of the law on when a district court ruling is appealable because it is “final,” or is an appealable interlocutory action, strikes many observers as unsatisfactory in several respects. The area has produced much purely procedural litigation. Courts of appeals often dismiss appeals as premature. Litigants sometimes face the possibility of waiving their right to appeal when they fail to seek timely review because it is unclear when a decision is “final” and the time for appeal begins to run. Decisional doctrines—such as “practical finality” and especially the “collateral order” rule—blur the edges of the finality principle, require repeated attention from the Supreme Court, and may in some circumstances restrict too sharply the opportunity for interlocutory review.

We propose that Congress consider permitting the rulemaking process to refine and supplement definitions of appellate jurisdiction under the Rules Enabling Act, 28 U.S.C. § 2072, which, we emphasize, includes the constraint that “[s]uch rules shall not abridge, enlarge or modify any substantive right.” Congress has given admirable attention to many technical issues in the Judicial Code in recent years, but the area of appellate jurisdiction might profit as well from the specialized focus of those re-

sponsible for the Federal Rules of Appellate Procedure. The rulemaking authority under this proposal would include authority both to change (by broadening, narrowing, or systematizing) decisional results under the finality rule of 28 U.S.C. § 1291 and to add to—but not subtract from—the list of categories of interlocutory appeal permitted by Congress in 28 U.S.C. § 1292. Favorable experience under this limited rulemaking authority over appellate jurisdiction might later support a broader delegation of power to treat the entire area of appealability from federal district courts by rule rather than statute.

Part III contains additional material on this subject.

5. **Congress should amend 29 U.S.C. § 160 to provide that National Labor Relations Board orders be self-enforcing and to give jurisdiction over contempts and executions to the district courts.**

The National Labor Relations Board must petition a court of appeals—or if the court is in vacation, a district court—for enforcement of a Board order and appropriate temporary relief or restraining order. These orders arise in cases that mostly involve matters decided by administrative law judges and reviewed by the Board, stipulated records decided by the Board in the first instance, or tests of unit determinations in representation cases that regional directors decided on behalf of the Board subject to request for review by the Board itself. Congress has made the other administrative agencies (notably the Federal Trade Commission, on whose procedures and remedies those of the NLRB were originally modeled) self-enforcing, with appropriate provisions for judicial review. We believe Congress should extend similar authorization to the NLRB. NLRB orders would become final upon exhaustion of appellate remedies and violations would be remedied by civil penalty actions brought in federal district courts.

The statutory provisions for entry of enforcement orders by the courts of appeals require that the Board return to that court for an order of contempt if the respondent fails to obey. A court of appeals is not well adapted to proceed in matters of this nature. Under the existing system, if the Board desires to levy on a money judgment, it must make application to the court of appeals to transfer its order to the district court so that the judgment may be docketed locally and execution proceedings commenced. To ease these procedural complexities, Congress should repose jurisdiction in the district court in cases other than those in which the respondents contest enforcement of Board orders in petitions for review under 29 U.S.C. §§ 160(e) & (f).

- C. We recommend a comprehensive examination of how courts handle scientific and technological complexity in litigation. Based on that examination, the Federal Judicial Center should produce a manual to assist judges in managing such cases.

Economic, statistical, technological, and natural and social scientific data are becoming increasingly important in both routine and complex litigation. This development creates several questions about the future of the federal courts: Are law-trained judges and lay juries competent to deal with the information? Can judges attain and maintain the mastery they need in light of current and projected workloads? Can courts handle the additional work created by this complex litigation? Can traditional litigation forums accommodate the clash of adversarial partisanship and the scientific ideal of the disinterested search for truth?

The federal courts would benefit from a comprehensive examination of:

- the types of economic, statistical and scientific issues presented to the courts, their frequency, and the problems they present;
- ways to improve the ability of judges, magistrates, law clerks, and juries to comprehend such materials in adjudication; and
- procedures for the handling of scientific evidence in the adjudication process, and informing decision makers about such evidence, including the fairness and accuracy of judicial notice of such matters; the use of panels of court-appointed experts; science masters; and alternative dispute resolution mechanisms in various types of cases. (We note that the Federal Judicial Center is conducting research on expert witnesses.)

Research on these topics could provide the basis of a reference source for federal judges on the types of problems likely to be encountered in such cases and how to handle them. It would serve a purpose similar to that served by the *Manual for Complex Litigation*. Because scientific and technological questions arise sporadically, we do not propose regular training in the area for all, or even all new, federal judges; it might be untimely or wasted.

In Part II, see also Chapter 2, § B.2.a, at pp. 44–47, on complex litigation.

Part III contains additional material on this subject.

D. Lay Participants in the Federal Judicial Process

1. **The courts and Congress should be sensitive to the contributions and needs of individuals who serve as jurors and witnesses. Increases in fees should be considered.**

Many ordinary individuals participate in the federal justice system as jurors and witnesses, often at great personal expense. We recognize the status of the jury system in common-law nations such as our own, the role that witnesses play in our adversary system of justice, and the contributions of the many diverse individuals who participate in our justice system. Their recompense is low—last set by Congress in 1978—and sometimes they suffer from inordinate delays in the justice system. But their contributions are substantial.

The role of the jury is set forth in Article III of the Constitution and in both the Sixth and Seventh Amendments, which guarantee the right to trial by jury in criminal prosecutions and civil suits at common law where the value in controversy exceeds \$20. As the Supreme Court said in 1975, “the purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge.”

Also, many individuals serve willingly, and some unwillingly, as witnesses in federal district courts. The Sixth Amendment provides that criminal defendants have the rights both to confront the witnesses against them and to compel the attendance of witnesses on their behalf. An integral element of our civil justice system is the use of witness testimony and cross-examination. Like jurors, witnesses should be treated with respect and with understanding that they have taken time from their ordinary stations in life.

2. **Congress should make no change in the existing law governing voir dire, and federal judges—and the Federal Judicial Center in its education programs—should continue to stress both elements of the federal jury selection method.**

Federal Rules of Criminal Procedure 24(a) and Civil Procedure 47(a) authorize the trial judge to question prospective jurors or to allow the lawyers to do so. If the judge conducts the voir dire, the judge must either allow the attorneys to ask additional questions, or ask any questions submitted by the parties that the judge deems proper to ask.

Both elements of this approach are essential explanations for the admirable success of federal jury selection: judicial control of the voir dire and judicial receptivity to appropriate supplementary participation by the attorneys. We urge judges to honor both elements and urge Congress to make no change in this fair and efficient system.

Federal jury selection methods produce fair juries in much less time than other systems that require questioning by the lawyers or allow lawyers to control the process. The federal voir dire rule enables federal district courts to conduct trials fairly and expeditiously—the virtues that are so attractive to so many litigants and that account in part for the extraordinary caseload pressures on these courts in the modern era. Federal voir dire practices are such a notable success that we not only oppose proposals to change them; we commend them to the rulemaking authorities of state courts.

Federal Judicial Center orientation programs for district judges emphasize the importance of judges' honoring the letter and the spirit of these two procedural rules. The Center should continue this emphasis.

Mr. Harrell dissents from the proposal on voir dire, noting that attorney participation in jury selection is essential to achieving a fair trial and that participation should involve the voir dire process.

E. Civil Case Management

1. **We encourage case management efforts by district courts, in particular (1) early judicial involvement to control the pace and cost of litigation (especially but not exclusively in complex cases), (2) phased discovery, (3) use of locally developed case management plans, and (4) additional training of judges in appropriate techniques of case management.**

The past two decades have seen a virtual revolution in the role of federal district judges. Their early involvement and active role in the management of litigation—facilitated by the 1983 amendment to Federal Rule of Civil Procedure 16—help explain the federal district courts' ability to keep abreast of their increased workload. During the same period federal litigation has become much more complex and there have been rapidly mounting demands on judges' time from criminal cases. Greater use of active case management, and development—in cooperation with the bar—of local plans to control cost and delay in civil cases, will be necessary to keep courts abreast of rising workloads and secure “the just, speedy, and inexpensive determination of every action” promised by Federal Rule of Civil Procedure 1. Recent reports on the civil justice system have been

helpful in highlighting areas of concern and offering specific recommendations for consideration, although many recommendations in the recent literature are already standard practice in many federal courts or represent proposals that have been tried and discarded.

We endorse the trend toward more vigorous case management by district judges. The 1983 amendments to the Federal Rules of Civil Procedure facilitate this process, and judges should make appropriate use of their authority under the rules. Many cases, especially but not exclusively those that are complex or hotly contested, call for judicial management measures such as status conferences; targets for completion of various pretrial stages; and close supervision of discovery, including prompt decisions on discovery issues by one judicial officer primarily responsible for discovery matters in the case. The growing importance of case management techniques calls for even more judicial education about the range and implementation of such techniques to eliminate unnecessary cost and delay while maintaining judicial impartiality.

The field of case management is relatively young, however, and districts vary greatly in such things as caseload, geography, and legitimate local preferences. With case management as with alternative dispute resolution, these factors point to the importance of retaining considerable flexibility for districts to experiment with different procedures and adapt case management techniques and plans to local conditions. Thus we believe that to require highly specific case management plans for all federal districts would be unwarranted micro-management of the courts.

Some systems report favorable experience with "tracking" or "differentiated case management," in which cases are classified as simple, standard, or complex and treated differently in such respects as time limits for discovery and trial. Such techniques are worthy of further consideration, but more study is needed to learn whether tracking or much more individualized case management is generally preferable for the federal civil caseload. In any event, case management programs should be so organized as to retain significant decisions in the hands of judicial officers and ensure sufficient flexibility to accommodate the needs of individual cases.

Part III contains additional material on this subject.

2. To enhance federal district courts' ability to appoint counsel for claimants in employment discrimination actions pursuant to 42 U.S.C. § 2000e-5, the Federal Judicial Center should undertake a study of exper-

rience under the statute, including the responses to it of the district courts and bar associations (in local rules or otherwise). On the basis of this study, Congress should consider the need to amend the statute to enhance its effectiveness.

Chapter 3 noted the special characteristics of employment discrimination litigation and the substantial increases in the numbers of such cases in the federal courts. These cases are among the most wrenching of the various categories of federal court litigation. Plaintiffs often have a great deal of emotional investment in the outcome. To the degree that plaintiffs litigate without counsel, they create special demands on the court. The monetary stakes in some of these cases may be so small, however, that, even with the potential to recover attorney's fees, claimants sometimes find it difficult to litigate in federal court because they cannot find counsel to take their cases.

42 U.S.C. § 2000e-5(f)(1) authorizes district courts, "in such circumstances as the court may deem just," to appoint attorneys for persons pressing certain employment discrimination claims and to permit the action to commence without payment of fees, costs, or security. We endorse the goals of the statute: providing better access to the courts for deserving claimants and reducing the substantial judicial burdens of employment discrimination litigation brought by pro se plaintiffs.

Experience, however, has revealed several obstacles to the statute's effective implementation. Lawyers' concern over possible legal malpractice actions, and the cost of insuring against such claims, have made them reluctant to accept appointment. And Congress has not provided funding for litigation costs, such as those for discovery, that attorneys may be reluctant to advance (the statute's fee-shifting provisions provide no reimbursement for cases that do not succeed).

A study of experience under § 2000e-5(f)(1) is an important first step toward making it work as Congress intended. Such a study could document effective strategies courts have devised for remedying obstacles such as we note above, information that other courts could use. More important, such a study could point to statutory amendments to promote Congress's goal.

Finally, we note that one source of funds for attorneys' out-of-pocket litigation costs may be the library and bar admission fees that district courts collect, provided that their use for this purpose comports with applicable law and prevailing Judicial Conference regulations and practices.

In Part II, see also Chapter 3, § B, at pp. 60–62, on voluntary arbitration by the EEOC.

3. District judges should take greater advantage of their authority to use oral findings of fact and conclusions of law in bench trials.

A 1983 amendment to Federal Rule of Civil Procedure 52(a) authorizes district judges to state their findings of fact and conclusions of law orally and have them "recorded in open court following the close of the evidence." The amendment's objectives are to "lighten the burden on the trial court in preparing findings in nonjury cases" and to "reduce the number of published district court opinions that embrace written findings." Despite the rule change, too often nonjury cases remain undecided for considerable lengths of time after the end of court hearings.

The committee urges district judges to make greater use of this authority and recommends that Federal Judicial Center educational programs for district judges continue to include instruction about it. Oral findings and conclusions after the close of the evidence can speed decision-making because the facts and issues are fresh in the judge's mind. Dialogue with counsel on the spot may sharpen the facts and issues when necessary. Judges could invite proposed findings and conclusions in advance of the trial or of a decision to be rendered orally.

We do not recommend, however, that judges render limited oral or written findings subject to elaboration in event of appeal. The practice is too likely to complicate losing parties' decisions whether to appeal, to encourage needless notices of appeal as a way of getting clearer statements of findings and conclusions, and to encumber the appellate process with delays pending filing of Rule 52(a) findings and conclusions after notice of appeal. District judges can, if appropriate and necessary, edit and polish recorded oral findings and conclusions to be issued with the formal judgment order.

4. Federal courts should continue to use protective orders to preserve the confidentiality of sensitive materials in order to expedite discovery. That such materials are disclosed through discovery does not make them presumptively public. To reduce duplicative discovery, however, courts entering protective orders should be prepared to modify them to permit appropriate access to discovered information by litigants in other cases unless such information would not be discoverable in these cases.

Particularly in complex or multiple litigation, confidentiality of sensitive discovered materials can assume substantial importance. Discovery is broad, involuntary, and meant primarily to serve the purposes of a particular dispute. It is not easy to generalize about how to strike appropriate balances in the many different situations in which otherwise non-public

information extracted under at least the implicit threat of discovery sanctions is sensitive but might nonetheless be of value to other litigants, regulatory authorities, and the public. On the one hand, using protective orders to preserve the confidentiality of sensitive information (such as trade secrets) may expedite discovery by reducing concern about publicity. On the other hand, when the same issues arise in several related cases, sharing of information can make litigation more accurate and less expensive by avoiding duplication of effort. Courts should therefore be prepared to consider modifying protective orders in such circumstances.

It is fundamental that confidentiality orders in one litigation may not deny to different litigants information that they otherwise would have been able to obtain by regular discovery processes. Access might, however, be limited (e.g., by requiring specific requests rather than opening files to later litigants) when *all* parties to the first litigation oppose access or confidentiality as a condition of settlement. Only for especially good cause should courts deny other litigants access to relevant, otherwise discoverable information (e.g., to protect confidentiality of settlement discussions or statements made in voluntary alternative dispute resolution proceedings).

Legitimate reasons for confidentiality of discovered materials raise concern about legislative proposals that would limit protective orders in such areas as product liability. To subject pretrial civil discovery, generally or in one class of cases, to some form of "sunshine" law would distort the discovery process and disregard legitimate privacy interests. When the public or governmental regulators need sensitive private information, disclosure should normally come through other processes such as governmental subpoenas.

Part III contains additional material on this subject.

5. Sanctions for litigation misconduct should be studied further.

Federal Rule of Civil Procedure 11, as amended in 1983, has both strong defenders and strong critics. Critics believe it escalates antagonism in litigation, creates satellite controversies, inhibits innovative arguments, discourages unpopular claimants, and sows conflict between attorney and client. Defenders see it as an essential tool to curb substantial cost-inflicting abuses and are inclined to believe that much current litigation over Rule 11 is similar to what occurs in the early stages of any major rules change.

Given the strong disagreements among judges, practitioners, and academics, the committee declines to offer specific recommendations for change in the rule. Rather, we call for more research before revisions are considered. It is essential to determine whether the criticisms have substance, to aid in the rule's interpretation and possible amendment, and to avoid overreaction to problems that some (but by no means all) members of the bar believe exist. Further research could also consider the propriety of applying sanctions in habeas corpus proceedings, which are technically civil but which some courts have held should rarely be subject to the rule.

Part III contains additional material on this subject.

F. Attorneys' Fees

1. To simplify the process of assessing attorney fee awards, courts should consider (1) adopting reasonable rate schedules and uniform enhancement factors; (2) using magistrates or special masters as fee taxing masters; and (3) setting advance guidelines for compensable items in certain cases. Also, the Federal Judicial Center should conduct a study of alternatives to the lodestar method of setting fee awards.

How courts reckon fee awards can vitally affect not only the parties' incentives to litigate and to settle, but also the furtherance of the purposes underlying a fee-shifting rule and the amount of satellite litigation over fee award amounts. Under the dominant lodestar method, judges multiply hours of attorney time appropriately spent on the winning aspects of the case by a reasonable hourly rate. The method may unduly burden judges and give lawyers incentives to run up hours unnecessarily, which can lead to overcompensation or later litigation over fee padding. Nevertheless, the lodestar approach is increasingly entrenched in case law—and seems inescapable when defendants are entitled to fee awards or prevailing plaintiffs win only injunctive or declaratory relief. It is important to improve the administration of the lodestar in ways consistent both with statutory goals in providing for fee shifting and with fairness to lawyers and clients. The federal courts can usefully attempt several approaches:

- limit disputes about rates, and discrepancies among judges, by adopting reasonable rate schedules by district or circuit—the schedules to be indexed to prevent lags behind changing market rates;
- simplify the handling of the risk of loss by adopting a uniform enhancement factor or a schedule of factors for different types of cases;
- designate (at least in the larger courts) a single magistrate as a “taxing master” (or assign the task in some instances to special masters) for all fee applications, in order to enhance regularity and per-

ceived neutrality in fee awards and relieve district judges of the task of setting fees; and

- avoid later disputes over compensable items by adopting, either in general or in individual cases, advance guidelines to govern such matters as the level of attorney involvement that will be compensated.

In addition, because of the lodestar method's problems, we recommend further study of alternatives, most prominently that of basing fee awards in whole or in part on a percentage of the recovery obtained by prevailing plaintiffs' counsel in damage actions.

Mr. Harrell dissents from the recommendation in § F.1.

2. Congress should not adopt a "loser pays" rule for the federal courts or for federal law claims generally.

Although sometimes advocated, a general rule making losing parties fully liable for the winners' reasonable attorney fees is a radical measure that would be inconsistent with traditional American attitudes toward access to courts. Such a rule would work harshly in close cases, especially when a party advocates a position that is reasonable but is nevertheless unsuccessful. It might excessively discourage parties with plausible but not clearly winning claims, particularly when a prospective party is risk averse—as is likely to be true of middle-class persons who cannot risk a big loss. Furthermore, the rule could actually make settlement less likely: other things being equal, it increases the negotiation gap between the litigants. Even jurisdictions like the United Kingdom that formally follow the loser-pays rule often temper it substantially, as by imposing only partial liability, providing broad public legal aid, or making the rule inapplicable in significant classes of cases.

We note, however, possible benefits of modifications of the "American rule" against attorney fee shifting, modifications directed toward specific problems. Loser-pays attorney fee shifting may be appropriate in some circumstances such as discovery motions and in business litigation between well-financed adversaries, although such cases are often governed by state rather than federal law.

Part III contains additional material on this subject.

G. Criminal Law and Case Management

1. **Congress should enact a comprehensive recodification of the federal criminal laws and should create a code revision commission to expedite the process.**

The current federal criminal law is hard to find, hard to understand, redundant, and conflicting. There are more than 3,000 separate federal statutory offenses. Important offenses such as murder and kidnapping are commingled with trivial offenses like reproducing the image of "Smokey the Bear" without permission (18 U.S.C. § 711) and taking false teeth into a state without the approval of a local dentist (18 U.S.C. § 1821). The current statutes use seventy-eight different terms to describe the *mens rea* that must accompany the various offenses. Many offenses overlap. For example, 446 statutory offenses deal with just four offense areas—thief, fraud, forgery, and counterfeiting. The resulting confusion and inefficiency seriously impede the operation of an effective criminal justice system, and lack of a rational criminal code has also hampered the development of a rational sentencing system.

