REPORT OF THE FEDERAL COURTS STUDY COMMITTEE: AN UPDATE

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> I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind. . . . [A]s new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times.
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> Thomas Jefferson (1809)[1]

> Framers of judiciary acts are not required to be seers; and great judiciary acts, unlike great poems, are not written for all time. It is enough if the designers of new judicial machinery meet the chief needs of their generations.
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> Felix Frankfurter & James M. Landis (1927)[2]

> Justice is too important a matter to be left to the judges, or even to the lawyers; the American people must think about, discuss and contribute to the future of their courts.
>
> Chief Justice William H. Rehnquist (1990)[3]

I. INTRODUCTION

At the close of 1988, the 100th Congress responded to mounting professional and public concern about "the federal courts' congestion, delay, expense, and expansion."[4] Congress did so by creating, within the Judicial Conference of the United

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1 Letter from Thomas Jefferson to a Friend (1809) (engraved on interior wall at the Jefferson Memorial, Washington, D.C.).

2 F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 107 (1927).

3 W. Rehnquist, unpublished remarks of the Chief Justice at the filing of the REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (Apr. 2, 1990).

4 REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 3 (Apr. 2, 1990) [hereinafter REPORT]. *See also* 134 CONG. REC. S16294-95 (daily ed. Oct. 14, 1988) (statement of Sen. Heflin). Senator Heflin noted that "[i]n a sense, the pending bill is a continuation of over a decade of efforts in both the Senate and the House to respond to the needs of the Judiciary." *Id.* at S16294. He added, "I look forward to seeing this court reform measure finally become law." *Id.* at S16295.

States, a fifteen member Federal Courts Study Committee (Committee).[5] The Committee was directed to make, by April 2, 1990, "a complete study of the courts of the United States and 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 [State] Chief Justices, and the State Justice Institute on such study. . . ."[6] Specifically, pursuant to statute, the Committee was directed to analyze the different types of disputes embraced by the federal court system, alternative dispute resolution, federal court structure and administration, and intra and inter-circuit conflicts in the courts of appeals.[7] More broadly, the Committee was instructed to "recommend revisions that should be made to the laws of the United States that the Committee deemed advisable.[8] Finally, the Committee was commanded to formulate a long-range plan for the federal judicial system, and to render such other conclusions and recommendations it deemed appropriate.[9]

The goal of this article is to provide a summary of the work of the Committee. In particular, this article will discuss some of the Committee's recommendations, and comment on the likely effects of the recommendations on the workload of the federal

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[5] The Committee members, according to the statute, were to be "representative of the various interests, needs and concerns which may be affected by the jurisdiction of the Federal courts." Federal Courts Study Act, Pub. L. No. 100-702, 102 Stat. 4644 (codified as a revision note in 28 U.S.C. § 331 (1988)) [hereinafter Act]. The Committee included members of the federal executive, legislative and judicial branches, and representatives from state governments, universities and private practice. Specifically, members of the Committee included:

Judge Joseph F. Weis Jr., *Chairman*
J. Vincent Aprile II, Esq.
Judge Jose A. Cabranes
Chief Justice Keith M. Callow
Judge Levin H. Campbell
Edward S.G. Dennis Jr., Esq.
Sen. Charles E. Grassley
Morris Harrell, Esq.
Sen. Howell Heflin
Rep. Robert W. Kastenmeier
Judge Judith N. Keep
Rex E. Lee, President Brigham Young University
Rep. Carlos J. Moorhead
Diana Gribbon Motz, Esq.
Judge Richard A. Posner

REPORT, *supra* note 4, at iii.

[6] Act, *supra* note 5, at 4645 (approved Nov. 19, 1988).

[7] *Id.* at 4644.

[8] *Id.* at 4645.

[9] *Id.*

courts. Additionally, this article will describe recent actions in the Congress, and other fora, in response to the Report's proposals.

