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The Federal Courts Study Committee Begins Its Work.

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THE FEDERAL COURTS STUDY COMMITTEE BEGINS ITS WORK

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Bringing federal court modernization before this group brings to mind Yogi Berra's classic comment, "It's déjà vu all over again." But court reform generally moves at a snail's pace—persistence and repetition are seemingly inevitable in the process.

The idea of a federal courts study committee is not a novel one. In the last 10 years, the concept has been the subject of various bills in Congress and has been discussed regularly at these conferences. At the close of the session in the autumn of 1988, Congress finally created the Federal Courts Study Committee. This committee differs in some respects from the earlier proposals for a commission. Thus, any discussion of the new committee should begin with the language of the enacting statute.

The committee is established within the judicial conference—not as an independent body. However, in addition to trial and appellate judges, its membership includes practitioners of the bar and members of Congress. Recognized experts in the field, Senators Howell Heflin (D-Ala.) and Charles Grassley (R-Iowa) of the Senate Judiciary Committee and Representatives Robert Kastenmeier (D-Wis.) and Carlos Moorehead (R-Cal.) of the House Judiciary Committee are active members of the group.

As stated in the statute,[1] the committee's purposes 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) Alternate methods of dispute resolution;
   (B) The structure and administration of the federal court system;

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* Circuit Judge, 3rd Circuit. Judge Weis delivered this speech at the Eleventh Seminar on the Administration of Justice sponsored by the Brookings Institute on Saturday, April 1989.

1. Pub. L. No. 100-702, § 102, 102 STAT. 4644 (1988)(codified at 28 U.S.C. § 331).

(C) Methods of resolving intracircuit and intercircuit conflicts in the courts of appeals; and

(D) The types of disputes resolved by federal courts.

The committee is instructed to "make a complete study of the courts of the United States and of the several states" and to submit a report by April 1, 1990 to the President, the Chief Justice, the Congress, the Judicial Conference of the United States, the Conference of Chief Justices, and the State Justice Institute.[2] The report is to recommend revisions to the laws of the United States, to develop a long-range plan for the judicial system, and to make such other recommendations and conclusions as the committee deems advisable.[3]

Unlike former study groups which concentrated on the courts of appeals or the Supreme Court, this committee is to focus its attention on a broad plan for the federal judiciary as a whole, emphasizing the specific areas noted above.

Obviously, developing a long-range plan requires a study of what the courts are doing at the present time. Also necessary is some serious thought on the role of the courts, and what that role should be. These roles are not necessarily the same.

Because the committee must consider issues confronting the courts, our first three months were devoted to identifying the problems to be addressed. Work began with a broad solicitation of views on the issues by:

1. Surveying all members of the federal judiciary;
2. Inviting suggestions from an extensive range of organizations including citizen groups, bar organizations, research groups, academics, civil rights interests and others;
3. Contacting all federal court administrators, chief probation officers, pre-trial services chiefs, and federal public defenders.

In addition, we sought and received a number of suggestions from both the Administrative Office of the United States Courts and the Federal Judicial Center. We also invited comments from all law school deans.

The committee held four public hearings in various cities across the nation, receiving testimony from seventy-five quite diverse witnesses.

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2. *Id.* § 105(1).
3. *Id.* § 105(2)-(4).

The committee has also received a fairly steady stream of public comment in the media.

Several organizations are preparing issue focus studies for us. For example, the Carnegie Foundation will present a paper on science and technology issues affecting the courts. The Center for Public Service Resources in New York is preparing a presentation on alternative dispute resolution issues.

We are engaged in dialogues with the State Justice Institute and the American Judicature Society, and will be accepting offers of assistance from the National Institute of Justice, the National Center for State Courts, the Conference of State Chief Justices, and others. We will coordinate our efforts with a number of other programs such as the Senate Judiciary Committee's Civil Litigation Project.

The full committee has divided its work internally by forming three subcommittees, assisted by a number of able reporters from academia, experts from the Federal Judicial Center and staff members from congressional committees. A small but dedicated and hard-working central staff has exerted untiring effort on behalf of the committee.

Because, to this point, the committee has been engaged almost exclusively in defining the issues for study, it has not taken any position on the policies it will recommend or even what subjects it can address in the limited time available. The comments that follow in these brief remarks, therefore, express some of my own, very tentative views and do not necessarily reflect those of the committee.

In the early 1950s, Justice Frankfurter expressed his concern over the detrimental effect of increasing the size of the federal judiciary, but little heed was paid to his warnings. In the 1970s, Judge Friendly and others spoke of an inevitable loss of quality in product and confidence in the federal courts if growth continued unabated. But again, few listened.

The Freund Commission, a Department of Justice study, and the Hruska Commission proposed changes primarily to assist the Supreme Court and the courts of appeals. Opposition by both bench and bar succeeded in turning away some of the major proposals.

But growth continued and, indeed, accelerated. The gloomy predictions of the past have proved to prophetic: the federal courts have already exceeded the size many thought to be desirable. The future looks no brighter.

The Administrative Office of the Federal Courts recent projection is that by the year 2000 (only 11 years from now), filings in the courts of

appeals will increase 76% over the number of appeals in 1988. Let me amplify that statistic. In 1972 there were 14,534 filings in the courts of appeals; in the year 2000, only 28 years later, it is predicted that appeals will number 66,000—an increase of more than 400%. In the year 2000, filings in the district courts will soar 63% from the 1988 levels, and the bankruptcy filings will swell by 152%.

Assuming that a continuing increase at this rate is unacceptable, it is obvious that we have a problem. Essentially, what has happened in the 100 years, and particularly in the last 30, is that the pendulum has swung in the direction of increasing the burden on the federal courts. Although the first judiciary act may have given too little jurisdiction to the federal courts, they now have too much to do.