The need for recodification has long been recognized, but its accomplishment has been indefinitely postponed. Congress authorized a National Commission on the Reform of Federal Criminal Laws in 1966, and the Commission presented its report to Congress in 1971. Unfortunately, this work never came to fruition despite repeated efforts in Congress between 1971 and 1982. The effort must be resumed, and a new code commission should be created to assist in this undertaking. The commission should work with Congress, the judiciary, and the Department of Justice to focus public and professional attention on the need for a revised criminal code, to develop draft legislation, and to help shepherd the resulting bills through the legislative process.

We believe that this is a pressing matter for Congress's attention.

2. **The Attorney General should convene a conference of prosecutors and defense lawyers to consider the problems of complex criminal trials and whether changes in the Federal Rules of Criminal Procedure, or guidelines promulgated by the Department of Justice, could expedite such trials.**

The committee's January 1990 hearings called attention to the problems created by extremely long complex criminal trials. These problems have been the subject of recent appellate opinions and of proposals drafted by various groups, including the Federal Bar Council in New York. Although there are relatively few long trials, their incidence has in-

creased greatly in recent years. Since 1979, the number of criminal trials lasting over forty days has grown four-fold, and those lasting over twenty days have more than doubled.

In light of our reporting deadline, we were unable to give these proposals our full consideration. We believe that the appropriate forum for their comprehensive discussion would be a conference convened by the Attorney General. This conference should consider the problems posed by extremely long and complex criminal trials and the desirability of amending the Federal Rules of Criminal Procedure, adopting internal Department of Justice guidelines, or making other changes to expedite such trials.

3. Discovery in criminal cases presents numerous issues that may be worthy of further study.

At our January 1990 hearings we heard many complaints concerning current rules with respect to such areas as pretrial discovery of witness lists, oral statements by defendants, pretrial statements by prospective government witnesses, Jencks Act administration, and discovery depositions. Although our reporting deadline precluded our giving these proposals the attention they deserve, we believe they should receive the care and immediate attention of the Department of Justice and the Judicial Conference Advisory Committee on Criminal Rules.

Separate statement and dissent by Mr. Aprile, in which Judge Keep joins:

Although I endorse the above recommendation, I do not believe that another study without experimentation and documentation will overcome the present objections raised to discovery reform in federal criminal cases. Suggested discovery reforms include the pretrial disclosure of the names and addresses of prosecution witnesses, release prior to trial of statements of prosecution witnesses, and discovery depositions. To obtain both empirical and laboratory data on discovery reform, appropriate statutory and/or procedural amendments should be enacted to authorize federal district court judges, in their discretion, to permit, without the consent of the parties, greater discovery in criminal cases, such as the reforms discussed above, on an experimental basis. A study group, composed of representative components of the federal criminal justice system, should be established within the federal judiciary to monitor the advantages and disadvantages created as a result of enhanced discovery in a limited number of federal criminal cases. The study of these discovery experiments would occur contemporaneously with the actual litigation and resolution of the cases in question to assess immediate as well as subsequent reactions of the prosecution, the defense, the judiciary, witnesses, and law enforcement agencies to the increased discovery.

4. The special problems of victims of crime deserve additional attention.

The committee's January 1990 hearings called attention to the special problems of victims of crime within the judicial system and whether the courts should do more to deal with those problems. While we recognize this as a concern, in light of our reporting deadline, we were unable to give it even the minimal attention it needs in order to determine even a basic approach or preference.

Chapter 6

Dealing with the Appellate Caseload Crisis

However people may view other aspects of the federal judiciary, few deny that its appellate courts are in a "crisis of volume" that has transformed them from the institutions they were even a generation ago. Further and more fundamental change to the appellate courts would seem to be inevitable unless there is a halt to the climb in appellate workload. While it is impossible to read the future, we see little reason to anticipate such a halt.

If growth continues, the nation must ask how further changes in the appellate courts will occur. Will they be insidious and unplanned; will oral argument and reasoned opinions simply fade away, for example? Or will Congress and the courts fashion new structures and procedures specifically designed to preserve the hallmarks of our judiciary? Those hallmarks include that the 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. Modern society requires no less.

Today's federal appellate courts have been able to provide these conditions only through increases in productivity that seem to be approaching their limit. Further attempts to raise productivity by the most commonly suggested and employed means, such as increases in staff and reducing opportunity for oral argument, could threaten the integrity of the process. Accordingly, although we make several proposals to enhance productivity, our emphasis in this chapter is on more far-reaching analysis. We anticipate that within as few as five years the nation could have to decide whether or not to abandon the present circuit structure in favor of an alternative structure that might better organize the more numerous appellate judges needed to grapple with a swollen caseload. To help prepare for any such decision, we propose a major pilot project and we urge Congress, judges, lawyers, and the public to weigh the alternating costs and benefits of major structural and procedural options such as those we summarize in section B.

The crisis of volume is beyond dispute, even if the statistical measures of appellate workload still need refinement. The crisis is caused partly by an increase in district court cases but mainly by a heightened proclivity to appeal district court terminations. In 1945, litigants appealed about one of every forty district court terminations; they now appeal about one in eight. As a result, appellate filings have risen nearly fifteen-fold. (As we note in the Overview, they have increased by ten-fold since 1958.) The number of appellate judges, however, has increased since 1945 by a factor of less than three, from 59 to 168. Consequently, the caseload per judge has multiplied by nearly six over the same period. Circuit judges of the 1940s and 1950s would find today's caseloads unmanageable. Even in 1965, each appellate judge, sitting in panels of three, participated in an average of 136 terminations after hearing or submission. By 1989, that number had almost tripled, to 372 per judge. In all but two circuits it exceeds 255, which is the Judicial Conference standard for an appellate judge's annual workload. In the five busiest circuits, it ranges from 411 to 525. The 255 participation standard, furthermore, is too high according to most judges who responded to the committee's survey. The federal appellate caseload is higher than that of many state appellate courts even though the responsibilities of the federal circuit judges are generally greater.

To date, the courts of appeals have managed to avoid the worst effects of this growth. There has been no systemic breakdown in the quality of the courts' work. Moreover, pending cases as a percentage of terminations—the measure of "backlog"—has risen only from 55 percent in 1958 to 80 percent now. But the appellate courts have avoided major deterioration only by pushing productivity to maximum levels and by adopting truncated procedures that probably have reached the limits of their utility without compromising the quality of the process.

The appellate caseload explosion, moreover, threatens not only the courts of appeals as we know them. It also threatens the Supreme Court's role as the enunciator of national law. The Court is unable to give full review to more than about 150 cases per year. As court of appeals decisions increase in number, there is a corresponding decline in the percentage of those decisions that the Supreme Court reviews, thus making the thirteen intermediate appellate courts more and more the nation's courts of last resort. The following table provides a comparative picture.

TABLE 1
Supreme Court Review of Court of Appeals Terminations

| <i>Court of Appeals</i> | 1945 | 1989 |
|---|-------|---------------------|
| a. Terminations on Merits | 1,992 | 19,178 |
| b. Petitions for Certiorari | 730 | 2,837 |
| <i>Supreme Court</i> Petitions Granted | 157 | 142 |
| <i>Petitions granted as a:</i> Percentage of b | 21% | 5% |
| Percentage of a | 7.9% | <i>Less than 1%</i> |

Note: Certiorari petitions (filed and granted) encompass state and federal cases. The important point is the two years' comparison.

A. Additional Judgeships

1. **The Judicial Conference should develop and adopt a weighted caseload formula for determining needed appellate judgeships (although the additional judgeships referred to in § 2 should not wait for a revised formula).**

In deciding how many additional circuit judgeships to recommend that Congress create, the Judicial Conference uses a statistical guideline of one judge for every 255 "case participations," as well as other, less quantitative factors. This standard assumes that appeals in odometer tampering cases require the same investment of judicial time as do appeals in antitrust cases. Its only concession to differences in case types is to treat prisoner petitions as constituting only one-half a case. Although general caseload figures have a rough validity, Congress and the courts need an indicator that reflects differences in the work that different kinds of cases require—a "weighted caseload index" such as that used to determine how many judgeships the districts courts need. Courts of appeals vary in their caseload mix. Not only will a weighted index provide a more precise measure for assessing each court's need for judges; it will help determine

the best combination of staffing and procedures to assist each court. A realistic standard will require adequately funded research into the time that judges actually devote to different kinds of appeals, research analogous to that which the Federal Judicial Center is conducting to revise the district court index.

2. Congress should quickly provide the additional appellate judgeships that the Judicial Conference has requested.

Filling the judiciary's current shortage of judgeships will not solve the current crisis of volume, but not doing so will make it demonstrably worse. The revised judgeship bill filed on behalf of the Judicial Conference (using 1987 statistics) requests sixteen new judgeships for the courts of appeals, a number smaller than the 255 case standard would indicate. The 1990 bill, using 1989 figures, will doubtless reflect the upward revisions. The courts of appeals are reluctant to request additional judgeships because of concerns about problems associated with circuit growth. Their requests invariably fall below the number that would be dictated by blind application of statistical standards. Any they do request, they clearly need.

In Part II, see also Chapter 2, § A.1, at pp. 35-36, and Chapter 8, § C.1.a, at p. 160, on the need for increased judgeships.

3. The Administrative Office of the United States Courts should regularly collect and report data concerning pro se litigation. Using the data so compiled, a Judicial Conference committee should conduct an in-depth evaluation of the costs of pro se litigation to the litigants and the courts, and recommend to the Conference methods to reduce those costs and to improve the efficiencies of dispensing justice in those cases.

Cases in which litigants serve as their own lawyers present an important means of access to the courts; efforts to manage pro se cases must be sensitive to citizens' rights to represent themselves, and ultimately, to the rights at stake. Pro se litigation also imposes special demands on the courts. Two recent analyses have shed some light on the extent of those demands. An Administrative Office of the United States Courts report on staff attorneys' offices indicated that in some circuits, pro se litigation almost fully occupies the staff attorneys. Second, preliminary data compiled for the committee by the First Circuit Executive suggest that pro se litigants are involved in roughly 15 percent of the district court cases and 30 percent of the cases in the courts of appeals.

We believe that two steps are appropriate at this time. First, we recommend that the Administrative Office add *pro se* litigation to its data collection and reporting protocols. Second, we recommend that the data so compiled inform a systematic study of the causes and management of *pro se* litigation.

We recommend both efforts in the interests of improving the courts' ability to adjudicate *pro se* cases fully and effectively, a matter of benefit both to the litigants and to the administration of justice generally.

B. Procedural and Structural Considerations

The geographic circuit is an ancient concept of judicial administration, imported to this country from England as a means of getting more work from judges by having them hold court throughout a region. The Judiciary Act of 1789 divided the country into eastern, middle, and southern circuits. In each it created two trial courts—district courts and circuit courts. District courts in every state tried admiralty and minor federal criminal cases; circuit courts tried diversity and major criminal cases, and heard some appeals from the district courts. Appeal as of right lay to the Supreme Court in civil cases involving more than \$2,000.

There were no separate circuit court judges. Instead, Supreme Court justices "rode circuit" to hold circuit court in each district, sitting with the resident district judge. As the country grew, Congress created new circuits and additional seats on the Supreme Court to provide justices for them. Justices, though, gradually stopped riding circuit; the burden was simply too great. Thus, district judges (along with nine circuit judges authorized in 1869) became to a large extent the federal judges of last resort. The Supreme Court had no authority to refuse appeals, but, ironically, was too swamped with cases to decide more than a fraction of those submitted.

To restore the nation's appellate capacity, Congress in 1891 created three-judge intermediate courts of appeals in each of the then-nine circuits. And it began the process of statutory change that has gradually given the Supreme Court virtually total discretion over the appeals it will hear.

The courts of appeals still show at least five fundamental characteristics of their creation in 1891. They are still the only courts between the district courts and the Supreme Court. Appeal from the district court is a right. The three-judge panel is still the basic decisional unit. The courts are still geographically based. And their number, now thirteen, is basically an incremental modification of the number of justices on the Supreme Court in 1891 (nine), reflecting the fact that long ago the number of Supreme Court justices was a function of the number of regional circuits.

The size of the courts, however, has exploded. Even through the 1950s, the courts averaged less than seven judges and were thus unitary tribunals notwithstanding their division into panels. Small size and intimacy gave each the character of a unified court that spoke with a single voice and style, maintaining a consistent case law of its circuit on which lawyers and lower courts could rely.

That day seems irrevocably lost. In the past three decades the number of appellate judges nationally has almost trebled, ranging now from six in the First Circuit to twenty-eight in the Ninth. The average court of appeals has thirteen judges. If caseload were the sole determinant, and using the Judicial Conference's 255 participations standard, there would today be 206 judgeships for the twelve regional circuits, not the present 156. The average court would have seventeen judges, and at least four of the courts would be on the brink of twenty judgeships. Applying the same standard to conservative caseload projections suggests a need by 1999 for 315 appellate judges, with an average court of twenty-four judges (and forty-nine on the Ninth Circuit). Tribunals of seventeen, much less twenty-four, sitting in panels of three, may resemble a judgeship pool more than a single body providing unified circuit leadership and precedent. Still, large courts such as these may be workable. Whether tribunals of thirty or forty judges will be workable is more problematic. The question is not simply one of administration but of the effect, both within the circuit and nationally, of so many uncoordinated opinions from so many judges. Whether these will breed litigation and incoherence or, as some believe, will cause no serious problem, are questions for further study.

1. Process and Procedure

The courts of appeals have raised their productivity over the last half century by hard work and a series of personnel and procedural changes that have limited but hardly stopped their growth: three law clerks per judge, not one; "central" staff attorneys; reducing the length of oral argument, or eliminating it; early identification and summary disposition of weaker cases, and pre-hearing innovations, like settlement programs, for others. Many worry that these palliatives threaten the appellate ideal of individual attention to individual cases. Without them, however, the appellate courts would be in serious difficulty, rather than current, as now. More changes are probably inevitable if the courts are to keep up.

- a. **Congress should allow each court of appeals to perform its in banc functions by such number of the members of its in banc courts as may be prescribed by rule of the court of appeals, except that the number**

should not be less than nine unless the court has fewer than nine authorized judgeships.

28 U.S.C. § 46(c) and Public Law 95-486 (92 Stat. 1633), § 6, together authorize each court of appeals to order hearings in banc and establish the procedure governing the exercise of that authority. A court in banc must consist of all circuit judges in regular active service, except that any court of appeals having more than fifteen active judges may perform its in banc function by whatever number of members of its in banc court that the rules of that court prescribe. In accordance with the statute, the court of appeals for the Ninth Circuit has set the number of judges for its "limited in banc" at eleven, ten to be drawn by lot and the chief judge.

The limited in banc appears to allow more efficient use of court of appeals resources and should be available to the other courts of appeals, even those that do not regularly have fifteen active judges. The growth in the number of circuit judges is likely to continue, increasing the potential for in banc courts of unwieldy size.

Dissenting statement of Congressman Kastenmeier, in which Mrs. Motz joins.

I am somewhat troubled by a proposal that would permit fewer than all judges in a circuit to speak on behalf of all judges in that circuit. In close cases, the majority view of the small in banc may not reflect the view of the majority of judges in the circuit. Even in cases that are not close, the failure to include some judges in the decision-making process risks a diminution in the quality of the decisions made. Some circuits, such as the Ninth, have arguably grown so large that requiring the participation of all judges at in banc proceedings becomes impracticable. I am, however, reluctant to support the recommendation as a general proposition applicable to all circuits. I note, for example, that this recommendation is opposed by the chief judge of the Eleventh Circuit—a circuit identified during discussions in support of the recommendation as most in need of relief the small in banc proposal would provide.

- b. The Judicial Conference should conduct an intercircuit study, perhaps under the aegis of the Federal Judicial Center, of the most effective appellate case management techniques, and provide a means for the courts regularly to exchange case management information, experience and ideas.**

Although we believe that per judge productivity is close to the maximum, and that further acceptable efforts to enhance productivity will yield sharply diminishing returns, some benefits may still come from additional case management innovations. The Washington Supreme Court's appellate commissioners program is one of several innovations worthy of

careful analysis. The Ninth Circuit's program to develop a computerized system of classifying the issues in each case as the cases are briefed is another. Experimentation with two judge panels might be a third. There are more—many of them—such as settlement and case expediting programs, already in place in some circuits. We are aware of no program, however, that will preclude the need for increasing judgeships as caseload mounts, because there is a finite limit to the number of cases to which a judge can provide meaningful personal attention.

- c. **Congress, the courts, bar associations, and scholars should give the problem of appellate procedure serious attention over the next five years.**

Analysis now of the strengths and weaknesses of more far-reaching changes will mitigate disruption if and when such changes become necessary. To give an example of a major change that should be studied, various observers have proposed giving each court of appeals certiorari authority similar to the authority the Supreme Court uses to control its docket. Courts of appeals would determine the number of appeals they would decide in light of their available judgeship resources, perhaps using a screening procedure much like the certificate of probable cause now used in habeas appeals. Several state courts have adopted a discretionary review procedure, as has the United States Court of Military Appeals.

Although we see certiorari for the courts of appeals as a last resort, we encourage further study of the concept. Any such change to discretionary review would have to accommodate the tradition of error-correction on appeal, a fundamental task of the courts of appeals but not the Supreme Court. To determine whether error could have occurred below, an appellate court must often conduct a comprehensive, time-consuming examination, aided by briefs and the trial record. This kind of inquiry may require as much time and effort as courts of appeals currently expend in reviewing already-docketed cases for summary or other non-argument dispositions. Conceivably certiorari could be combined with such procedures as truncated review of a colleague's case by a panel of two or three district judges operating as an appellate division of the district court.

One thing is clear, however. Although the Supreme Court has never held that an appeal is constitutionally required, the federal system and virtually all state systems now allow all litigants at least one appeal as of right. Changing that presumption, even in the civil area alone, would be a major departure from our tradition.

2. **Fundamental structural alternatives deserve the careful attention of Congress, the courts, bar associations and scholars over the next five**

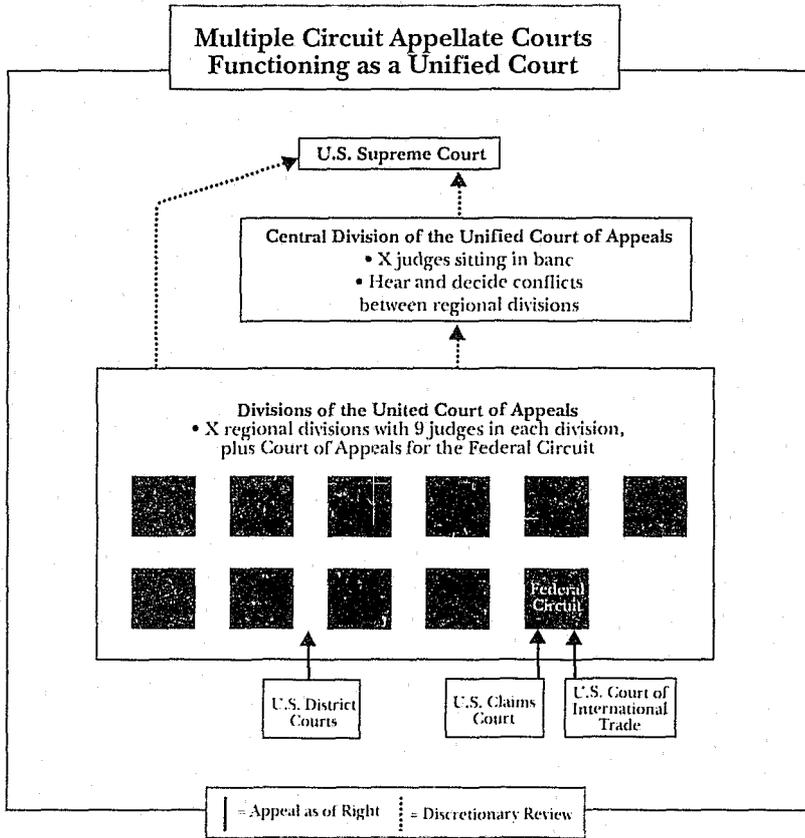
years. The committee itself has studied various structural alternatives. Without endorsing any, it lists a few here to stimulate further inquiry and discussion. The committee does not favor the creation of a "national intermediate court of appeals" as proposed in 1975 by the Commission on Revision of the Federal Court Appellate System.