II. COMMITTEE ORGANIZATION AND METHODOLOGY

In order to facilitate review of the diverse issues confronted by the Committee, it was divided into three separate subcommittees with broad topical responsibilities.[10] The Role and Relationships Subcommittee concentrated on the federal courts' interaction with Congress, state courts, article I courts and federal administrative agencies.[11] The Workload Subcommittee inquired into such topics as caseload problems (both civil and criminal), multi-district litigation, science and technology, and alternative dispute resolution.[12] Finally, the Administration, Management and Structure Subcommittee focused on the organization of the courts, review of personnel matters, court administration and management, and appellate structure and procedure.[13]

To perform the necessary functions, the Committee solicited the views of a broad spectrum of groups and individuals, including employees of the federal court system, as well as federal court practitioners affected by the courts' work. Specifically, the Committee sent a request for ideas to the entire federal judiciary, senior court personnel, employees of the Administrative Office of the United States Courts and members of the Federal Judicial Center. Additionally, the Committee sought the recommendations of "citizen groups, bar associations, research organizations, university scholars, judicial improvement organizations, and numerous groups with specific policy interests."[14] Specific questionnaires relating to issues of workload were sent to all article III judges later in the study and nearly ninety percent responded. The subcommittees were supported by reporters and associate reporters from government service, private practice and universities. A broad array of advisory panels and consultants donated their time performing research and commenting on the draft recommendations of the subcommittees. On December 22, 1989, the Committee distributed tentative recommendations so as to

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10 REPORT, *supra* note 4, at 31.
11 *Id.* at 32.
12 *Id.*
13 *Id.* at 31.
14 *Id.* at 32.

receive comments and suggestions on the proposals that had been developed. The Committee then held public hearings in nine cities where more than 270 witnesses testified.

III. THE REPORT

Utilizing the hearings' testimony and extensive written commentary, the Committee refined its proposals. It was, however, unable to accomplish all of its assigned tasks because of time and funding restraints. For instance, the Committee could not perform a meaningful study of the courts of all fifty states. Reccomendations, however, were made to form a state-federal judicial council in order to analyze salient issues in this area. In spite of time and resource limitations the Report contained a thorough review of a broad array of topics. In addition to its one hundred recommendations in chief, the Report identified twenty-three discrete areas for additional study.[15]

A. Significant recommendations

Some of the recommendations contained in the Report are more noteworthy than others. Among the significant recommendations are the following:

1. Narcotics prosecution—Federal officials with the authority to prosecute narcotics cases should not bring cases in the federal courts that could just as well be filed in the state courts.[16] Congress should direct some additional drug enforcement funds to the states to encourage them to serve as the nation's primary forum for narcotics prosecution. Moreover, the assignment of additional federal judges should not constitute the long range solution for federal court problems created by the war on drugs.[17] Rather, for the near term, Congress should increase the federal court's resources so as to help them meet the increased workload. Such resources should include not only creating additional necessary judgeships but also providing funding for magistrates, probation, pretrial services and related programs. Judicial vacancies should be filled and additional judgeships that have been requested should be added.

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15 *See id.* at 171-85.

16 *Id.* at 35. Drug cases currently account for 44% of the criminal trials in the federal courts, and represent roughly 50% of federal criminal appeals. *Id.* at 36. Mr. Dennis and Rep. Moorhead dissented, advocating the creation of a greater number of federal judgeships to confront the drug problem. *Id.* at 38.

17 *Id.* at 160.

2. *Alternative dispute resolution*—Congress should broaden the statutory authorization for federal courts to implement alternative and supplementary techniques to the standard procedures for processing civil litigation.[18] Each federal court should be permitted to institute (after public notice and comment) mediation, arbitration and other appropriate alternative dispute resolution programs. Further, Congress should provide funds for rigorous assessments of the programs' impact.