Long-range planning for the federal courts must accept the premise that litigation growth will parallel the rise in population. Legal disputes must be adjudicated in one of two forums—the federal or the state courts. The division of litigation between those two systems will have a direct bearing on the size of the federal courts and most certainly an impact on their mission. In the past, increases in case load were met by adding additional judges. This, however, is not the optimal solution for our overload in the long range.

There may be some room for increased efficiency in the methods courts use to process their work, and here we can assess the potential for alternative dispute resolution. But frankly, I think the gains in this area will be limited.

I doubt very much that any change in appellate procedures could allow the courts of appeals to absorb a 70% increase in filings without restructuring or adding a substantial number of new judges.

Automation can speed the transmission of needed information to the judge's desk and eliminate some slippage in the processing of appeals. However, the critical element—reasoned deliberation by the judge—is the factor that will be impaired by further increases in volume. Attacking large numbers of cases by increasing staff cannot help but move decision-making away from the intense personal scrutiny of the judge to the unacceptable alternate of hurried judicial approval of staff submissions.

In addition to a long-range plan, the committee has other assignments related to that central objective. Among these are the nagging problems of intercircuit and intracircuit conflicts of decisions in the courts of appeals. Again, the problem is not new—it has been raised in the past. Various solutions, including the creation of a new inter-

mediate court between the courts of appeals and the Supreme Court, or an intercircuit tribunal, have been proposed.

Perhaps there has not been sufficiently vigorous opposition to the tacit acceptance of the notion that intercircuit conflicts are inevitable. Essentially, avoidable intercircuit conflicts occur because the courts of appeals are considered to be semi-autonomous, regional courts. That formulation for an intermediate appellate structure, however, should be reevaluated.

When the circuit courts of appeals were first established in 1891, they were adjuncts to the trial court, then known as the "circuit court." The judges on those circuit courts of appeals acted in both trial and appellate capacities. As time went on, the dual function proved impracticable, and in 1912 the circuit courts—the trial courts—were abolished, leaving the appellate entities to survive along with the district courts.

The primary mission of the courts of appeals originally was to correct errors which occurred during trials, reserving the function of assuring consistency in decisional law to supervision by the Supreme Court. As the volume of litigation grew over the years, the Supreme Court no longer was able to adequately meet the supervisory and law-giving function. Consequently, much of the decisional law formulation—particularly in the field of statutory interpretation—was assumed by the courts of appeals, by default as it were.

The concept of regional, semi-independent forums exercising an error-correction function was workable originally. But as time went on, few observers seemed to sense the anomaly of intermediate courts of appeals adopting independent and conflicting views on national law. Courts often flatly disagreed with earlier pronouncements on statutory interpretation made by the courts of appeals in other circuits.

The practice seemed to spread gradually, not provoking any violent objection. And with time came acquiescence. Today, one court of appeals feels free to disagree with any other if convinced that the earlier decision was not correct. Thus, we have the curious system where regional courts, sitting in different sections of the country, apply the same federal statute in a different manner. What results is a balkanization of federal law instead of uniformity.

Strangely enough, many judges and academic commentators accept the situation, defending it as a "percolation" process which ultimately results in the "correct" decision. This approach fails to question the

validity of a system which, although intended to apply federal statutes uniformly, does not do so.

I do not speak of inadvertent conflicts, but of deliberate and reasoned rejections of conformity. Indeed, governmental agencies openly seek to create conflicts between the courts of appeals in order to invite a final resolution by the Supreme Court. This practice not only squanders scarce judicial resources in an era when we should be conserving them, but invites disrespect for the administration of justice and heaps unnecessary work on an already overburdened Supreme Court.

Because of the heavy volume of cases coming to the courts of appeals and the large number of judges who now sit on those courts, it is impossible to secure complete uniformity. Inadvertent conflicts will occur. However, a structure which permits and even encourages deliberate intercircuit conflicts requires basic rethinking.

There may be a number of solutions, such as creating another separate court, but perhaps something more fundamental is necessary. For example, could not each of the regional courts of appeals in the thirteen circuits be considered a division of one, unified federal court of appeals. Divisions could function much as the courts in the circuits do today, perhaps in the same geographic areas. As an alternative, the divisions could be limited in size so that no court would have more than nine judges, thus preserving the benefits of collegiality.

However, the decision in one division would have national effect and would not be confined to that division or circuit as is true today. Inadvertent conflicts and difference in emphasis in decisions which can have an unsettling effect could be handled through an intra-court procedure which might take a number of forms.

Treating the courts of appeals as one unit offers other advantages and gives greater flexibility to meet changing conditions. The benefits of smaller, collegial groups could be retained—and perhaps expanded—by the use of a divisional organization. Current practices could continue so that judges would be appointed to, and function in, a specific division, rather than being assigned at large to a massive, impersonal, national body.

Details, of course, need to be hammered out, but the concept is, I believe, essentially workable and holds out the promise of solving many of the problems that confront the appellate courts today.

Another idea brought to our attention is the need for greater and more efficient exchange of information between the courts and Con-

gress on questions raised by statutory interpretation. Ambiguities and gaps in legislative drafting which have come to the notice of the courts could be called to the attention of Congress through some regular process. Congress could then correct the deficiency legislatively and end uncertainties about the statute.

Reallocation of functions between the district courts and courts of appeals in review of administrative decisions also merits further discussion.

I have done no more in this limited time than survey a few of the many issues that have been brought to the committee's attention. It is unrealistic to expect that we can develop and recommend all of them in the limited time available to us. Nevertheless, we have been stimulated, not discouraged, by the enormity of our assignment and are pressing ahead to prepare our report.