Courts of appeals of twenty, thirty and even forty or more judges—distinct possibilities if caseloads continue to rise at present rates—may well be too large to provide the necessary coherency of case law within their circuits. At the start of this chapter, we stated our belief that the nation may soon have to decide whether to retain the present court structure or adopt a new one. We recommend no alternative structure at this point; there has been too little analysis about their likely effects and about the types and numbers of cases to be accommodated.

Massive restructuring of the courts of appeals would, by definition, entail substantial disruption of the present system, and we would not propose it until the alternatives have been carefully and comprehensively analyzed. That is a task beyond our capabilities, given our limited time and resources. To stimulate that analysis, however, we describe briefly, and diagram, five alternatives that, among others, have been suggested to the committee. (Other variations are in Part III.) *We emphasize again that we endorse none of these alternatives.* We present them here simply to suggest a range of concrete alternatives that might be analyzed further. And we do not suggest these are the only alternatives worthy of consideration. One proposal that we do *not* favor, however, is the single national appellate court to take appeals on referral from the Supreme Court, as proposed in 1975 by the Hruska Commission; such a tribunal would enlarge the system's capacity to resolve intercircuit conflicts, but would not solve the problem of growth within the courts of appeals. Hence, by itself, it could resolve only a piece of the problem.

With respect to any alternative, we caution that caseload pressures are inexorable even now. Delay in seeking a remedy will make the situation worse and diminish the likelihood of making the right choice as a result of careful planning in advance. We hope that during the impending years the courts of appeals can continue to cope in their current format with the anticipated larger caseloads and thus allow adequate consideration of major structural alternatives. Here are five examples of structural alternatives. (For simplicity, we have not added our Tax Court proposal in Chapter 3 to the accompanying diagrams.)

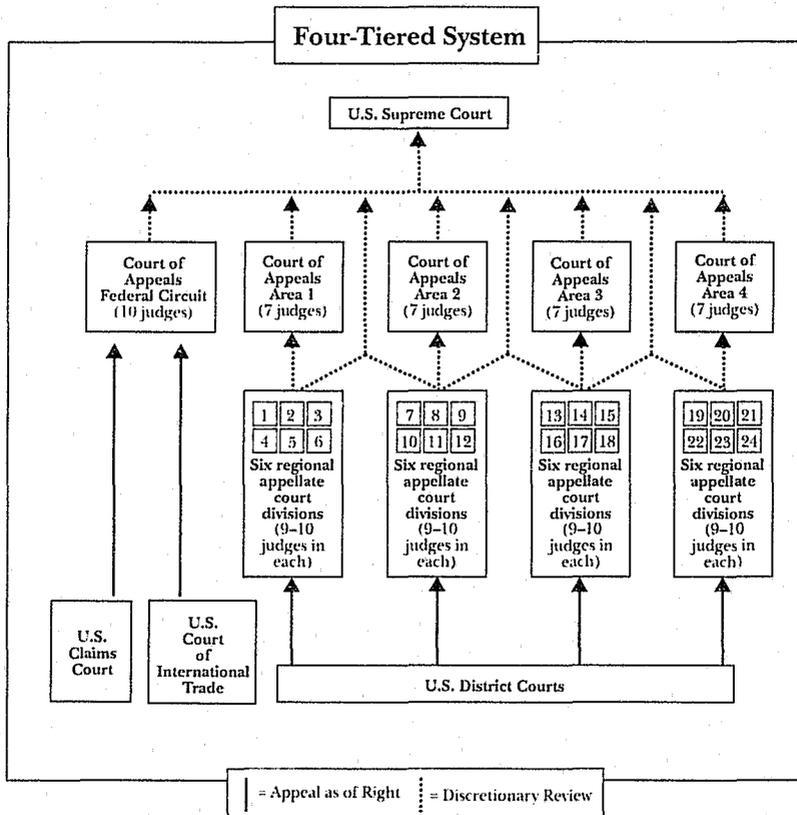
1. Multiple circuit appellate courts—of nine or ten judges each—could function as a unified court.



Simply dividing existing circuits—the remedy proposed in 1975 by the Commission on Revision of the Federal Court Appellate System—no longer appears practicable. Variations in caseload and geographical divisions not reflecting current conditions suggest that to achieve smaller courts, the present circuits would first have to be dissolved. This alternative, consequently, would eliminate the present circuits, draw entirely new circuit boundaries, and provide a mechanism for redrawing them periodically. The increased number of inter-circuit conflicts could be handled by requiring all courts of appeals to adhere to the precedents established by panels of other courts, unless the Supreme Court had spoken. Inter-circuit review panels could reverse other panels' decisions believed to be

clearly erroneous (subject to Supreme Court review). In other words, the court of appeals judges would themselves, in some formalized manner, bind colleagues beyond their own circuits, thus reducing conflicts without relying on the Supreme Court as the sole arbiter.

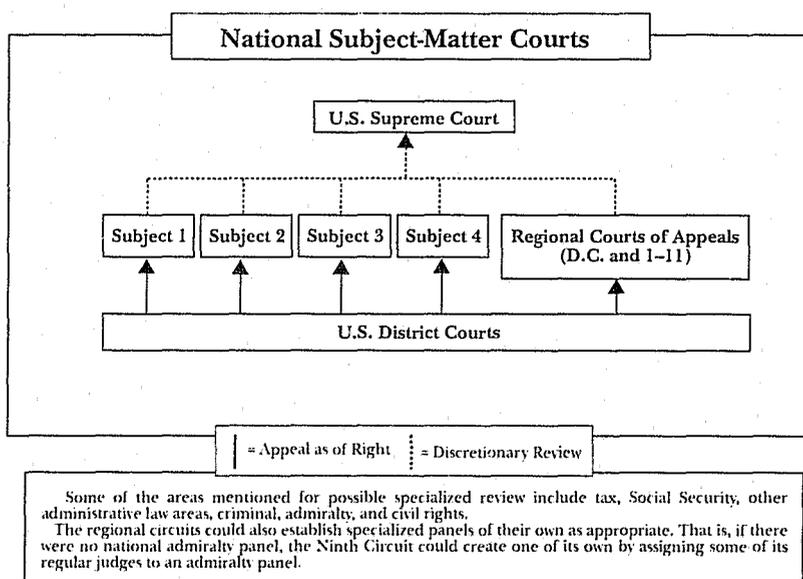
2. Create a four-tiered system.



This alternative extends the 1891 approach of increasing appellate capacity by providing an additional tier between the district courts and the Supreme Court. For example, Congress could divide the nation into twenty to thirty regional appellate divisions, placing a nine- to ten-judge court in each of these divisions as a lower "appellate I" tier, and create four or five "higher" tribunals (of seven judges each) in different areas of the country as an "appellate II" tier. The courts in the regional divisions would hear

appeals of right from the district courts in their divisions. Each new upper-tier court would hear cases on a discretionary basis from five or six of the lower-tier courts. The four or five upper-tier courts would be mainly law-declarers, and might produce a more compact body of primary precedent than the voluminous and increasingly disparate case law likely to be generated by 200 or 300 co-equal circuit judges, governed only by a distant Supreme Court. Instead, the Supreme Court would focus mainly on the four or five upper-tier tribunals, giving them in turn an important supplementary role riding herd on the lower-tier courts. Ample "percolation" could continue. Such an expanded system could absorb perhaps double or more the number of judges in the current system, would enable all the individual courts at both levels to remain small, and yet might restore the coherence threatened by untrammelled growth within the current circuits. But it could be harder to attract able jurists to the lower-tier courts.

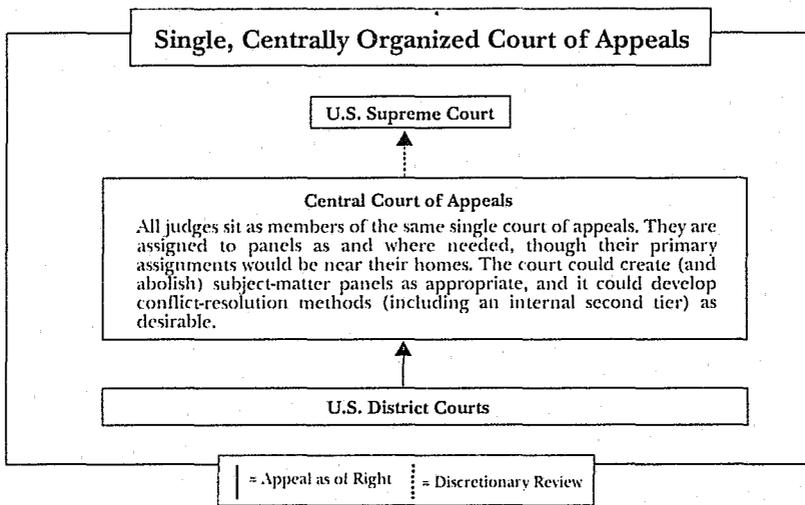
3. Create national subject-matter courts.



National tax, admiralty, criminal, civil rights, labor, administrative and other subject-matter courts could relieve the regional courts of appeals of some of their current caseload and eliminate intercircuit conflicts in those areas of the law. Specialized panels could simultaneously be created within the regional circuits. Subject-matter courts already have a recog-

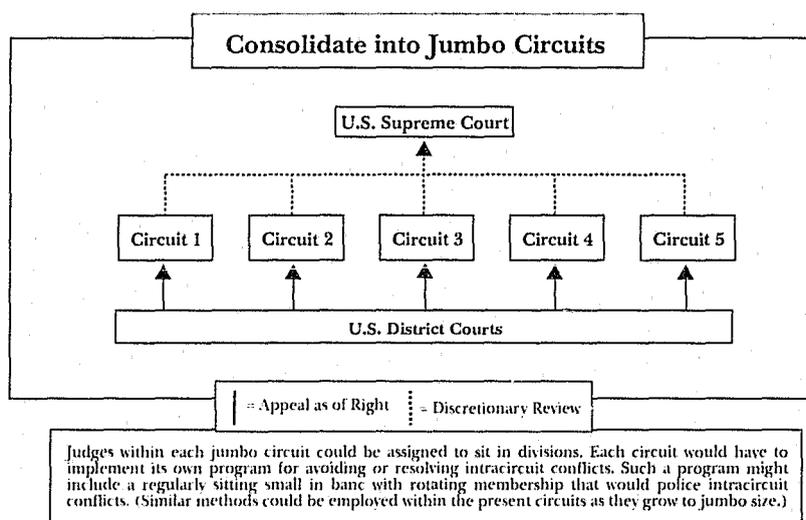
nized place among the country's judicial institutions. Both the Federal and D.C. circuits are composed of generalist judges whose jurisdiction is defined by the subject matter of the cases—only partially, to be sure, as to the D.C. circuit. Only a large number of such courts—or courts with broad jurisdiction—could have much effect on the caseload, however, and either type of court could create numerous political and organizational problems such as we describe in the Overview and Chapter 4.

4. *Merge and reorganize all federal courts of appeals into a single, centrally organized body.*



Such a court presents an enormous and complex picture. It would allow easy allocation of judges and resources to places of particular need, and it would eliminate intercircuit conflicts (using some of the methods described elsewhere). But it could have all the earmarks of a large bureaucracy, and it would counter the salutary trend in today's federal courts toward decentralized administration, and perhaps discourage the accountability for circuit and district performance that is now an incentive for productivity in an otherwise enormous system.

5. Consolidate the existing courts into perhaps five "jumbo" circuits.



This alternative would curtail intercircuit conflicts and by creating large units might make it easier for the circuits to shift resources within their borders. Small in banc could resolve intracircuit conflicts and might, with additional modifications, become something like supervisory courts within the courts. Judges within such "jumbo" circuits might sit within specified divisions. "Jumbo" circuits might thus take on the look of the four-tiered regional system described in alternative 2.

"Bigger is better," though, is not popular. Three-quarters of the circuit judges who responded to the committee's survey said that fifteen or fewer judges best served the proper and effective functioning of the courts of appeals; twelve or even nine, many said, is the ideal maximum. The Court of Appeals for the Ninth Circuit—a "jumbo" circuit today—apparently manages effectively, however, and according to some observers is not unduly troubled by intracircuit conflicts. In short, we would let more time pass before definitively concluding that larger circuits are unworkable.

The current debate between the Ninth Circuit and the other circuits revolves around two very different conceptions of an appellate court. The Ninth Circuit works as a rotating system of three-judge panels (over 3,000 combinations are possible) covering an enormous geographic area, bonded by a very capable administration and serviced by the nation's only small, or limited, in banc of ten randomly selected judges and the chief

judge. Other courts prefer the traditional concept of a smaller, more intimate, unitary tribunal, even as their growing caseload makes this ideal more and more difficult to sustain. Perhaps the Ninth Circuit represents a workable alternative to the traditional model. If not, the entire present appellate system needs restructuring before other circuits become the "jumbo" courts toward which they are gradually evolving. We take no position on whether the Ninth Circuit should be split. That question involves issues peculiar to the region that we are not qualified to address, given our deadline and resources.

In Part II, see also Chapter 4, § A.1, at pp. 69–72, on the creation of Article III appellate division in the Tax Court, and § A.2, at pp. 72–73, on administrative agency appeals courts.

Additional statement of Judge Cabranes, joined by Mr. Aprile, Senator Grassley, and Mrs. Motz:

In addition to echoing the committee's call for more study of this subject and reiterating that *the committee has approved none of the various proposals noted in the text*, we write separately to express our concern that this section of the report does at once too much and too little in addressing the "crisis" in the federal appellate courts.

In the first place, we fear that the alleged "caseload crisis" that is said to afflict the courts of appeals has not been adequately demonstrated. Although the committee does unveil some sobering statistics concerning the growth of the federal judiciary and ever increasing appellate caseload pressures, these numbers in and of themselves provide little guidance for determining the capacity of the system or the breaking point at which "crisis" must set in. Indeed, more than one circuit judge has expressed surprise at our report's characterization of the situation as critical. They point out that the raw caseload figures on which the crisis diagnosis is based are unreliable because of the variance in difficulty among different types of appeals. Specifically, they point to the large number of pro se filings, which—according to one judge—account for roughly one-third of all filings in his circuit yet only about 5 percent of a judge's actual working time. Whether these figures are accurate and whether they hold true for all circuits are obviously questions which must be resolved. However, it seems likely that until we can muster more sophisticated and thorough statistical analyses of the situation in the various courts of appeals, the committee's diagnosis of "crisis" will continue to invite skepticism and second guessing.

In addition to the diagnostic problems described above, our report may also be criticized for giving short shrift to less radical methods of treatment. Specifically, the committee gives a somewhat perfunctory glance to improved appellate case management techniques. This is puzzling and somewhat uncharacteristic of the report in general. After all, if pro se filings account for one-third of all appeals, a more effective and streamlined strategy for pro se review—like that employed in the Second Circuit—

should do much to ameliorate the growing burden on appeals courts while assuring full consideration to the submission of litigants without counsel. Similarly, Civil Appeals Management Plans (CAMPs) have been successfully employed in some circuits to conserve judicial resources. These and other case management techniques might be effectively introduced throughout the appellate system without the costs and tensions of a massive structural overhaul. Moreover, limitations of time and resources have not permitted the committee to give adequate attention to some wounds to our appeals system that are, at least in part, self-inflicted. We refer, in particular, to the notable—indeed, vast—increase in the length of appellate court opinions, aided and abetted by the substantial increase of law clerks and staff attorneys. Although this vice has also afflicted district judges, nowhere has self-restraint been so clearly cast to the wind as in the appellate courts. Judge Posner has recounted the story, in arithmetic detail, in *The Federal Courts: Crisis and Reform* (1985).

While it is indeed possible that these “homespun” remedies will prove insufficient to meet the challenges facing the appellate courts, they should at least be pursued and taken seriously. In sum, radical structural surgery like that mentioned in—but not, we repeat, endorsed by—our report should be considered only as a last resort.

Finally, we are concerned at the possibility that the committee’s identification of several radical models for alternative court structures will be misinterpreted by observers as tacit approval of one or some of them. In our view, these purported cures may be worse than the disease for which they are designed. We hope that their presentation here for further study does not lend them a legitimacy to which they are not yet entitled. We acknowledge with appreciation the effort of our colleagues to describe some of the literature on this issue while avoiding any suggestion of committee endorsement for particular proposals, but we nevertheless urge caution. Thus, while we do not oppose the committee’s general recommendations for more study, we are not convinced of the wisdom of presenting for special consideration, much less pursuing, any of the particular options presented here.

C. Intercircuit Conflicts

As recently as 1960, the Supreme Court reviewed approximately 3 percent of all federal appeals. That proportion has dropped precipitously to less than 1 percent, and will continue to drop as the total number of appeals rises (see table, *supra* p. 111). The Supreme Court handles roughly 150 or fewer cases annually (and that number may be dropping); approximately 75 percent come from the federal courts of appeals. This figure has remained constant for some time, with little prospect for expansion. We are not persuaded that the Court could increase its output, given the difficulty of the cases that the Court hears.

Although the Court sits at the apex of the state and federal systems, theoretically to harmonize the federal law coming from both, the Court has long since given up granting certiorari in every case involving an inter-

circuit conflict. Thus, a federal statute may mean one thing in one area of the country and something quite different elsewhere—and this difference may never be settled. Some conflicts, of course, may have the redeeming feature, especially in the constitutional area, of helping to develop legal doctrine and insight. Other conflicts need rapid resolution. Conflicts over some procedural rules and laws affecting actors in only one circuit at a time may have a negligible effect. A federal judicial system, however, must be able within a reasonable time to provide a nationally binding construction of these acts of Congress needing a single, unified construction in order to serve their purpose.

It appears from academic analyses that the Supreme Court in 1988 refused review to roughly sixty to eighty “direct” intercircuit conflicts presented to it by petitions for certiorari. This number does not include cases involving less direct conflicts (e.g., fundamentally inconsistent approaches to the same issue). Not all these sixty to eighty conflicts, however, are necessarily “intolerable,” to use a commonly applied adjective. Commentators have suggested various criteria for identifying “intolerable” conflicts. For example, does the conflict:

- impose economic costs or other harm to multi-circuit actors, such as firms engaged in maritime and interstate commerce?
 - encourage forum shopping among circuits, especially since venue is frequently available to litigants in different fora?
 - create unfairness to litigants in different circuits—for example, by allowing federal benefits in one circuit that are denied elsewhere?
 - encourage “non-acquiescence” by federal administrative agencies, by forcing them to choose between the uniform administration of statutory schemes and obedience to the different holdings of courts in different regions?
1. **The Federal Judicial Center should study the number and frequency of unresolved conflicts and analyze how many of them are, by some objective criterion, truly “intolerable” yet, for whatever reason, unlikely to be resolved by the Supreme Court.**

2. Pilot Project

Although the study we request in § 1 will be helpful and should be undertaken immediately, a complementary but much richer database will come from an operational examination of the proposition that there are an excessive number of unresolved intercircuit conflicts and that they could be

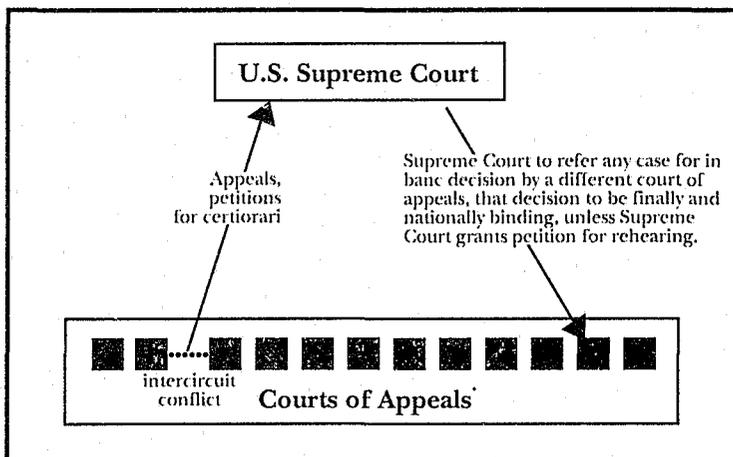
resolved through some alternative structural arrangement. Accordingly:

- a. Congress should authorize a five-year, experimental pilot project to resolve some intercircuit conflicts, during which the Supreme Court could refer selected cases to an in banc court of appeals for disposition and creation of national precedent on the conflict issue.
- b. A properly staffed committee of the Judicial Conference of the United States should monitor the project and recommend after four years whether the experiment should be continued, modified, or discontinued.