3. *Intercircuit conflicts*—Congress should authorize an experimental pilot project to resolve conflicting decisions of the thirteen United States Courts of Appeals.[19] This recommendation is premised upon the belief that federal statutes should not have different meanings in different parts of the country. During the experiment, which would last five years, the Supreme Court could refer cases to court of appeals not involved in the conflict for disposition by that court "en banc." That court's decision would be final and nationally binding. However, the party adversely affected by the decision could request reconsideration or rehearing by the Supreme Court within thirty days.

4. *Legislative assessment*—An Office of Judicial Impact Assessment should be created within the judicial branch.[20] This office would develop information intended to assist Congress in gauging the effects of proposed legislation on the judicial branch. Further, the office would provide an estimate of the additional court resources that would be required to handle litigation resulting from the bill. Finally, the office would identify defects in drafting that might foster unnecessary litigation.

5. *Sentencing*—Congress should repeal any mandatory minimum sentences that result in distorted penalties which hamper federal criminal adjudication.[21] Additionally, the Sentencing Guidelines, which may be hindering effective criminal case processing, should be studied extensively by both public and private organizations.

6. *Tax jurisdiction*—Civil tax litigation should be unified in one court.[22] Congress should make the United States Tax Court

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18 *Id.* at 83-86.

19 *Id.* at 125-27. Mr. Aprile would have the decision of the in banc court of appeals remain final. *Id.* at 128.

20 *Id.* at 89-90.

21 *Id.* at 133-36.

22 *Id.* at 69-71. Mr. Dennis issued a statement dissenting from this recommendation, in which he was joined by Senator Grassley, Mr. Harrell, Representative Moorhead and Judge Weis. *Id.* at 71-72. Essentially, the dissenters argued that

an article III court at the appellate level. This court should be supported by an article I trial division, with exclusive jurisdiction over federal income, estate and gift tax proceedings. The current system fosters inconsistencies in the law, and allows tax claimants to forum shop among the district courts, the United States Claims Court or the United States Tax Court.

7. *State-Federal allocation*—The Chief Justice of the United States and the Chairman of the Conference of (State) Chief Justices should form a National State-Federal Judicial Council.[23] This Council would consist of federal and state judges, in equal numbers, responsible for analyzing and offering recommendations to promote cooperation and enhance efficiency between the two court systems.

8. *Diversity jurisdiction*—Since the early 1970's, diversity cases have consisted of twenty to twenty-five percent of the federal trial court caseload and ten percent of the appellate caseload.[24] To remedy this situation, Congress should limit diversity jurisdiction to interpleader, complex multi-state litigation and suits involving aliens. Similarly, the Federal Employers' Liability Act (FELA), which provides federal court hearings for injured railway workers, and the Jones Act, which allows injured seamen to utilize the terms of FELA, are both inferior to existing workers' compensation schemes.[25] Accordingly, Congress should repeal FELA and the Jones Act.

9. *Administrative decisions in disability cases*—Congress should establish a new article I Court of Disability Claims.[26] This court would hear appeals from administrative law judges' decisions de-

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there was sufficient evidence to indicate that the current tax litigation system is performing adequately. *Id.*

[23] *Id.* at 52-53. This recommendation adopted the suggestion of the Chairman of the Conference of (State) Chief Justices. *Id.* at 52.

[24] *Id.* at 38-47. Sen. Grassley partially dissented, opposing elimination of diversity jurisdiction. *Id.* at 42.

Mr. Harrell and Mrs. Motz dissented, arguing that diversity jurisdiction provides a politically neutral forum to protect against local prejudices, and that diversity actually contributes to "Our Federalism" by forcing federal judges to keep abreast of state law and local concerns. *Id.* at 42-43.

[25] *Id.* at 62-63. Representative Kastenmeier submitted a dissenting statement, claiming a lack of expertise on the part of the Committee to make the recommendation. *Id.* at 63-64.