We believe the legislation should include these provisions:

- (1) The Supreme Court may (a) refer any case to such an in banc court before or after granting or denying certiorari or before or after noting probable jurisdiction of an appeal, and (b) direct such an in banc to decide any case so referred.
- (2) The referral must be to a court not involved in the conflict issue.
- (3) The referral must be on a random basis that would preclude the Supreme Court's knowing the recipient of the case before it made the referral.
- (4) Temporary amendments to the Federal Rules of Appellate Procedure should establish uniform procedures and time limitations to govern the transmittal of each case from the Supreme Court to the courts of appeals for the in banc review.
- (5) The in banc court's decision on the designated conflict issue will be final, subject only to the right of the party adversely affected by the decision to seek reconsideration or rehearing of that ruling by the Supreme Court within thirty days from the date the court of appeals renders its in banc opinion. No response to such a reconsideration motion will be permitted unless the Supreme Court requests it.
- (6) Unless modified or overruled by the Supreme Court, decisions of an in banc court, when the case has been so referred by the Court, will be binding as if made by the Court.
- (7) Assignment to the courts of appeals will be adjusted so that each court receives assignments in proportion to the relative size of the court.

FIGURE 4
Five-Year Intercircuit Conflict Experiment



This project will establish a mechanism to resolve real conflicts and thus provide a practical understanding of the problem and its likely solutions. The mechanism relies entirely on existing court resources and requires no new structure reminiscent of the controversial court that the Hruska Commission proposed in 1975. Most important, the Supreme Court's active participation in the experiment will make it possible to find out whether there are many or only a few conflicts that are both unsuitable for Supreme Court review and nonetheless deserve national resolution. This is a judgment call which the Court is uniquely suited to make; its determination will go a long way toward resolving a question of great importance in the future design of our national courts system. The in banc procedures, to be sure, will create some additional work for the courts of appeals. We assume, though, that the Supreme Court will refer a much smaller number of cases than the more than sixty conflicts estimated to have occurred in 1988. Congress might wish to authorize—for the purpose of the project and separate from its consideration of our general recommendation for greater in banc authority—a more liberal use of the reduced in banc provisions now followed in the Ninth Circuit.

In Part II, see also Chapter 6, § B.1.a, at pp. 114–15, regarding broader authority for limited in bancs.

Separate statement by Mr. Aprile:

To minimize the cost to litigants, to reduce delays in the appellate process, to foster finality, and to avoid unnecessary re-litigation of issues, the Supreme Court's decision to refer a conflict issue to an in banc court of appeals for resolution of the conflict issue should terminate its involvement in the disposition of that particular case. Once the Supreme Court refers a case to an in banc court of appeals for final disposition of the conflict issue, the Supreme Court should be prohibited from reviewing the decision of the in banc tribunal. The Supreme Court should only be able to reverse the precedent generated by the in banc court of appeals in the context of another case after granting certiorari to review the ruling's application in a successor case.

Basically, the committee's proposal is advanced to assist the Supreme Court, to reduce the courts' of appeals workload, and to provide uniformity in the interpretation of federal statutory law which should generate benefits to litigants and litigators within the federal court system. In this spirit, the substitution of an in banc court of appeals as a replacement for the Supreme Court to decide a statutory conflict issue should not constitute another layer of appellate review, but should be seen as an alternative to a disposition on the merits by the Supreme Court.

To allow the losing party to revive the Supreme Court's interest in the conflict issue, even through a reconsideration motion, extends unnecessarily the appellate litigation process to the detriment of both the litigants and the judiciary. To require a federal court of appeals to convene in banc to resolve a conflict between circuits and to promote uniformity of federal law appears reasonable when the in banc decision will put at least a temporary resolution to the interpretation issue. Such a referral procedure appears unnecessarily duplicative when the losing litigant and litigator are permitted to persuade the Supreme Court that the national precedent rendered by the in banc tribunal is incorrect and should be reversed immediately by the Supreme Court through a reconsideration process (in a court where no initial consideration of the issue's merits had ever occurred).

Finally, there is merit to a proposal, particularly an experimental one, that truly requires the Supreme Court to select from three disparate options with no escape clause to allow the Supreme Court to resurrect its once abandoned jurisdiction over a case. When the Supreme Court denies certiorari and reconsideration of that denial where appropriate, that case ceases to be available to the Supreme Court as a vehicle for resolving issues of law. Similarly, under this proposal, the Supreme Court's decision to refer the conflict issue to an in banc tribunal for resolution should be a choice between keeping the case by granting certiorari to resolve the question or confidently delegating, at least in the context of this case, the ultimate resolution of the conflict issue to another court with no expectation of or potential for reassuming jurisdiction over that matter. There should be a cost, albeit small, to the Supreme Court's decision to employ this alternative means of resolving conflicts. Loss of jurisdiction over the controversy is an appropriate cost to the Supreme Court which also lends greater dignity and importance to the function of the in banc tribunal in this experimental procedure.

In view of the experimental nature of this proposal and the concerns expressed elsewhere in this report about the caseload of the federal courts of appeals, the proposal should limit the Supreme Court's referral capacity to not more than forty cases per year. Such a limitation precludes the in banc procedure from becoming a logistical or administrative burden to the federal appellate courts while ensuring that the Supreme Court's status as this nation's highest court is not undermined by an excessive number of national precedents rendered in any year by in banc courts of appeals.

3. **Apart from the pilot project, we believe that when a court of appeals reviews a case raising an issue already decided in another circuit, it should accord considerable respect to that earlier decision; a panel contemplating disagreement with the panel of another circuit should circulate its draft opinion among the remaining judges of the court for their comments.**

Intercircuit conflict should be created only if a majority of the active judges of the court are convinced that the earlier decision in another circuit is definitely wrong. Some intercircuit conflicts could undoubtedly be prevented by more deference to prior decisions reached by other courts which are of equal rank, are part of the same national system, and have equal responsibility for interpretation of federal law.

Separate statement and dissent of Mr. Aprile:

While I endorse the general principle that a court of appeals panel in deciding an issue "should accord considerable respect to" a prior decision from another circuit which has resolved the same question, I cannot agree that the autonomy of a panel of a circuit should be subjugated to or even circumscribed by an informal in banc polling of the other judges of the circuit not involved in the panel's decision. The commentary's assertion that a panel should not create an intercircuit conflict unless a majority of the active judges of the panel's circuit concur is a principle of efficiency which finds no support in either federal statutory or decisional law. Appellate litigants and litigators in federal court are well aware that an individual appeal may be heard or reheard by the court of appeals in banc, after appropriate notice to the parties. The committee's recommendation, particularly in light of the commentary's language, could be construed as an invitation for federal courts of appeal to conduct *sub rosa* in banc adjudications of certain issues when, to all outward appearances, the opinion in question was resolved by a three-judge panel. In practice, a draft opinion of a unanimous panel on a particular issue could be overruled by the less than unanimous, majority vote of the remaining active judges of the circuit. An informal, invisible in banc procedure, even of this limited nature, will skew the effectiveness of legitimate in banc procedures and will leave counsel and clients pondering whether the decision of the three-judge panel in their case was vetoed by a silent and invisible vote of judges who never were legally authorized to adjudicate their case. And, of course, the informal in banc vote will always

be suspect when the amount of information presented to the non-panel judges is controlled not by the advocates through briefing and oral argument, but by internal administrative procedures conducted behind closed judicial doors.

Separate statement and dissent of Judge Keep, in which Mr. Aprile joins:

I concur that when a court of appeals reviews a case raising an issue already decided in another circuit, it should accord considerable respect to the earlier decision. However, for two reasons, I disagree with the Committee's proposal that a panel contemplating disagreement should circulate its draft opinion among the remaining judges of the court for their comments.

First, although uniformity in the law is desirable, so too is reasoned evolution of the law: the "percolating" decision-making process is an important part of the American judicial system. A circulation requirement such as the committee proposes would stifle this percolation.

Second, applications for hearings in banc alert the entire court to conflicts. Hence, circulation of all draft opinions in cases that may create conflict would be a make-work requirement for our already burdened courts of appeals.

D. Unpublished Opinions

A representative ad hoc committee under the auspices of the Judicial Conference should review policy on unpublished court opinions in light of increasing ease and decreasing cost of database access.

The policy in courts of appeals of not publishing certain opinions, and concomitantly restricting their citation, has always been a concession to perceived necessity. Sheer bulk prohibits universal publication in traditional hard-copy volumes, and many opinions are indeed easy applications of established law to fact.

Still, non-publication policies and non-citation rules present many problems. Some argue that non-publication policies are inconsistently administered and partially circumvented when regular litigants often circulate such opinions internally and then use arguments from them in other cases. One purpose of restrictions on citing unpublished opinions, after all, is to keep those with better access to them from having an unfair advantage. There are also doctrinal reasons for questioning the non-publication rules: litigants should be able to argue that they are indeed situated similarly to a party in a previous case, even if the court thought it not significant enough to warrant publication.

Universal publication has enough problems of its own that we cannot recommend it now; but inexpensive database access and computerized search

technologies may justify revisiting the issue, because these developments may now or soon will provide wide and inexpensive access to all opinions.

Working papers and other materials used in the development of some recommendations of this chapter are in Part III.

Chapter 7

Sentencing

The 1984 Sentencing Reform Act created the United States Sentencing Commission and directed it to fashion a comprehensive and rational sentencing system (28 U.S.C. § 991 *et seq.*, esp. § 991(b)). The Act also effected numerous changes in federal sentencing law and procedure. The Commission's statutorily mandated guidelines prescribe sentencing ranges for most federal crimes, which the court adjusts based on various factors particular to the offense and the offender. The guideline ranges are subject to the maximum sentences that Congress has prescribed for each crime and any minimum sentences it may have prescribed for particular crimes. Under the statutory scheme the judge may impose a sentence that is outside the guideline range only if the case presents factors that the Commission did not adequately consider in preparing the guidelines; and sentences outside the guideline ranges ("departures") are subject to appellate review to determine whether they are reasonable. Most federal judges have been imposing sentences under the Act, as amended, since the November 1, 1987, effective date, and all have been doing so since January 1989, when the Supreme Court sustained the constitutionality of the Commission's membership and its authority to promulgate guidelines.

The committee believes there are certain dysfunctions in the current sentencing system and that there may be other dysfunctions.

A. Congress should repeal mandatory minimum sentence provisions, whereupon the United States Sentencing Commission should reconsider the guidelines applicable to the affected offenses.

In recent years, Congress has established, mainly for drug-related crimes, numerous sentences with minimum terms that are much longer than the sentences that would otherwise be imposed under the guidelines and much longer than appear reasonable to many observers. For example, a 1986 statute set a mandatory minimum sentence of five years for possession with intent to distribute five grams of crack cocaine. A 1988 statute created the same mandatory five-year minimum sentence for simple possession of that amount (21 U.S.C. §§ 841(b)(1)(B) & 844(a)). Moreover, persons serve these sentences almost in full; as noted in Chapter 3, § D, the 1984 Sentencing Reform Act abolished parole for crimes committed after October 1987, and it also sharply curtailed any "good time" reductions.

Our point is not to debate whether the criminal law should punish these offenses. That is a decision of substantive legislative policy. Rather, our concern is that the recent mandatory minimums create penalties so distorted as to hamper federal criminal adjudication. They control judicial discretion in a way that is far more rigid than—indeed, inconsistent with—the sentencing approach Congress adopted in the 1984 Sentencing Reform Act. The overarching goal of that legislation is sentences that are less subject to judicial discretion than under the former regime but that will nevertheless vary depending on specified offense and offender factors. The 1984 Act contemplated sentences that would vary, for example, depending on whether the defendant used a weapon, whether the defendant was the instigator and leader or a follower, and the nature of any injury to the victim (28 U.S.C. §§ 994(c) & (d)). The recent mandatory minimum sentence provisions ignore these offender and offense variables and in the process inhibit the efforts of the Sentencing Commission to fashion a comprehensive and rational sentencing system, for the Commission must adjust its guideline ranges to accommodate the legislatively created minima. Repeal of these mandatory minimum sentences would allow the Sentencing Commission to revise its guidelines applicable to the relevant offenses—a compelling need in light of the huge projected increase in the federal prison population.

Moreover, lengthy mandatory minimum sentences seriously frustrate the normal and salutary process of pretrial settlements in criminal cases. Even defendants who have little doubt of the likelihood that they will be found guilty are more likely to take their chances on a trial when faced with the possibility of a lengthy minimum sentence, especially because of the abolition of parole. Many district judges have reported such developments to the committee.

Finally, and with deference, we are bound to suggest that the Congress may not realize the impact of these mandatory minimum sentences. The Judicial Conference's Criminal Law and Probation Administration Committee stated, in urging their repeal, that it had "received reports of a significant number of cases in which mandatory minimum sentences have had to be imposed by district judges in factual scenarios which have persuaded those judges . . . that the Congress could not have intended that such defendants receive long mandatory minimum sentences without parole." It is especially noteworthy that virtually all commentators on our draft proposal on this subject, including present and past members of the Sentencing Commission, support repeal of mandatory minimum sentences.

B. Sentencing Guidelines

In the Sentencing Reform Act, Congress sought to reduce unwarranted sentencing disparity while ensuring judges sufficient latitude to adjust sentences to reflect special factors in individual cases. To that end, Congress made numerous statutory changes in both title 18 and title 28, and it created the United States Sentencing Commission and directed it to promulgate sentencing guidelines. Our committee was initially reluctant to address the guidelines in this report, in part because most members saw them as a matter of substantive policy beyond the committee's mandate. It became obvious, however, from our earliest requests for comment and information from federal judges and others who work daily in the system (see Chapter 1, § C), that there is a pervasive concern that the Commission's guidelines are producing fundamental and deleterious changes in the way federal courts process criminal cases and federal judges use their time.

Other than a single rule amendment recommendation in the next section, we propose no specific changes in the statute or the guidelines. Rather, we accept the invitation of the three members or former members of the Sentencing Commission who, in committee testimony, strongly urged careful study and monitoring of the Commission's work before formal recommendations for statutory change. Accordingly, we urge a broad examination, by multiple parties, of the operation of the current sentencing scheme to determine whether the congressionally formulated principles are being effectively implemented.

1. The sentencing guidelines promulgated by the United States Sentencing Commission are causing serious problems according to many judges, public defenders, private defense counsel, the organized bar and others. These critics have recommended numerous significant revisions to the Sentencing Reform Act, including amendments to the effect that the guidelines issued by the Sentencing Commission are not compulsory rules but rather general standards that identify the presumptive sentence. On the basis of the concerns raised in testimony and submissions, the committee concludes that Congress, the courts, bar associations and scholars should give serious and close attention to the sentencing guidelines promulgated by the United States Sentencing Commission, with a view to a careful and in-depth re-evaluation by Congress of federal sentencing policy and, in particular, the sentencing guidelines.

We approve or disapprove no particular policy regarding the guidelines system or proposals for change, but we endorse serious consid-

eration of proposals that (1) the guidelines issued pursuant to the Sentencing Reform Act not be treated as compulsory rules but, rather, as general standards that identify the presumptive sentence, and (2) the guidelines, and if necessary the Sentencing Reform Act, be amended to permit consideration of an offender's age and personal history.

It would be well to note several points at the outset. First, we do not favor a return to the sentencing scheme that prevailed prior to November 1987, when the Sentencing Reform Act and the guidelines took effect. Indeed, we recognize the fundamental goals of the Act:

- using sentencing guidelines or ranges to avoid unwarranted sentence disparities;
- requiring the sentencing judge to explain on the record the reason for the sentence and for any deviation from the applicable guidelines; and
- authorizing both the defendant and the government to appeal sentences as, among other things, an abuse of discretion.

Second, we appreciate the difficult task that would befall any sentencing commission whose appointment was delayed and that faced the statutory obligation to develop comprehensive sentencing guidelines for a corpus of federal criminal law in dire need of recodification.

Third, we realize that the guidelines have been in force for less than three years, and for even less time in some circuits or districts. That short period of experience provides some counsel against proposing change in a system that is still evolving. On the other hand, given the evidence we have seen about the *direction* in which the system is apparently headed, we believe it would be irresponsible not to urge intensive and multi-faceted analyses now and in the near term with an eye toward correcting problems before they become ingrained in the system.

Our knowledge about the sentencing guidelines has come from various sources but most importantly from the responses of 82 percent of the district judges to a committee survey seeking information about how judges process criminal cases and from the testimony and correspondence of judges, defense counsel, probation officers, and others who asked to be heard during one of the committee's nine public hearings in January 1990. (We solicited no specific testimony.) Although past and present members of the Sentencing Commission testified that the guidelines are working well, that no substantial change is needed, and that any change at this time would be premature (and the Attorney General agreed that change at this time was not warranted), every one of the numerous other witnesses who addressed this subject—including trial and appellate

judges—supported modification of the character of the guidelines. The following specific and often inter-related problems were described to us.

TIME SPENT ON THE SENTENCING HEARING

Ninety percent of the district judges responding to the committee survey stated that the guidelines have made sentencing more time-consuming. Over half reported an increase of at least 25 percent, and a third reported an increase of at least 50 percent. The time necessary for the Rule 11 hearing for taking guilty pleas has also increased. About three-fourths of the judges so stated; more than a fourth said it had increased by 25 to 100 percent.

UNDUE RIGIDITY IN FASHIONING THE SENTENCE

The guidelines, we were told again and again, do not give the sentencing judge clear or adequate authority to adjust sentences in light of all factors that judges and others regard as pertinent for a just sentence. For example, the guidelines do not authorize the court to adjust the sentence in light of the defendant's personal history, including such factors as age and employment history.

DISRUPTION OF PLEA NEGOTIATION PROCESS

Guilty pleas have historically been the dominant mode of criminal disposition in the federal courts, and plea negotiations have long been sanctioned by the Federal Rules of Criminal Procedure and decisional law. Traditionally, 85 to 90 percent of federal convictions are the result of guilty pleas, generally as part of a plea bargain. Hence, even a 5 percent reduction in guilty pleas means a 33 to 50 percent increase in trials. According to critics, the guidelines appear to be disrupting the plea negotiation process. More than 70 percent of the judges surveyed stated that the guidelines had reduced the incentives to induce a defendant to plead guilty, and half stated that the guidelines had decreased the percentage of guilty pleas in their caseload.

LIMITATIONS ON PROSECUTORIAL OPTIONS

We were told as well that the guidelines unduly constrain prosecutors by limiting the concessions they can legitimately offer to induce guilty pleas. The guidelines do not clearly state, for example, whether the sentencing judge has authority to approve a sentence below the guidelines in accepting a plea bargain when the prosecutor's concessions are based, for example, on the prosecutor's caseload pressures, or on factual or legal aspects of the government's case that have traditionally affected the prosecutor's willingness and ability to take a case to trial. Although the guidelines

that authorize sentence reductions for defendants who accept responsibility and defendants who provide substantial assistance to the government provide some leeway, critics insist that they are not sufficient to meet the prosecutors' legitimate needs.

PROMOTION OF HIDDEN BARGAINING

The fifth flaw identified by critics of the current guidelines appears to be an outgrowth of the others. It is true that the guidelines may have made progress toward the congressional purpose of limiting and regulating the trial court's sentencing discretion. Moreover, the Sentencing Commission has, based on information provided to it, publicly reported a high rate of guideline compliance, as well as a 90.2 percent guilty plea rate for the first seventeen months that the guidelines were in effect. On the other hand, we have been told that the rigidity of the guidelines is causing a massive, though unintended, transfer of discretion and authority from the court to the prosecutor. The prosecutor exercises this discretion outside the system. The guidelines have limited federal prosecutors' formal authority to offer concessions, but Congress has not provided corresponding resources to take more cases to trial. The result, it appears, is that some prosecutors (and some defense counsel) have evaded and manipulated the guidelines in order to induce the pleas necessary to keep the system afloat during this period of rapid criminal caseload increase. Some district judges report feeling enormous pressure to accept pleas even though they clearly do not comport with the guidelines. Critics of the guidelines charge that such practices occur regularly, despite the fact that many of them contravene the Attorney General's instructions to federal prosecutors, which state that departures from the guidelines "should be openly identified rather than hidden between the lines of a plea agreement."

DISTORTION OF THE ROLE OF PROBATION OFFICERS

Although district judges have great confidence in the federal probation service, there is a growing concern among judges, prosecutors and defense lawyers that the new sentencing regime imposes on these officers responsibilities as independent investigators and fact-finders—recommending decisions and legal judgments as to the application of rules to factual situations—for which they may not be particularly well trained or well suited. In most districts, prior to the sentencing hearing, prosecutors and defense counsel file objections, with the officers, to their presentence investigation report and underlying factual premises. The judge must then resolve any differences between the parties and/or the probation officer. The probation officer, in developing recommendations for the judge about proposed findings, is thus thrust into the middle of a highly contentious situation—and sometimes must testify at the sentencing hear-

ing itself. In these circumstances, the district judge may be forced to pass formal judgment on the credibility and judgment of professionals who, we believe, should enjoy a close and confidential working relationship with the district judges. Challenges to the officers' factual findings and the evidentiary hearings held to resolve them reportedly have prompted some judges to advise probation officers to secure counsel.

The studies of the guidelines system we propose should include an examination of the role of probation officers in that system. We recognize that any guideline system will change the role of the probation officer.

* * * *

In short, reasonable and sincere people disagree fundamentally with the current federal sentencing scheme. Given the extent and depth of this disagreement, we recommend immediate study of proposals to amend the Sentencing Reform Act to bring greater flexibility to the system while adhering to the central tenets of the Act. We hope that these analyses are not confined to the Commission or to a few groups or government agencies. Rather, bar associations, prosecution and defense groups, public policy organizations, public and private research institutes, foundations and other funding sources and, of course, individual scholars, should all join in this research effort that, heretofore, has been largely the sole province of the Sentencing Commission.

2. The Judicial Conference should create a standing committee to study proposed and actual guidelines and to provide advice on them to the Sentencing Commission, the federal judiciary, and the Congress.

Such a committee would serve a number of salutary purposes. It would enable the Commission to have the benefit of the views of a representative body within the federal judiciary. It would provide the federal judiciary with timely and considered comments regarding the Commission's work. And it would provide the relevant committees of Congress with the views of a representative committee of the federal judiciary regarding proposed new guidelines as they emerge. This third point is especially important, in light of Congress's need for information for its oversight function. The proposed committee could have as advisors a representative group of former federal and current prosecutors, members of the defense bar, scholars, probation officers, and judges with significant and current experience in sentencing. In the same spirit of broad and multi-faceted research as described above, we believe the committee should not draw its membership from the Sentencing Commission or from individuals who have been major participants in the Commission's research effort.

We considered recommending that this work be done by an advisory or special subcommittee of the Judicial Conference's Committee on Criminal Law and Probation Administration, but we concluded that a separate committee with its own small staff would be more appropriate. The highly technical character of the guidelines requires careful and detailed consideration over time by committee members and staff not diverted by other Judicial Conference concerns. Adding this assignment to the already broad and demanding agenda of the Committee on Criminal Law and Probation Administration would necessarily impair the ability of that important committee to meet all its responsibilities and still perform the special assignment we propose here.

3. Congress and the Sentencing Commission should re-evaluate the process by which Commission-promulgated guidelines become law.

The Sentencing Reform Act (28 U.S.C. § 994(p)) provides that guidelines promulgated by the Sentencing Commission take effect 180 days after submission to Congress, absent congressional action. The current scheme is parallel to that used for amendments to the Federal Rules of Civil and Criminal Procedure. Former members of the Commission, and a special counsel to the Commission, have criticized the manner in which the Commission has developed some of its recently promulgated guidelines, suggesting the need for more intensive review and analysis before the Commission's promulgations become law. Given the extraordinary impact that the guidelines have upon both the federal court system and individual defendants, one question that should be considered by the Judicial Conference committee recommended in § 2 is whether to propose a statutory amendment to require positive congressional action before a new guideline or an amendment becomes law.

Additional views of Senator Grassley, in which Judge Campbell joins:

The guidelines system, in place for barely over a year, represents a bipartisan effort at sentencing reform, in response to a public that demands uniform, certain and proportionate punishment. Though careful study is, of course, always a good thing, it is premature to abandon the guideline system. Amendments to the guidelines become effective only after publication for public comment and a six-month congressional review period, with the amendments effective only if Congress does not vote to modify or disapprove them. I fear that requiring further congressional action to amend the guidelines would politicize this area of the law and deprive the Commission of the flexibility it needs to do the job the public expects.

Additional statement by Judge Keep, in which Mr. Aprile and Chief Justice Callow join:

The federal sentencing guidelines are not working. According to the legislative history, the goal of the guidelines was honesty, uniformity, and proportionality in sentencing. (United States Sentencing Guidelines Manual, p. 2.) The guidelines are failing miserably in achieving any of these goals. Most significantly, for purpose of this committee's task, guideline sentencing is contributing significantly to a criminal caseload crisis which threatens to paralyze the district courts. Hence, I disagree with the committee's recommendation that the guidelines be studied. This will only postpone dealing with the crisis and time is a luxury we do not have in dealing with this crisis. Rather, I urge we adopt the committee's tentative recommendation.

The crisis is particularly acute on the district court level. The increased amount of time required by a district judge to try to handle his/her criminal caseload has caused civil cases to be relegated to the back burner. In those districts with heavy criminal caseloads, the judges are struggling to keep up with the criminal caseload itself. Indeed, in some districts, judges fear that they will have to start dismissing criminal cases because they cannot get the cases tried within the requirements of the Speedy Trial Act.

The crisis has been caused by the following: more criminal cases are being filed; more criminal cases are being tried; and many cases take longer to try. If a defendant does plead guilty, the change of plea takes longer than it used to. Sentencing hearings now take an enormous amount of in-court and out-of-court time; and appeals of sentencing decisions, an insignificant percent of the appellate caseload prior to November 1, 1987, now amount to a significant part of the appellate courts' caseload.

The crisis is not the result of the Sentencing Reform Act of 1984 alone. However, this is a significant cause of the crisis. Under the Sentencing Reform Act, a defendant gets points for the nature of the criminal conduct charged, adjustments are made for such factors as his/her role in the offense, and points are computed for the defendant's criminal record. The total points for the adjusted offense level and criminal history are then compared to a grid which tells the judge the sentencing guideline range which applies.

Because sentencing is now so technical, explaining this process to a defendant during a change of plea has increased the time required for taking a change of plea. Because the results of any particular finding allowed under the guidelines significantly impact the sentence imposed, judges are spending an enormous amount of time making findings at sentencing hearings before a sentence can be imposed. Prior to guideline sentencing, the average sentencing took about fifteen minutes. Now, in my experience, most sentencing takes at least one half hour; at least 25 percent take over one hour. Hence, the increased time for sentencing is consuming a significant amount of judicial time.

Most significant of all, however, is that the Sentencing Guidelines have seriously impacted plea bargaining, the key to keeping the criminal docket current. A defendant

knows exactly what the sentencing range will be whether or not he/she goes to trial. See United States Sentencing Commission Guidelines Manual 6B1.2, and Commentary; 3E1.1 (b) (c). Hence, any incentive to plea has been eviscerated by the sentencing guidelines.

Insofar as notions of "justice" are concerned, the statutory authority creating the guidelines do not allow a court to consider the personal factors about a defendant in determining the length of a prison sentence. 28 U.S.C. § 994(e). This is no doubt based upon the laudable goal of uniformity in sentencing, see, United States Sentencing Commission Guidelines Manual, p. 1.2-1.4. The commission states "Congress sought *uniformity* in sentencing by narrowing the wide disparity on sentences imposed by different federal courts for similar criminal conduct by *similar offenders*" (emphasis added). *Id.* However, by eliminating such personal factors as age, employment history, ties to the community, etc., from the sentencing equation, guideline sentencing actually does a disservice to these notions of uniformity, as key factors about the "offender" are eliminated from the sentencing computation.

It is for these reasons that the committee proposed the following tentative recommendation:

Congress should amend the Sentencing Reform Act to state clearly that the guidelines promulgated by the Sentencing Commission are general standards regarding the appropriate sentence in the typical case, not compulsory rules. Although the guidelines should identify the presumptive sentence, the trial judge should have general authority to select a sentence outside the range prescribed by the guidelines, subject to appellate review for abuse of discretion. The exercise of this discretion may be based upon factors such as an appropriate plea bargain or the defendant's personal characteristics and history.

This recommendation would not only further the congressional goal of uniformity, but it would aid the criminal caseload crisis. Presumably, because there would be authority to sentence outside the guidelines if personal factors about a defendant merited such, a court could finesse time required to rule on guideline objections because of the ability to make appropriate adjustments due to a defendant's personal history. Further, because there would be an ability to sentence outside the guidelines, defendants would not feel compelled to go to trial to seek a hung jury or jury nullification because they are trying to avoid the certainty and often harsh results of guideline sentencing in a particular case.

In nine public hearings, with 270 persons testifying, only four persons spoke against this proposal: three present or former Sentencing Commission members and the Attorney General of the United States. Essentially, their testimony was that the guidelines are working well and more time should be allowed before there is any congressional tinkering with them.

The guidelines are not working well—and more time will not cure the defects noted herein. If anything, more time is likely to cause the criminal caseload crisis to paralyze the district courts and will significantly impact upon the appellate courts' ability

to resolve appeals other than sentencing appeals. For this reason, I strenuously urge Congress to consider the tentative recommendation.

C. The Judicial Conference Advisory Committee on Criminal Rules should consider revising Federal Rule of Criminal Procedure 35(b) to authorize the district court (1) to correct an error in the sentence, on motion of either party made within 120 days of sentence imposition, and (2) to amend a sentence based upon newly discovered facts, on motion of the defendant within 120 days of sentence imposition.

The Sentencing Reform Act substantially altered Rule 35, which had authorized the court to correct an illegal sentence at any time and to reduce a sentence or correct a sentence imposed in an illegal manner within 120 days of sentence imposition or appellate court action. We believe it may be well to restore some of the discretion allowed by former Rule 35, subject to its 120-day limit.

ERROR CORRECTION

Some sentences will inevitably reflect technical errors of sentence determination or imposition. Even if a judge realizes an error shortly after imposing sentence, there is no clear authorization in either statute or procedural rules for the judge to correct it. The district court should be given explicit authority to correct sentencing errors if they are discovered promptly, thus avoiding the need for appeal or habeas corpus petitions.

SENTENCE AMENDMENT

The committee also believes, after careful consideration, that district judges should have authority to amend a sentence based upon new factual information provided by the defendant. To guard against abuse, this authority should be limited to information that was not known to the defendant at the time of sentencing. A defendant's acceptance of responsibility (see U.S.S.G. § 3E1.1) after sentence would not qualify as a basis for a reduction under this provision. We trust that the Advisory Committee notes will emphasize the narrow construction envisioned for this provision.

We recommend the 120-day limit on motions (with respect to both correction and amendment) because of the need for finality. For the same reason, the Advisory Committee might also state the time period within which the judge must rule on such motions.

Memoranda and other materials used in the development of some recommendations of this chapter are in Part III.

Chapter 8

Federal Court Administration

From an administrative standpoint, the third branch of government differs greatly from the organization it was even twenty years ago. The judiciary itself has made many changes, and Congress, working with the judiciary, has legislated several structural and procedural changes. Since 1970, the Judicial Conference leadership and committee structure have been reorganized and the judicial councils have gained more authority and broadened membership. The office of chief judge has grown in complexity and significance. Persons with specific court management skills help administer the courts. There is an expanded United States magistrates system and a fundamentally overhauled bankruptcy system. The explosive caseload growth has led Congress to increase the number of judicial branch employees from about 7,400 in 1970 to over 20,000, the increases being due mainly to supporting personnel.

This chapter contains recommendations about various aspects of the federal courts' administration and management.

A. Management and Planning

1. National Agencies

a. Judicial Conference

The Chief Justice has indicated to the committee that he plans to appoint a committee to review the Judicial Conference leadership structure established in 1987. For that reason, the committee has limited its specific recommendations to the few that follow:

- (1) **The concept of a "chancellor" of the United States courts merits serious consideration, although whatever conclusion is reached, the Chief Justice should remain the acknowledged head of the entire federal judiciary.**

At least since 1979 various observers have recommended the creation of a position, sometimes termed "chancellor," to which the Chief Justice would appoint a federal judge who would function as the administrative head of the federal judiciary (exclusive of the Supreme Court). The chancellor would exercise on a full-time basis many of the functions now per-

formed by the Chief Justice (or, through recent delegations, by the chair of the Executive Committee of the Judicial Conference or the director of the Administrative Office of the United States Courts).

The Chief Justice, we understand, believes that the chancellor concept and alternatives should be considered during the forthcoming review of the Conference leadership structure referred to above. We simply note our agreement that the matter be considered then. Some committee members also believe that a viable alternative would be the statutory authorization of the new Executive Committee structure within the Judicial Conference. The chair of the Executive Committee could fulfill most of the duties of the chancellor without formally altering the responsibilities of Chief Justice. On the other hand, the pressures of short and long-range planning, testifying before Congress, and leadership in general, may by now require full-time service of a chancellor rather than the part-time service of the Executive Committee chair.

Whether to adopt the chancellor concept or an alternative is a matter that will require very careful and extended consideration by knowledgeable persons under the aegis of the Chief Justice. Whatever arrangement is adopted, the committee believes it is essential that the Chief Justice continue to be the acknowledged head of the entire federal judiciary.

- (2) The Judicial Conference should enhance its long-range planning capability under the direction of its Executive Committee, with support from existing resources and from a discrete planning research unit, which could be located within the Federal Judicial Center.**

The Judicial Conference has made considerable progress recently in developing planning capabilities to guide those federal court operations that have a national focus. Various standing committees of the Conference, assisted primarily by the Administrative Office of the United States Courts and to a lesser degree by the Federal Judicial Center, are continually analyzing the courts' projected needs in such areas as additional judgeships, the budget, supporting personnel, space and facilities, and automation. Indeed, the Administrative Office recently created an Office of Planning, Evaluation, and Statistics as a source of assistance in several of these areas. Furthermore, judicial councils and individual courts have undertaken planning in discrete areas.

Most of this planning, however, is necessarily directed toward relatively short-term, operational goals. 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 committee, 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. Obviously, the Constitution determines the judiciary's most important goals and the separation of powers places many strategic planning decisions for the judiciary within the authority of Congress. But the Judicial Conference can and should participate with Congress in helping to shape the judiciary's future.

- How, for example, will anticipated demographic trends affect the judiciary and how should it plan for them?
- To what degree, if at all—and subject to what exceptions—should the judiciary be supported by the fees of its users?
- How should the judiciary adapt—in its administration and its decisional procedures—to major scientific and technological changes?
- What are the most reliable means for estimating the need for growth within the judicial branch?
- How should the courts see to the provision of representation of criminal defendants unable to afford their own counsel?

Thus, the Conference should consider enhancing its long-range planning capability to complement the planning activities already in place. A first step is to form an entity to oversee and coordinate the planning function. Long-range planning is a distinct function that embraces the full range of the judiciary's administration and thus should be the responsibility of a special subcommittee of the Conference's Executive Committee. That subcommittee should include representation from both the Administrative Office of the United States Courts and the Federal Judicial Center leadership. It might also include representation from one or more major committees of the Judicial Conference—for example, the Budget Committee—and, most importantly, it should have access to persons outside the judicial branch who may be of assistance in formulating policy. We understand that the Executive Committee has already taken steps to implement this proposal.

Where this "long-range planning committee" turns for staff is, of course, a decision for the Executive Committee to make. We presume it would rely to some significant degree on existing staff support in the Administrative Office of the United States Courts, particularly when the Office has special expertise in the area under study. It would also rely on the expertise and work of the various committees of the Judicial Conference. However, a long-range planning function needs additional support, different from that required for the operational planning already underway. Long-range planning requires social scientific, empirical research skills that allow

analysis of demographic trends, weighing conflicting data, and determining how to gather additional data. Consequently, the committee recommends that there be a small research staff dedicated to the long-range planning function. The location of that staff should ultimately be determined by the Conference. We note, however, that Congress has already authorized the Federal Judicial Center "to provide staff, research, and planning assistance to the Judicial Conference . . . and its committees." The Center has a tradition of providing professional research services that yield reliable, neutral, and detached information. Thus, this research staff would logically fit within the Center. The Center's staff and its research standard would be subject to the control of the Center's Board—thus ensuring an appropriate measure of independence. The long-range planning subcommittee of the Executive Committee would determine the planning research program and control the assignment of projects either to the research staff or to other persons or groups within the judiciary.

The Center, of course, always has on its agenda specific recurrent research and development obligations to the Conference and its committees and to specific courts. Consequently, should the Executive Committee designate the Center as a resource for long-range planning research, the Center should provide the Conference a separate unit, dedicated solely to the long-range planning function. The Conference's long-range planning will not function effectively with a staff that must meet a variety of other responsibilities in addition to the research necessary for long-range planning. The Conference will need continuous analysis of how the judiciary might try to anticipate and meet its future needs. At the same time, by placing planning responsibility under the aegis of the Executive Committee, the planning process will be a part of the mainstream of the judiciary's governing process, rather than an isolated, abstract function.

In Part II, see also Chapter 5.A.1, at pp. 89–91, proposing creation of an Office of Judicial Impact Assessment.

(3) Congress should amend 28 U.S.C. § 331 to recognize the Conference's authority to issue administrative rules.

The Judicial Conference has no specific statutory authority to mandate administrative actions. By contrast, each circuit judicial council may "make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit." Yet the Conference frequently and appropriately adopts directives to regulate administrative matters within the federal court system. These directives have implied legal foundation, and practical effect, because they are executed by the director of the

Administrative Office of the United States Courts, who exercises his statutory authority "under the supervision and direction of the Judicial Conference." We believe, nevertheless, that the Congress should provide explicit statutory acknowledgement of the Judicial Conference's rule-making function in the court administration area.

b. Congress should amend 28 U.S.C. § 133 to authorize temporary judgeships for the court of any active judge selected to assume a full-time office of national federal judicial administration.

Federal judges currently serve as members of the United States Sentencing Commission and have served and currently serve as the director of the Federal Judicial Center. Conceivably judges might in the future be asked to assume other national judicial administrative positions, such as director of the Administrative Office of the United States Courts, administrative assistant to the Chief Justice, and chancellor, should that office be established. If a judge in senior status accepts such a position, the judge's court loses the services of the senior judge, but the court still remains at its full judgeship strength. If an active judge is selected for such a position, however, one or both of the following will occur: (1) the court will lose the services of an active judge, and/or (2) the judge will assume an extraordinarily heavy workload.

We commend the active judges serving in such positions, but we believe they should not be expected to fulfill the responsibilities of two very demanding jobs. We also note that the current statutory arrangement encourages the selection of senior judges for such national administrative positions, whereas the courts should have the benefit in these offices of judges representing all levels of seniority.

Therefore, we recommend that Congress authorize a temporary judgeship for the court of any active judge selected to serve in a full-time position of federal judicial administration, so that the number of active judges on the court will not be reduced by virtue of the judge's service. The authorization should provide that the President would not fill the first vacancy that occurs if the judge should return to active service on the court.

c. Administrative Office of the United States Courts

At the outset, we commend the current leadership of the Administrative Office for the many positive changes of recent years. We offer two suggestions, both of which are directed to Congress.

- (1) **Congress should amend 28 U.S.C. § 601 to authorize the Chief Justice to appoint the the director and deputy director of the Administrative Office, subject to Judicial Conference concurrence.**

Currently, the Supreme Court appoints both the director and the deputy director of the Administrative Office. Yet the Chief Justice is the only member of the Court with any official judicial administrative duties regarding the circuit and district courts. The Administrative Office, on the other hand, serves the lower courts but is not involved in the administration of the Supreme Court (which has its own administrative structure). Because the Administrative Office works under the statutory supervision of the Judicial Conference, the Chief Justice, as presiding officer of the Conference, should appoint the Office's director and deputy director, subject to the Conference's concurrence.

- (2) **Congress should increase funding for the Administrative Office.**

Increases in the federal judicial workload, and additional statutory responsibilities, have created in turn a dramatic increase in the Administrative Office's workload and responsibilities. The funding and personnel available to the Administrative Office, however, have not kept pace with the rest of the judicial budget. The Administrative Office's share of that budget has dropped since 1981 from 2.6 percent to an estimated 1.9 percent.

The Administrative Office's work is also increasing in complexity. On average, Administrative Office staff members each support almost forty persons in the judicial system, an increase of more than 25 percent in ten years. The Office thus needs more senior professionals to accomplish more work with comparatively fewer resources. In fact, Congress may wish to consider granting the Administrative Office greater flexibility in its personnel selection and salary determinations, especially at the top management levels. At present, the director of the Administrative Office has authority to appoint many fewer top management personnel than would be the case in executive agencies of similar size; and, although a judicial branch agency, the Administrative Office is subject in these matters to regulations of the Office of Personnel Management.

- d. **The Federal Judicial Center should request, and Congress should provide, significant increases to its budget.**

Like the Administrative Office, the Federal Judicial Center, the third branch's education and research agency, is serving a much larger judiciary with staff and resources that are, proportionately, much smaller than they were ten years ago. Furthermore, the Center's mission—especially for the education of judges and supporting staff—has taken on a fundamen-

tally greater importance in this era of complex litigation and a complex work environment. Beyond that, this committee recommends at least fourteen major research and education projects for the Center.

We are concerned that the Center no longer has the resources to allow it to make the contribution to the courts that the Congress intended. The size of its staff since 1980 has actually declined by more than 16 percent. Thus, in 1980, there was one Center staff person for every 120 court employees, but there is now one Center employee for every 240 in the courts. And the Center's budget—expressed as a percentage of the entire third branch budget—is half of what it was in 1980. Then, the Center budget was 1.44 percent of the total judicial budget; now it is 0.75 percent.

We do not fault the Congress for this situation. The Center has historically been reluctant to seek major appropriations increases. We believe the Center should abandon that approach, and we urge the Congress to respond accordingly.

2. Regional Agencies

a. Judicial Councils

(1) The Judicial Conference should consider whether council composition should be prescribed by statute.

The circuit judicial councils are essential to the administration of the judiciary, and thus Congress ten years ago provided that they be composed of both district and circuit judges according to a statutory formula (28 U.S.C. § 332(a)(1)). The formula requires minimum representation of district judges, based on the number of circuit judges on the council, a number determined by a vote of all active circuit judges in the circuit. The committee believes that variations in the degree of district judge representation from circuit to circuit may weaken the councils' effectiveness and therefore recommends that the Judicial Conference consider whether the composition of judicial councils ought not to be prescribed by statute in a nationally uniform manner.

(2) The councils should undertake long-range planning.

Long-range planning by the judicial councils, in addition to short-term operational policy making, is especially desirable in light of present trends toward decentralization of budgeting, administration, and space and facilities planning. The committee believes that all councils should give greater attention to long-range planning.

b. Management in the courts

(1) Congress should not change the current method of chief judge selection.

The modified seniority method of chief judge selection established in 1982 (see 28 U.S.C. §§ 45 & 136) is not faultless, but it operates well in practice and is preferable to any other method. The statutorily specified term for chief judges is a definite improvement over the previous pattern of very short or very long periods of service. Seniority, of course, does not ensure management ability, but additional training can help, and the committee has recommended it. The training, we presume, will include options for delegation of authority.

We note that the statute does not *require* that a next-eligible judge assume the chief judge position when it becomes vacant. Judges whose skills and interests do not lie in the administrative area should be commended for letting the office pass to a judge who is more interested in the work of the chief judgeship and for seeking other ways to serve the court.

(2) The Federal Judicial Center should continue its plans to increase training to chief judges and chief-judges-to-be.

Competence as a chief judge requires initial and continuing education in the special demands of the position. Training is not a sufficient condition, but it is a necessary one. As courts become increasingly busy, and as programs such as budget decentralization shift more administrative responsibility to the courts, effective leadership and skillful administration become all the more crucial. Chief judges should not be micro-managers. Enlisting the aid of able professional staff and encouraging colleagues to share in the running of the court are among the most important of leadership skills. The committee endorses the recommendation of the Judicial Conference Executive Committee that the Federal Judicial Center increase its training programs for chief judges and notes that the Center has begun efforts to do so for district and bankruptcy court chief judges, including providing preparatory training for those soon to become chief judges.

(3) Courts should fill key administrative positions only through a merit selection process.

The complexities of administration in an era of burgeoning caseloads make professional staff assistance a necessity. Creation of the office of circuit executive two decades ago reflected growing awareness of the need for professional court administration. The dedicated professional court ad-

administrator, skilled in modern management and familiar with the uses of automation, is a key to effective federal court management. The ultimate test of professionalism is, of course, performance—which turns as much or more on dedication, experience, and talent as on special training. Nevertheless, no court in this era can afford to hire key administrative personnel without a careful search and evaluation process designed to promote, or obtain from outside, the most qualified person. All courts should advertise and open up key administrative positions on a merit selection basis.

(4) Congress should authorize district courts to use the term “district court administrator” instead of “clerk of court.”

The title of “clerk” may not necessarily convey the multi-faceted management role that is increasingly expected of today’s clerks of court. A title change that emphasizes their administrative roles may enhance their administrative functions and reduce the friction between competing offices. The change of title should be optional since some districts may prefer the traditional title.

A district executive pilot program, patterned loosely after the circuit executive role, has been instituted in eight metropolitan district courts. This program has had mixed reviews. In the nation’s largest district court, the Southern District of New York, the office reportedly has worked well. In some other locations, friction has developed between the clerks of court and those occupying this new, largely undefined function. Superimposing a new and undefined function over, or side by side with, an existing function may create conflict, especially where it is unclear who is ultimately in charge. It may be that only some particularly large courts require the two separate offices. We believe most courts should emphasize upgrading existing functions. The title change suggested above may help by reflecting the increased range of administrative responsibility required in today’s courts.

(5) The Federal Judicial Center should conduct a comprehensive study of the administration of the district courts and the courts of appeals, including analysis of, among other topics, the role of chief judges, the interrelationship among court units, and the assignment of judges to specific duty stations.

B. Personnel

1. Judges

a. Congress should *not* enact disincentives to senior judge service.

Effective federal court operations require maintaining the incentives that the current senior judge system affords. Few organizations in the nation have such a successful method of utilizing retired employees in its work force as has the federal judiciary. The current system allows judges to retire on "senior status," thus permitting the positions to be filled by new judges while, at the same time, the senior judge continues to offer service to the courts.

The system works an enormous benefit to the taxpayer: it employs persons who, in most other occupations, would be receiving pensions while performing no service for the organization. Without the senior judge program, more than 80 additional judgeships would be needed at an additional cost of \$45 million in order to provide the equivalent service to the public.

The Omnibus Ethics Reform Act of 1989 approved a cost-of-living increase for United States judges and justices and provided for future cost-of-living adjustments. In order for senior judges to obtain these increases, the senior judge must be certified by the respective chief district or circuit judge as having met one of three requirements, one being an annual courtroom caseload equivalent to three months of regular duty. This and related changes were designed to offset criticism that a judge could do no work but still receive the increase. The committee believes that, sensitively implemented, this change can be incorporated without undermining the system's essential incentive.

b. Congress should repeal the statutory requirement for specific authorization for cost-of-living judicial salary adjustments and continue to provide timely and adequate judicial salary adjustments.

The committee welcomes passage of the Omnibus Ethics Reform Act of 1989 and encourages Congress to continue to provide timely and adequate adjustments to maintain the proper relationship between prevailing economic conditions and judicial compensation. In that regard, we believe Congress should repeal § 140 of Pub. L. No. 97-92, 95 Stat. 1183, 1200, which requires specific authorization before judges may receive cost-of-living adjustments granted to all other federal government employees.

- c. **Congress should increase funding of Federal Judicial Center judicial education programs, and those programs should include training in automation and computers.**

Judges, like other professionals, must periodically refresh their educations to stay abreast of the latest developments in the law. This is true with respect to both substantive changes and increasingly important administrative techniques of case management employed to handle heavy caseloads and complex litigation. Moreover, we believe all judges should have the right to become computer literate, to ensure that, at the least, they are able to direct the research of their staffs and become aware of the potential for more efficient handling of their caseloads through the use of automation and electronic docketing. No other entity is better suited to perform this function than is the Federal Judicial Center.

In Part II, see also Chapter 5, § E, at pp. 99-100, regarding civil case management; Chapter 9, § B.3, at pp. 169-70, on education regarding bias and discrimination.

- d. **Judges of the courts of appeals should be afforded a regular opportunity to sit on other courts of appeals from time to time, on an exchange basis, as a means of promoting education in court administration.**

We believe such a program would represent a cost-effective means of familiarizing judges of the courts of appeals with management and administrative techniques that appear to work effectively in other courts, and thus allow them to consider those techniques for adaptation and possible adoption in their own courts.

- e. **Congress should amend the applicable portions of titles 28 and 10 to provide that judges of the United States Claims Court and the United States Court of Military Appeals receive the same reappointment and retirement provisions as are allowed the judges of the United States Tax Court.**

Currently, all United States Claims Court judges have a fifteen-year term, with no possibility of recall or pension until they are eligible for retirement, generally at age sixty-five. Some may not even be eligible for any significant pension at age sixty-five because of a lack of prior government service. There are only two realistic options available to a judge who will not be sixty-five when that judge's term ends (a majority of judges now serving on the court). The judge must either seek reappointment from the President through the Justice Department or seek employment as a

litigating attorney. The Justice Department is the defendant's representative in all suits pending before Claims Court judges. The most likely source of litigation employment is with firms that appear before the court on behalf of plaintiffs. A judge's seeking employment through either is unseemly and may at least appear to threaten the Claims Court judges' independence.

Although the United States Court of Military Appeals is somewhat afield of our mandate, we note that the judges of that court have similar threats to their judicial independence. The United States, through the Department of Defense and its military departments, is the prosecuting authority in all cases before the Court of Military Appeals. Judges of the Court of Military Appeals must seek reappointment from the President through the Defense Department.

Since 1969, the judges of the United States Tax Court have been provided with both judicial independence and adequate job security through their reappointment and retirement provisions, 26 U.S.C. §§ 7443(e), 7447(b)-(f). Prior to the expiration of a Tax Court judge's fifteen-year term, that judge will advise the President of a desire to be reappointed. A judge not reappointed becomes a senior judge of the Tax Court and immediately receives retirement pay. The Congress, in creating the most recent Article I court, the United States Court of Veterans Appeals, instituted almost identical reappointment and retirement provisions for that court as exist for the United States Tax Court. See 38 U.S.C. §§ 4096-97.

We believe the judges of the United States Claims Court and the United States Court of Military Appeals should have similar protections and thus recommend that the judicial reappointment and retirement provisions of the United States Claims Court and the United States Court of Military Appeals be amended to conform to the same provisions of the United States Tax Court.

2. Supporting Personnel

We encourage the Administrative Office of the United States Courts, under the direction of the Judicial Conference Committee on Judicial Resources, to continue the in-depth, contracted review of the Judicial Salary Plan now under way.

In a period of substantially increased workload, the partnership between judges and a dedicated and competent support staff is critical to maintaining the high standards expected of the federal courts. The Department of Labor, however, in 1987 predicted an imminent, national workforce crisis, generated in part by technological change and demographic trends.

Increasing demands for highly skilled workers, combined with an aging workforce, has already created shortages of skilled workers—shortages that are likely to increase in ensuing years. More broadly, the private, bipartisan National Commission on the Public Service has warned of a disturbing erosion in the quality of America's public service.

Federal judicial administration will be increasingly affected by growing pressures from the private sector. The courts' need for more highly technically trained people will outpace their ability to attract and retain them. Budgetary constraints have already required the probation and clerks' offices to function at from 90 percent to 95 percent of authorized staffing levels—this at a time of increasing difficulty in filling technical positions under the judiciary's entry salary levels. Consequently, a number of critical positions throughout the system remain unfilled.

The committee believes that the judiciary can be effectively administered in the future only if it addresses these issues now, so as to strengthen the personnel cadre who manage the courts' work on a day-to-day basis and provide the experience, continuity, and institutional memory that sound government requires. The Administrative Office, at the direction of the Judicial Conference's Judicial Resources Committee and with the assistance of expertise from outside the Office, is currently analyzing such matters as a more rational compensation structure, geographic pay differentials, fringe benefits, and expanded continuing education opportunities for support staff. We trust that the study under way will also reflect the changing needs that technology creates for the courts professional staffs and supporting personnel.

3. Criminal Justice Act Administration

- a. **Congress should amend 18 U.S.C. § 3006A(g)(2)(A) to require that the selection of the federal defender in each jurisdiction be done by an independent board or commission formed within the district to be served.**

The Criminal Justice Act provides for two kinds of defender offices to serve the federal courts. (A district is not obliged to have either.) District courts may provide in their statutorily-mandated criminal justice act plans for a "federal public defender organization"; the respective court of appeals selects the federal public defender, who, along with the office's other staff, are federal government employees, supported by the federal judicial budget. Alternatively, districts may be served by a "community defender organization." The Act characterizes such an organization as "a non-profit defense counsel service." The head of the office is typically selected by the

governing board or commission of what the statute calls the "group authorized by the plan to provide representation."

We believe that whether courts adopt the federal or community defender model, the head of the office should be selected by a board or commission rather than by judges before whom they may appear as counsel. This method also spares federal judges the time-consuming burdens of selecting the chief defender and of administering the panel attorney system.

b. The Judicial Conference should conduct a comprehensive review of the 1964 Criminal Justice Act, as amended, including its implementation and its administration.

Some years have passed since the last comprehensive review of the Criminal Justice Act program. Since that time, the federal defender program has grown substantially in size and complexity. For example, panel attorney appointments have risen from 16,000 in 1966 to 65,000 in 1988. There have been many other changes: the maturation of the defender movement, the dramatic increase in criminal prosecutions, the evolving sophistication and complexity of criminal law, the constitutionally mandated necessity of competent defense counsel, the small percentage of the legal profession that practices criminal law, the legal and ethical requirement of an independent criminal defense bar, the heavy workload of the federal judiciary, the independence of the federal prosecutor, and the revival of the federal death penalty.

In view of the great importance of this program, we suggest that the Judicial Conference appoint a special committee to conduct a detailed study of the federal defender program. The review should assess the current effectiveness of the CJA program and recommend appropriate legislative, procedural, and operational changes. In addition to present and former federal defenders, the study committee should include representatives of the criminal defense bar recommended by the National Legal Aid and Defense Association, the National Association of Criminal Defense Lawyers, and the Criminal Justice Section of the American Bar Association. Because issues of administration, ethics, and the public trust and interest are involved, participants sensitive to such perspectives should likewise be appointed.

The study committees should focus on:

- the impact of judicial involvement in the selection and compensation of the federal public defenders and the independence of federal defender organizations, including the establishment and termination

of federal defender organizations and the federal public defender and the community defender options.

- equal employment and affirmative action procedures in the various federal defender programs.
- judicial involvement in the appointment and compensation of panel attorneys and experts.
- adequacy of compensation for legal services provided under the Criminal Justice Act.
- the quality of the Criminal Justice Act representation.
- the adequacy of administrative support for defender services programs.
- maximum amounts of compensation for attorneys with regard to appeals of habeas corpus proceedings.
- contempt, sanctions, and malpractice representation of panel attorneys.
- appointment of counsel in multi-defendant cases.
- early appointment of counsel in general, and prior to the pretrial services interview in particular.
- the method and source of payment of the fees and expenses of fact witnesses for defendants with limited funds.
- the provision of services and/or funds to financially eligible arrested but un-convicted persons for non-custodial transportation and subsistence expenses, including food and lodging, both prior to and during judicial proceedings.

The study should propose a formula for the compensation of CJA counsel that will include an amount to cover reasonable overhead and a reasonable hourly fee. The notion that CJA representation is or should be a casual pro bono assignment has long been outmoded. While the committee does not anticipate that CJA representation will be compensated at the rates charged by leading retained counsel, the committee nonetheless believes that representation of indigent defendants should not involve a financial loss to counsel.

- c. Based on the study recommended above, Congress should enact a more comprehensive compensation system for CJA attorneys that will include an amount to cover reasonable overhead and a reasonable hourly wage.

C. Resources

1. Increased funding

- a. **Congress should provide increased resources to enable federal courts to meet the increased workload created by the war on drugs, including necessary judges and judgeships and funding for magistrates, probation and pretrial services officers, substance abuse treatment programs, defender services, and court security, including housing for incarcerated defendants near the courthouse.**

Rapid expansion of the federal criminal caseload caused by drug prosecutions threatens to overwhelm the resources of the federal courts. Congress must appropriate resources to enable the federal courts to deal effectively with their enlarged criminal caseload. The committee believes the situation calls for rapid congressional action on two related proposals: Congress should provide both (1) the resources requested in the Judicial Conference report of March 1989, and (2) additional judgeships.

Congress should increase funding for the federal courts to permit them to cope with their enlarged criminal caseload. Congress should provide not only the resources requested in the March 1989 report of the Judicial Conference but also additional judgeships on an emergency basis. The situation is too urgent to await the 1990 biennial judicial survey.

This recommendation for additional judgeships is not to be confused with our overall recommendation that Congress and the Judicial Conference investigate alternative means for reducing federal caseloads *before* encouraging the appointment of additional judges. Nor does this request override our recommendation for restoring a balance to federal and state drug prosecutions.

In Part II, see also Chapter 2, § A, at pp. 35–38, on the need to divert drug prosecutions to the state courts.

- b. **The Office of Judicial Impact Assessment should analyze the resource implications of proposed legislation.**

As noted, one function of the proposed Office of Judicial Impact Assessment proposed in Chapter 5 should be to provide estimates of the additional resources the federal judicial system will need to process the litigation likely to be created by proposed statutes.

In Part II, see also Chapter 5, § A, at pp. 89–91, proposing the Office of Judicial Impact Assessment.

2. Federal Judicial Budget Process

- a. **The Administrative Office of the United States Courts should continue its budget decentralization program and pilot studies regarding further decentralization of budgeting, procurement, and other administrative functions.**

Under statute, authority for certain basic management functions for all federal courts across the country—functions such as procurement and property management, to name just two examples—resides with the director of the Administrative Office (28 U.S.C. § 604). It is clear, however, that delegating much of this authority to the courts—“decentralization”—is in the best interests of the entire judiciary. The Administrative Office has made commendable progress in recent years in delegating to the federal courts across the country the authority to manage their own affairs in thirty specific areas, with fourteen pilot or planned delegations under way. Currently, for example, all courts have authority to manage funds associated with ten budget categories, totalling \$52 million, which is a large portion of the courts budget other than the large categories of salaries and space rental. A more extensive pilot decentralization program involves four districts and one court of appeals.

We understand that the Administrative Office, with the approval of the Judicial Conference and the Congress, will continue this move toward decentralization of authority as long as appropriate systems and controls are in place.

- b. **Congress should provide the judicial branch control over its space and facilities functions.**

Proposed legislation would make the judicial branch, in consultation with the Congress, independent of the executive branch in acquiring and maintaining its space and facilities. The Judicial Conference approved this legislation at its September 1989 meeting. The Conference’s Space and Facilities Committee developed it with support from the Administrative Office and recommendations by the National Academy of Public Administration, based on the Academy’s extensive review of the history of the court’s space and facilities administration.

This legislation would change the current relationships between the judiciary and executive branches in courtroom and office space matters. Currently, the General Services Administration controls planning for the judiciary’s needs and the Office of Management and Budget reviews and changes those plans. We believe that, instead, the judiciary should control the planning for judicial branch space needs. Under this legislation, the

judiciary would work directly with the congressional committees with jurisdiction over public works. The legislation would also give court administrators greater discretion and control of this support function. Any additional administrative burdens that the statute would create for the judiciary would be more than offset by the increased efficiencies it would provide the courts.

- c. **Congress should require that the budgets for the Court of Appeals for the Federal Circuit and the Court of International Trade be submitted as part of the overall federal judicial budget request.**

Currently, the Court of International Trade and the Court of Appeals for the Federal Circuit each submits its own appropriations request to the Office of Management and Budget and thus to Congress, separate from the rest of the federal judicial budget proposal. This treatment, due to an historical anomaly, is inconsistent with the budgetary process for the other federal courts. The Court of International Trade and the Court of Appeals for the Federal Circuit should participate in the same budgetary process as the rest of the federal judiciary.

We make this recommendation with the realization that the current chief judges of both courts have used their courts' special budgeting situation responsibly and in complete cooperation with other courts. Congress may wish to consider deferring implementation of this proposal during their tenures as chief judge. We believe, however, that according individual courts special budgetary treatment is unsound in principle, and could create special problems in the future.

- 3. The Judicial Conference should authorize a thorough study of the federal court library program.**

The last detailed study of the federal court library system was published in 1978. Between 1978 and 1988, the total number of primary users served by the federal court libraries—including judicial officers, law clerks and staff attorneys—grew from less than 2,000 to almost 4,000. Law clerks, the chief users, increased from 849 to 2,107 in the same period. The number of central libraries serving judges and their staff grew from 28 to 70; those libraries presently serve some 1,570 judicial officers located in over 330 cities.

During this ten-year period, the number of library support staff has not kept pace. The Judicial Conference developed a formula in 1981 for determining the number of library personnel needed for the judiciary. This formula provided one library staff member for every six full-time judicial

officers. Until recently, there were more than twenty satellite locations serving at least six judicial officers without any library staff on site. As to the entire federal court library system, present staff levels are only 80 percent of the support staff suggested under the 1981 staffing formula.

In terms of automation and information delivery, the federal court library system is ten to fifteen years behind its counterparts in universities and the private sector. Automation efforts require intensive and critical planning prior to systems implementation. The press of meeting immediate needs has put the federal court libraries in the precarious position of managing differing data utilizing a variety of software on non-compatible hardware.

The services provided to the judiciary by the federal court library system are critical to the substantive decisional process, but the system must avoid unnecessarily large investment in space, staff and books. The situation urgently requires a detailed examination of the resources, capabilities and operations of the federal courts' library system. In view of the growing gap between the federal courts library program and other public and private sector libraries, such a study should be conducted by qualified library consultants specializing in long-range planning and personnel evaluation.

4. Court reporting

- a. **The courts should consider the impact on courts and litigants before adopting technological innovations designed to save costs in court reporting. The committee recognizes the enormous importance of an excellent court reporting system to the efficient functioning of the federal courts. Delays in obtaining transcripts are a serious cause of appellate delay. We recognize the significant contributions that official court reporters have made and continue to make to the administration of justice.**

We did not have the resources to study the specifics in this rapidly changing area, but we note a number of continuing concerns in this area to the courts, reporters, and litigants. Accordingly, the committee urges that the federal judicial system, and in particular the Administrative Office, give high priority to ensuring that transcripts are produced in the most efficient and expedient manner possible. The committee also cautions that resort to a technological innovation, at any level of the federal judiciary, should not occur until the impact of that improvement has been assessed by both the courts and litigators at the trial and appellate levels.

- b. Congress should amend the Ethics in Government Act to excuse federal court reporters from filing financial disclosure forms.**

Although some reporters have incomes high enough to trigger the requirement, they do not have realistic opportunities for conflict of interest situations. Requiring the Judicial Ethics Committee to review their reports thus deprives the Ethics Committee of time it might otherwise spend on more important matters.

D. Relations with the Press and Public

- 1. Each circuit should designate the circuit executive or another person as the media contact person. The Federal Judicial Center or some other body should provide training for them, and for chief judges, in media relations.**
- 2. Courts should hold "press days" to facilitate communication between the courts and the media.**
- 3. The courts should continue and expand publications programs to explain court operations to the public.**

Federal court capacities to provide the public and the press the information they deserve in an efficient manner have developed only recently. The Supreme Court had no such office until 1935, and it was quite rudimentary until 1973. The first statutory recognition of such a need came in 1971, when the Circuit Executive Act authorized those individuals to serve as the circuit's "liaison to [among others] . . . news media and other public and private groups having a reasonable interest in the administration of the circuit." Only in 1987 did the Administrative Office create a Public Information Office within what is now its Office of Legislative and Public Affairs, responsible for handling the public information needs of the federal judiciary as a whole and that of the Judicial Conference in particular. The Office disseminates information to the courts and to the media through press releases and a newsletter and assists courts in organizing "press days" through which the media and court representatives can discuss their respective work, needs, and concerns.

The courts' slow pace in creating these essential instruments of modern government probably reflect the fact that courts speak through their decisions and do not need press secretaries to promote their work. The press and the public, however, should have ready access to the information about court operations and work that is demonstrably public. The Administrative Office's Public Information Office is necessary for the federal courts but it is obviously not sufficient to meet the public information needs of the entire federal court system. The committee encourages the circuit executives

and district court personnel to continue to give greater emphasis to public information needs. Many of the inquiries received by the Administrative Office's Public Information Officer concern the activities of a particular court or judge and should be handled in that court, not in Washington. The "press days" instituted in various district courts have received wide acclaim by the judges and the news media.

(The committee considered the issue of cameras in the courtroom but elected to defer to the Ad Hoc Committee on Cameras in the Courtroom established by the Judicial Conference. We note, however, that while much of the interest in this area has focused on the televising of trial proceedings, the televising of appellate court proceedings presents very different issues.)

Working papers and other materials used in the development of some recommendations in this chapter are in Part III.

Chapter 9

Protecting Against Bias and Discrimination in the Judicial Branch and the Judicial Process

A. Excellence and Diversity in the Judicial Branch

The President and Senate should endeavor to select the most qualified candidates for federal judicial office, irrespective of party affiliation, but with due regard for the desirability of reflecting the heterogeneity of the American people. The judiciary should endeavor to select the most qualified people to serve as supporting personnel of the federal courts, including bankruptcy judges and magistrates, also with due regard for the heterogeneity of the American people.

B. Internal Judicial Branch Procedures

The federal judiciary can be proud of its role in promoting civil rights and equal employment opportunity throughout this nation. Nevertheless, that history must not blind us to the potential for invidious discrimination in judicial branch employment practices and, more generally, in how the judges and court staff deal with the general public and litigants.

1. Judicial Branch Grievance and Complaint Procedures

The judicial branch currently employs thousands of men and women in all manner of staff positions; there is a potential for abuse and discrimination in a system so big. Judicial branch employees and the nation at large must have confidence in procedural protections to guard against discrimination and misconduct.

a. **The Judicial Conference and circuit judicial councils should establish informal grievance procedures to handle and resolve complaints.**

Almost fifteen years ago, the Administrative Office drafted model grievance procedures for employees in that office, but the majority of courts have no apparatus for addressing and resolving the concerns and complaints of their employees. The use of such procedures is good practice in

any organization, including the judiciary. Grievance procedures would promote efficiency and respect for the administration of the nation's courts and could be implemented easily in all but the smallest courts. Accordingly, we recommend that all circuit councils consider adopting such procedures.

- b. The Judicial Conference should amend the judicial branch Discrimination Complaint Procedures to ensure that complaints of employment discrimination will receive an independent review outside the court in which the complaint arose.**

The Model Plan currently employed by the Judicial Conference and the federal courts provides for prompt review of complaints of invidious discrimination, including allegations of restraint, interference, coercion, discrimination, or reprisal. Under the existing procedures, the court's equal employment opportunity coordinator first attempts to resolve the complaint informally and may conduct any investigation deemed necessary. The coordinator then files a report with the chief judge of the court and either the complainant or alleged discriminatory official may object to the coordinator's findings by filing a written request for review with the chief judge. The chief judge is to conduct any further proceedings deemed necessary and determine the appropriate resolution of the complaint. The chief judge's decision is final and may not be appealed.

Although this procedure appears to have been successful over the years, the complete lack of review by a person somewhat removed from the situation is arguably a cause for concern. It is not difficult to imagine a situation in which a fact-finder's impartiality and judgment might be clouded or questioned because of over-familiarity with the parties or allegiance to the court and its officers. The opportunity for an independent review made from outside the court in which the complaint arose would eliminate this possible problem. Perhaps the most promising choice for the role of independent reviewer would be a committee of the circuit's judicial council, which would enjoy the double advantage of familiarity with, but yet independence from, a particular court and personnel in question. However, the Judicial Conference has been reluctant to impose additional assignments on the judicial councils and has twice rejected proposals of this sort. These concerns are understandable, but they do not override the need for review in the discrimination complaint process that will bolster the confidence of judicial employees and reinforce the proud heritage of the federal judiciary.

To avoid undue additional burdens on already overtaxed judges, we suggest that the judicial councils appoint a review panel with a rotating member-

ship comprising district and circuit judges. This will effectively prevent any single judge or group of judges from shouldering the full responsibility for outside review. Moreover, the judicial council or panel should be empowered to appoint any judicial officer within the circuit (but outside the court in which the complaint arose) to investigate or resolve grievance complaints.

2. Complaints from the public

The judicial councils of the circuits should consider establishing grievance procedures for complaints by members of the public of inappropriate treatment by judicial branch personnel, including allegations of racial, ethnic, religious, or gender bias.

On some occasions members of the public may have complaints about actions of personnel of the federal judicial system. In some situations, existing statutory discipline mechanisms are available for such complaints. Where there are no extant mechanisms, the judicial councils should establish appropriate procedures to consider such complaints.

3. **The federal judicial system should expand efforts to educate judges and supporting personnel about the existence and dangers of racial, ethnic, and gender discrimination and bias.**

Ours is a nation committed to the principle of equality under the law. We need more than good laws to make this principle a reality. We need to be able to continue to rely on good judges and supporting personnel as well. Studies in many state systems reflect the presence of bias—particularly gender bias—in state judicial proceedings. Although we have confidence that the quality of the federal bench and the nature of federal law keep such problems to a minimum, it is unlikely that the federal judiciary is totally exempt from instances of this general social problem.

State studies on bias in the courts provide considerable knowledge of this subject. Rather than another study, the committee proposes means of preventing and dealing with bias in federal court proceedings and operations. Although formal disciplinary procedures may sometimes be a necessary and appropriate response, in most instances they will prove an overly blunt and clumsy instrument. We believe education is the best means of sensitizing judges and supporting personnel to their own possible inappropriate conduct and to the importance of curbing such bias when shown by attorneys, parties, and witnesses. To this end, we ask the Federal Judicial Center and circuit conferences to continue and expand their educational efforts in this important field.

Judicial education should not, however, end with orientation or yearly circuit conferences but should be a life-long process and pursuit. We should never underestimate the power of informal peer pressure. The federal judiciary is a relatively small and collegial body; individual judges can and should make the aspiration of "equality under law" a living reality.

Chapter 10

Summary and Conclusions

This chapter serves three purposes:

- it summarizes, by topic, the committee's recommendations to the various branches of the federal government, to the state courts, to the bar, and to the research community;
- it lists, by topic, several subjects of importance that came to the committee's attention but that the committee was unable to study sufficiently to form any recommendation;
- it summarizes the committee's responses to its statutory charge.

A. Summary of Recommendations

The table on pp. 172-83 summarizes, by topic, the committee's recommendations to the Congress and to the federal courts, the two objects of the great bulk of recommendations. Following the table are recommendations for the Department of Justice and executive branch generally (p. 184), to the State Justice Institute (p. 184), and to the state courts (p. 185), and recommendations for research projects not directed to any particular organization or entity (p. 185). As much as possible, the recommendations in § A use the same topic headings throughout. The parentheticals give the corresponding pages in the preceding chapters. For ease of reference, we have listed some items in more than one place.

Recommendations to Congress and the Federal Courts

| Topic | Recommendations to Congress | Recommendations to the Courts* |
|--|---|--|
| Administrative Office of the United States Courts | <p>Authorize the Chief Justice to appoint director and deputy director with Judicial Conference approval (150)</p> <p>Increase appropriations and consider providing greater flexibility in personnel matters (150)</p> | |
| Administrative appeals | Do not create a national administrative appellate court (72-73) | |
| Alternative dispute resolution | Broaden authorization for procedures; fund broadened experimentation, including on financial incentives (82-86) | Establish an ADR oversight and information committee (86-87) |
| Appealable orders | Consider delegating authority to Supreme Court, under Rules Enabling Act, to define and broaden categories (95-96) | |

* Including, as appropriate, the Judicial Conference, judicial councils, the Administrative Office, the Federal Judicial Center, the United States Sentencing Commission, and the various courts or judges.

| Topic | Recommendations to Congress | Recommendations to the Courts |
|------------------|--|--|
| Appellate courts | <p>Provide requested judgeships and take action with respect to existing vacancies (112)</p> <p>Authorize all circuits to use limited in bancs (114-15)</p> <p>Authorize a five-year project on intercircuit conflicts (126-29)</p> <p>Do not create a national intermediate appellate courts(116-17)</p> <p>Do not create a national administrative appellate court (72-73)</p> | <p>Devise weighted caseload index for appellate judgeships (111-12)</p> <p>Gather data on pro se litigation and analyze ways of handling such cases (112-13)</p> <p>Conduct study of appellate case management techniques (115-16)</p> <p>Study number and frequency of intercircuit conflicts (125)</p> <p>Create committee to monitor proposed five-year intercircuit conflict project (126-29)</p> <p>Try to avoid intercircuit conflicts by giving deference to opinion of first-speaking court (129-30)</p> <p>Review opinion publication rules through ad hoc Judicial Conference committee (130-31)</p> |
| Attorney fees | Do not adopt the "English rule" (105) | <p>Consider ways to limit disputes over court-set attorney fees (104-105)</p> <p>Conduct, through Federal Judicial Center, study of alternatives to lodestar method (104)</p> |

| Topic | Recommendations to Congress | Recommendations to the Courts |
|-------------------------|--|--|
| Bankruptcy | <p>Require each circuit to create Bankruptcy Appellate Panels; provide increased resources for their operation (74-76)</p> <p>Authorize multi-circuit BAPs for small circuits (74-76)</p> <p>Clarify certain bankruptcy appellate provisions (76-77)</p> <p>Transfer U.S. trustee program from Justice Department to judicial branch (77-79)</p> | <p>Select well-qualified lawyers as bankruptcy judges, with due regard for the heterogeneity of the American people (167)</p> |
| Bias in judicial branch | | <p>Establish informal internal grievance procedures; provide independent review of formal internal grievance complaints; provide education about bias and discrimination in courts and courtrooms (167-70)</p> <p>Select qualified people with due regard for heterogeneity of American people as support personnel (167)</p> <p>Consider establishing grievance procedures for complaints by public alleging racial, ethnic, or gender bias (169)</p> |
| Chief judges | <p>Do not change chief judge selection method (152)</p> | <p>Continue training of chief judges and prospective chief judges (152)</p> |

| Topic | Recommendations to Congress | Recommendations to the Courts |
|---------------------------|---|--|
| Civil case management | Consider alternatives to highly specific mandatory case management requirements (99–100) | Consider additional case management efforts and provide more judicial education about same (99–100) Make greater use of oral findings and conclusions and continue to provide, through the Federal Judicial Center, additional education about it (102) |
| Claims Court | Amend statute governing reappointment and retirement provisions (155–56) | |
| Complex cases | Create new minimal diversity jurisdiction to facilitate resolution of complex cases; amend multi-district litigation statute to allow consolidated trials (44–45) | Include guidelines for consolidation and severance in <i>Manual for Complex Litigation</i> (45) Disseminate information about judicial experiences with megacase procedures (46–47) |
| Court of Military Appeals | Amend statute governing reappointment and retirement provisions (155–56) | |
| Court reporting | Exempt reporters from filing requirements of Ethics in Government Act (163–64) | Consider impact on courts and litigants before adopting technological innovations (163–64) |
| Criminal code | Create a code revision commission and enact a recodification (106) | |

| Topic | Recommendations to Congress | Recommendations to the Courts |
|---|--|--|
| Criminal Justice Act | <p>Require selection of federal defenders by independent commissions (157-58)</p> <p>Enact more comprehensive compensation scheme for CJA attorneys (159)</p> | Conduct thorough study of CJA administration (158-59) |
| Disability claims (Social Security) | Create a new Article I adjudication structure (55-59) | |
| Discovery (confidentiality of discovery material) | Do not adopt legislation limiting protective orders (102-03) | Continue, with refinements, current practices (102-03) |
| Diversity of citizenship jurisdiction | <p>Limit diversity jurisdiction to complex multi-state litigation, interpleader and alien suits, or, at a minimum, enact less comprehensive changes (38-43)</p> <p>Consider need for short-term financial assistance to state courts to absorb diversity caseload (41-42)</p> <p>Create new minimal diversity jurisdiction for complex cases (44-45)</p> | |
| Drug cases | <p>Authorize reallocation of funds to assist state criminal justice systems—including public defenders and state courts—in meeting responsibilities in the war on drugs (37-38)</p> <p>Provide more resources for federal courts, magistrates, probation and pretrial services, defender services, court security, and housing for incarcerated defendants (160)</p> | |

| Topic | Recommendations to Congress | Recommendations to the Courts |
|---------------------------------------|--|---|
| Employment discrimination cases | Authorize pilot program of voluntary arbitration before EEOC (60-62) | Study implementation of 42 U.S.C. § 2000e-5 (re: attorneys fees), disseminate effective techniques, and consider use of admission fees and similar funds to pay for certain costs unreimbursable under the statute (100-01) |
| ERISA | Forbid removal to federal courts in cases below \$10,000 (43-44) | |
| Federal Judicial Center | Increase appropriations generally and for judicial education (150-51, 155) | Request increased appropriations (150-51) |
| FELA | Repeal in favor of state or federal worker compensation systems (62-63) | |
| Federal tort claims | Establish \$10,000 minimum and provide one of several suggested small-claims procedures for below-minimum cases (81) | |
| Intercircuit conflicts | Authorize a five-year pilot project by which the Supreme Court could refer a conflict to a court of appeals for an in banc, nationally binding decision (125-29) | Monitor experiment through ad hoc Judicial Conference committee (125-29) Study number and frequency of intercircuit conflicts (125) Try to avoid intercircuit conflicts by giving deference to opinion of first-speaking court (129-30) |
| Jones Act | Repeal; modify LHWCA to cover seamen (62-63) | |

| Topic | Recommendations to Congress | Recommendations to the Courts |
|---|--|--|
| Judges (Article III) | Confirm as judges those who are most qualified, with due regard for the heterogeneity of the American people (167) | |
| Judges (senior) | Do not enact disincentives to senior judge service (154) | |
| Judgeships | Provide judgeships already requested and fill vacancies (35-36, 112, 160) (The committee does not, however, regard additional judgeships as a long-term solution to the problems of the federal courts.) | Develop reliable formula for determining appellate judgeship needs (111-12) |
| Judicial administration (national) | <p>Authorize Judicial Conference to prescribe administrative rules (148-49)</p> <p>Require Federal Circuit and International Trade Courts budgets to be submitted with overall judicial budget (162)</p> <p>Authorize temporary judgeships for courts of judges selected for national judicial administration positions (149)</p> <p>Provide judicial branch with control over its space and facilities (161-62)</p> | <p>Consider concept of "chancellor of United States courts" (145-46)</p> <p>Establish long-range planning function within Judicial Conference (146-48)</p> <p>Continue Administrative Office budget decentralization program (161)</p> |

| Topic | Recommendations to Congress | Recommendations to the Courts |
|--|--|---|
| <p>Judicial administration (regional and local)</p> | <p>Authorize courts to use term "district court administrator" instead of "clerk of court" (153)</p> <p>Do not change chief judge selection method (152)</p> | <p>Continue Administrative Office budget decentralization program (161)</p> <p>Continue training of chief judges and prospective chief judges (152)</p> <p>Use merit selection and strive to select the most qualified people, with due regard for reflecting the heterogeneity of the American people, to serve in support positions (152-53, 167)</p> <p>Conduct thorough analysis of local court management, including the role of chief judges and assignment of judges to specific duty stations (153)</p> <p>Continue study in progress of judicial branch personnel system and practices (156-57)</p> <p>Undertake thorough study of federal court library system (162-63)</p> |
| <p>Judicial councils</p> | | <p>Consider (through Judicial Conference) whether composition should be determined by statute (151)</p> <p>Undertake long-range planning (151)</p> |

| Topic | Recommendations to Congress | Recommendations to the Courts |
|---------------------------|--|--|
| Judicial education | Increase funding of Federal Judicial Center judicial education programs (155) | Continue training of chief judges and prospective chief judges (152) Include automation training in judicial education programs (155) Develop an educational program for circuit judges based on temporary service in other circuits (155) |
| Judicial impact | Consider use of a checklist to avoid litigation-causing technical errors in legislative drafting (91-93) | An Office of Judicial Impact Assessment should conduct technical assessments of legislative impact on the judiciary, and analyze resource implications of proposed legislation (88-91, 92-93) |
| Judicial salaries | Continue to provide timely and adequate adjustments; repeal requirement for specific legislative approval for cost-of-living adjustments (154) | |
| Juries | Do not change the voir dire rules (98-99) Be sensitive to jurors' needs (98), consider need for increase in juror fees | Continue to adhere to the letter and spirit of voir dire rules (98-99) Be sensitive to jurors' needs (98) |
| Libraries (federal court) | | Authorize thorough study (162-63) |

| Topic | Recommendations to Congress | Recommendations to the Courts |
|---------------------------|--|---|
| Magistrates | <p>Authorize judge or magistrate to remind parties of the option of civil trial before a magistrate (79-80)</p> <p>Retain magistrates' auxiliary role (79)</p> | <p>Undertake through Judicial Conference thorough review of allowable magistrate duties (80-81)</p> <p>Select well-qualified lawyers as magistrates, with due regard for the heterogeneity of the American people (167)</p> |
| NLRB | <p>Amend 29 U.S.C. § 160 to provide that NLRB orders be self-enforcing and to give jurisdiction over contempts and executions to district courts (96)</p> | |
| "Non-acquiescence" policy | <p>Prohibit Secretary of HHS from following "non-acquiescence" policy in Social Security cases except as necessary for the Solicitor General to bring test cases (59-60)</p> <p>Study "non-acquiescence" policies in other areas (59-60)</p> | |
| Parole | <p>Continue the Parole Commission or create a successor agency to set parole release dates and to conduct parole revocation hearings (64-66)</p> | |
| Pendent jurisdiction | <p>Broaden federal court jurisdiction (47-48)</p> | |
| Planning | | <p>Establish long-range planning capability within the Judicial Conference (146-48)</p> |

| Topic | Recommendations to Congress | Recommendations to the Courts |
|-------------------------------------|---|---|
| Prisoner civil rights suits | Amend 42 U.S.C. § 1997e to facilitate judicial fact-finding regarding exhaustion of state administrative remedies (48-51) | |
| Probation | Do not remove probation functions from the judicial branch (66-67) | |
| Public/press | | Designate, through each court, press contact person and provide that person training; encourage press days; expand publications programs to explain courts to public (164) Consider establishing grievance procedures for complaints by public alleging racial, ethnic, or gender bias (169) |
| Removal | Repeal 28 U.S.C. § 1441(c), concerning removal of separate and independent claims (94-95) | |
| Scientific and technical litigation | | Conduct comprehensive examination and produce manual to provide guidance to courts (97-98) |
| Sentencing guidelines | Give close attention to current federal sentencing policy (135-39) Reconsider manner in which guidelines are promulgated (140) | Establish standing Judicial Conference committee to study sentencing guidelines (139-40) Reconsider manner in which guidelines are promulgated (140) |
| Sentencing laws | Repeal mandatory minimums (133-34) | |

| Topic | Recommendations to Congress | Recommendations to the Courts |
|----------------------------------|---|--|
| Sentencing procedures | | Propose rule amendment to allow error correction and sentence amendment (143) |
| Space and facilities | Provide judicial branch control over its own space and facilities (161-62) | |
| State-federal judicial relations | | Create, with Conference of Chief Justices, a national State-Federal Judicial Council (52-53) |
| Statutes of limitations | Adopt statutes for major claims and fall-back limitations for others (93-94) | |
| Supervised release | Shift responsibility for supervised release revocation from district courts to the Parole Commission or a successor agency (64, 66) | |
| Tax litigation | Create Article III appellate division of Tax Court; vest near-exclusive tax jurisdiction in the Tax Court (69-72) | |
| TECA | Abolish and shift caseload to Court of Appeals for the Federal Circuit (73) | |
| Venue | Clarify the general venue statute (94) | |
| Witnesses | Be sensitive to witnesses' needs, consider need for increase in fees (98) | Be sensitive to witnesses' needs (98) |

Recommendations to the Department of Justice and Executive Branch Generally

| Topic | Recommendation |
|-----------------------------|--|
| Drug prosecutions | Limit federal prosecutions to cases that cannot and should not be prosecuted in state court (35–38) |
| Criminal trials | Convene an Attorney General’s conference on the trial of complex criminal cases (106–07) |
| Judges (Article III) | Nominate as judges those who are most competent, with due regard for reflecting the heterogeneity of the American people (167) |
| Judgeships | Nominate candidates for existing judicial vacancies (35–36, 112, 160) |
| Judicial impact | Consider use of a checklist to avoid litigation-causing technical errors (91–93) |
| Supervised release | Employ lawyers in the Parole Commission or successor agency for supervised release revocation hearings (64, 66) |

Recommendations to the State Justice Institute

| Topic | Recommendation |
|--|---|
| Diversity of citizenship jurisdiction | Consider need for research or other steps to help state courts absorb diversity caseload (41) |
| Prisoner civil rights suits | Provide, in concert with proposed National State-Federal Judicial Council, support for projects to develop effective inmate grievance procedures (51) |

Recommendations to the Courts of the States

| Topic | Recommendation |
|----------------------------------|--|
| Juries | Consider adopting federal voir dire rules (98-99) |
| State-federal judicial relations | Create, with federal courts, National State-Federal Judicial Council (52-53) |

General Recommendations for Study and Analysis, for the Organized Bar, the Research Community (and, as Appropriate, Agencies of the Federal Government)

| Topic | Page |
|---|--------|
| Appellate procedure | 116 |
| Appellate structure | 116-24 |
| Sanctions | 103-04 |
| Scientific and technical litigation management techniques | 97-98 |
| Sentencing guidelines (broad-ranging study of federal sentencing policy in all its aspects) | 135-39 |

B. Subjects that Came to the Committee's Attention and That It Regards as Important but to Which It Was Unable to Give Sufficient Study to Formulate Recommendations:

| Subject | Page |
|---|-------------|
| Anti-injunction act, abstention, and removal (other than removal recommendations in Chapter 2, § B.2.b, and Chapter 5, § B.3 | 48 |
| Criminal discovery procedures | 107 |
| Habeas corpus petitions by state prisoners (see explanation as to reason for no recommendation) | 51-52 |
| Crime victims' rights and needs | 108 |
| Separate offices for probation and pretrial services | 67 |

C. The Committee's Response to its Statutory Charge

Statutory Objectives

(text of the statute is in Appendix A)

§ 102(b)(1): examine problems and issues currently facing the courts of the United States:

§ 102(b)(2): develop a long-range plan for the future of the federal judiciary, including assessments involving:

§ 102 (b)(2)(A): Alternative methods of dispute resolution:

Response of Committee

The committee's comprehensive examination of such problems and issues will be found in its report.

The contours of the committee's long-range plan are set out most plainly in Part I of the report ("Overview," pp. 3-28), although reference to Part II is required for many details. The committee has advisedly stopped short of making "radical" recommendations, i.e., for total revisions of the judiciary's structure. The need for, and nature of, such major revisions depend on too many unpredictable factors: for example, whether caseload continues to grow and in what subject areas. The committee believes, moreover, 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. Nonetheless, we have also described several of the more radical options and urged their early study, because if growth continues at past rates, major structural revisions may become unavoidable.

The committee's recommendations appear in Chapter 4, § C (pp. 81-87).

Statutory Objectives

§ 102(b)(2)(B): Structure and administration of the federal court system:

§ 102(b)(2)(C): Methods of resolving intra-circuit and intercircuit conflicts in the courts of appeals and:

§ 102(b)(2)(D): The types of disputes resolved by the federal court:

§ 102(b)(3): Report to the Judicial Conference of the United States, the President, the Congress, the Conference of Chief Justices, and the State Justice Institute on the revisions, if any, in the law of the United States which the committee, based on its study and evaluation, deems advisable.

§ 105, "Functions and Duties," contains a further summary of the committee's mission. Because of its basic similarity, we do not separately repeat or track these provisions. The only significant difference is to mandate a study not only of the federal courts but of the courts of the several states. The committee regrets its inability to accomplish this in the allotted time. See comments in Chapter 1, § D (p. 33).

Response of Committee

The committee's recommendations and analyses appear in Chapter 4, §§ A & B (pp. 69-81); Chapter 6, § B.2 (pp. 116-24); and Chapter 8.

The committee's detailed recommendations as to intercircuit conflicts appear in Chapter 6, § C (pp. 124-29). The problem of intracircuit conflicts is referred to indirectly in the discussion of the growth of the courts of appeals. The latter subject requires empirical research beyond the committee's resources and time; a recent study of the Ninth Circuit stands virtually alone at this moment.

The committee makes numerous recommendations concerning the types of disputes belonging in the various courts. See, e.g., Chapter 2.

The committee makes numerous recommendations for revisions in federal law as well as for other changes that can be carried out without statutory changes.

Appendix A

JUDICIAL IMPROVEMENTS AND ACCESS TO JUSTICE ACT

Pub. L. No. 100-702, 102 Stat. 4642

Approved November 19, 1988

Title I: Federal Courts Study Act

102 Stat. 4644

Sec. 101. Short title.

This title may be cited as the "Federal Courts Study Act."

Sec. 102. Establishment and purposes.

(a) **Establishment.**—There is hereby established within the Judicial Conference of the United States, a Federal Courts Study Committee on the future of the Federal judiciary (hereafter referred to as the "Committee").

(b) **Purposes.**—The purposes of the Committee are to—

- (1) examine problems and issues currently facing the courts of the United States;
- (2) develop a long-range plan for the future of the Federal judiciary, including assessments involving—
 - (A) alternative methods of dispute resolution;
 - (B) the structure and administration of the Federal court system;
 - (C) methods of resolving intracircuit and intercircuit conflicts in the courts of appeals; and
 - (D) the types of disputes resolved by the Federal courts; and
- (3) report to the Judicial Conference of the United States, the President, the Congress, the Conference of Chief Justices, and the State Justice Institute on the revisions, if any, in the laws of the United States which the Committee, based on its study and evaluation, deems advisable.

Sec. 103. Membership of the Committee.

(a) **Appointments.**—The Committee shall be composed of fifteen members to be appointed by the Chief Justice of the United States, within ten days after the effective date of this title.

(b) **Selection.**—The membership of the Committee shall be selected in such a manner as to be representative of the various interests, needs and concerns which may be affected by the jurisdiction of the Federal courts. The Chief Justice shall designate one of the members of the Committee to serve as Chairman.

(c) **Term of office.**—The Committee members shall serve at the pleasure of the Chief Justice.

(d) **Rules of procedure.**—Rules or procedure shall be promulgated by vote of a majority of the Committee.

Sec. 104. Powers of the Committee.

(a) **Hearings.**—The Committee or, on the authorization of the Committee, any subcommittee thereof may, for the purpose of carrying out its functions and duties, hold such hearings and sit and act at such times and places, as the Committee or any such subcommittee may deem advisable.

(b) **Information and assistance.**—The Administrative Office of the United States Courts, the Federal Judicial Center, and each department, agency, and instrumentality of the executive branch of the Government, including the National Institute of Justice, and independent agencies, shall furnish to the Committee, upon request made by the Chairman, such information and assistance as the Committee may reasonably deem necessary to carry out its functions under this title, consistent with other applicable provisions of law governing the release of such information.

(c) **Personnel.**—(1) Subject to such rules and regulations as may be adopted by the Committee, the Director of the Administrative Office shall furnish to the Committee necessary staff and technical assistance in response to needs specified.

(d) **Advisory panels.**—The Committee is authorized, for the purpose of carrying out its functions and duties pursuant to the provision of this title to establish advisory panels consisting of Committee members of members of the public. Such panels shall be established to provide expertise and assistance in specific areas, as the Committee deems necessary.

Sec. 105. Functions and duties.

The Committee shall—

- (1) 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 States Justice Institute on such study, within fifteen months after the effective date of this title;
- (2) recommend revisions to be made to laws of the United States as the Committee, on the basis of such study, deems advisable;
- (3) develop a long-range plan for the judicial system; and
- (4) make such other recommendations and conclusions it deems advisable.

Sec. 106. Compensation of members.

(a) **Employees of the government.**—A member of the Committee who is an officer or full-time employee of the United States shall receive no additional compensation for his or her services, but shall be reimbursed for travel, subsistence, and other necessary expenses incurred in the performance of duties vested in the Committee, not to exceed the maximum amounts authorized under section 456 of title 28.

(b) **Private sector.**—A member of the Committee who is from the private sector shall receive \$200 per diem for each day (including travel time) during which he or she is engaged in the actual performance of duties vested in the Committee, plus reimbursement for travel, subsistence, and other necessary expenses incurred in the performance of such duties, not to exceed the maximum amounts authorized under section 456 of title 28.

Sec. 107. Expiration of the Committee.

The Committee shall cease to exist on the date 60 days after it transmits the report pursuant to section 105.

Sec. 108. Authorization of appropriations.

To carry out the purposes of this title there are authorized to be appropriated \$300,000 for each of the fiscal years 1989 and 1990.

Sec. 109. Effective date.

This title shall become effective on January 1, 1989.

Appendix B

Committee Members, Senior Staff, and Reporters

JOSEPH F. WEIS, JR. of Pittsburgh, Pennsylvania, has served on the United States Court of Appeals for the Third Circuit since 1973, taking senior status in 1988. He served as a United States district judge for the Western District of Pennsylvania from 1970 to 1973 and prior to that for two years on the Court of Common Pleas of Allegheny County. He has served since 1987 as chairman of the Judicial Conference Standing Committee on Rules of Practice and Procedure and prior to that was a member and then chairman of the Advisory Committee on Civil Rules and served on several other Judicial Conference committees as well. Judge Weis is an adjunct professor at the University of Pittsburgh School of Law, from which he graduated in 1950.

J. VINCENT APRILE II of Louisville, Kentucky, is General Counsel of the Kentucky State Department of Public Advocacy. He joined the department in 1973 and became general counsel ten years later. A graduate of Ballarmine College, the University of Louisville Law School, and George Washington University's National Law Center, Mr. Aprile has served on the boards of directors of the National Legal Aid and Defender Association and the National Association of Criminal Defense Lawyers. Since 1982 he has been a faculty member of the National Criminal Defense College. For eight years, Mr. Aprile served as an adjunct professor of law at the University of Louisville.

JOSÉ A. CABRANES of New Haven, Connecticut, has served since 1979 as a United States district judge for the District of Connecticut. He is a graduate of Columbia College and Yale Law School and the University of Cambridge. At the time of his appointment to the district court, Judge Cabranes was general counsel of Yale University. He has been in private law practice and in government service and has taught law. He has served as a member of the Board of the Federal Judicial Center (1986-1990). Since 1987 he has been a Fellow of the Yale Corporation.

KEITH M. CALLOW of Olympia, Washington, has been the Chief Justice of the Supreme Court of Washington since 1989. Following his graduation from the University of Washington and its law school, he was a law clerk for the Washington Supreme Court, a state assistant attorney general and a deputy prosecuting attorney. Thereafter he practiced law in Seattle for fourteen years. Following the private practice of law he was a superior court judge and on the Washington State Court

of Appeals, where he served as presiding judge. He is a past chairman of the Committee on the Judiciary of the American Bar Association.

LEVIN H. CAMPBELL of Cambridge, Massachusetts, has been a member of the United States Court of Appeals for the First Circuit since 1972 and was chief judge of the circuit from 1983 to 1990. He served briefly as United States district judge for the District of Massachusetts and, before that, as an associate justice of the Massachusetts Superior Court. Judge Campbell was a member of the United States Judicial Conference from 1983 to 1990 and had served previously on several Conference committees. He was appointed to the Conference's Executive Committee in 1984.

EDWARD S. G. DENNIS, JR., of Washington, D.C., is the Assistant Attorney General for the Criminal Division of United States Department of Justice. Prior to that appointment, he was United States attorney for the Eastern District of Pennsylvania since 1983 and had held positions in both the United States attorneys' office in the Eastern District and in the United States Department of Justice. He is a graduate of the United States Merchant Marine Academy and the University of Pennsylvania Law School. He clerked for Judge A. Leon Higginbotham on the United States district court for the Eastern District of Pennsylvania.

CHARLES E. GRASSLEY of New Hartford, Iowa, was elected to the United States Senate in 1980 and reelected in 1986. He served since 1974 in the United States House of Representatives and prior to that in the Iowa state legislature, during which time he was also a farmer in Iowa. He is a member of the Senate Judiciary Committee and he is ranking minority member of the Subcommittee on Courts and Administrative Practices. Senator Grassley is a graduate of the University of Northern Iowa, where he also received a master's degree.

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HOWELL T. HEFLIN of Tusculumbia, Alabama, was elected to the United States Senate in 1978 and reelected in 1984. He was Chief Justice of the Alabama Supreme Court from 1971 to 1977 and was chairman of the Conference of Chief Justices in 1976-1977. He is a member of the Senate Judiciary Committee and chairman of the Subcommittee on Courts and Administrative Practice. Senator Heflin is a graduate of Birmingham Southern College and the University of Alabama Law School.

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WILLIAM K. SLATE II of Philadelphia, Pennsylvania, serves as Director of the Committee. He previously served as Executive Director and Chief Operating Officer of the Virginia State Bar, as Circuit Executive for the Third Judicial Circuit of the United States, as Clerk of the United States Court of Appeals for the Fourth Circuit and with the United States Department of Justice (FBI). Mr. Slate has practiced law and been an adjunct professor of law. He is a member of the Executive Committee of the American Judicature Society and is a founder of the Council for Court Excellence. A graduate of Wake Forest University and the University of Richmond Law School, he holds an M.B.A. from the Wharton School of the University of Pennsylvania. He is a graduate Fellow of the Institute for Court Management and an S.M.G. graduate of the John F. Kennedy School of Government at Harvard University.

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