[26] *Id.* at 55-60. Judge Weiss, joined by Messrs. Dennis and Harrell, dissented from the recommended establishment of the Court of Disability Claims. *Id.* at 58. Judge Weiss advocated (1) replacing the Appeals council with a Benefits Review Board; (2) retaining review in the district court for "substantial evidence" supporting the administrative decision; and (3) court of appeals review limited to questions of law. *Id.* at 58-59. Sen. Grassley dissented without a statement. *Id.* at 58.

nying claims for disability benefits under the Social Security Act. Thereupon, appeals to the court of appeals would be limited to constitutional issues and questions of law. More importantly, Congress should prohibit the Secretary of Health and Human Services from refusing to honor federal court decisions that overrule agency policies. This should be accomplished by amending the Social Security Act.

10. Pendent jurisdiction—Congress should clarify supplemental (pendent and ancillary) jurisdiction by statutorily authorizing federal courts to hear *all* claims "arising out of the 'same transaction or occurrence.' "[27] Such jurisdiction would be limited by compelling the federal courts to dismiss proceedings that are dominated by state law claims or in the interest of fairness and economy.

These are but a few of the Report's recommendations. Of course, their presence in this article is in no way intended to detract from the significance of the numerous other proposals. The Report, must ultimately be viewed as a whole in order to maximize the achievement of the congressionally mandated study of the federal court system.

IV. Recommendations Effect on Workload

One might well inquire what effect the Report's recommendations will have on the caseload of the federal courts. While a precise answer is not possible, an estimate can be made based on those recommendations that lend themselves to a rough quantification. For instance, 37,524 cases were filed in the courts of appeals in the fiscal year ended June 30, 1988. Assuming that all of the Committee's recommendations were fully implemented during that year, the following would have occurred:

(1) All 848 tax cases would have been transferred out of the courts of appeals and into the new article III Tax Court Appellate Division.[28]

(2) Half of the 992 Social Security disability cases would have been removed to a new Court of Disability Claims. This amount represents the best estimate of cases that do not present issues of law.

(3) All ninety-one FELA appeals would have been trans-

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[27] *Id.* at 47-48. Judge Campbell, Mr. Harrell and Mrs. Motz dissented from this recommendation without comment. *Id.* at 48.

[28] Actually, this number is slightly exaggerated because lien-enforcement suits would not have been transferred under the Committee's proposal.

ferred out of the federal courts.[29]

(4) Five percent of approximately 3,000 non-prisoner civil rights appeals would have been removed from the federal courts as a result of a suggested pilot program which would permit the Equal Employment Opportunity Commission to arbitrate employment cases.

(5) Nearly half of the 2,109 state-prisoner civil rights appeals would have been removed as a product of a proposal making it less burdensome to require exhaustion of state administrative remedies.[30]

(6) None of the current 3,198 diversity appeals would have been filed.[31]

(7) Forty percent of all appeals in bankruptcy proceedings to the courts of appeals, outside the ninth circuit, would have disappeared. This estimate is based upon the experience of the ninth circuit which utilizes appellate panels in bankruptcy cases.[32]

Under this hypothetical scenario, approximately 6,192 cases would have been eliminated from the various courts of appeals' dockets in 1988. This presents approximately sixteen percent of the appellate courts' caseload for the year.[33]

Similarly, 283,137 actions were filed in the district courts during the same period. Under the above assumptions, the Committee's proposals would eliminate approximately 105,000 cases: roughly thirty-seven percent of the district court's current filings.[34]

Admittedly, reducing trial and appellate caseloads alone is

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29 It is recommended that Jones Act cases be removed from the district courts to a federal administrative agency. Presumably, however, these cases would still produce appeals to the United States Courts of Appeals.

30 A Virginia study posits that only 44% of such cases would be resumed if exhaustion was required, implying a 56% reduction. This amount was then multiplied by 88% — reflecting the 44 states which have not adopted exhaustion requirements — in estimating the impact of the proposal. *See* REPORT, *supra* note 4, at 27.

31 This estimate is inflated because, under the Report's proposal, alienage, interpleader and complex multi-party actions remain within federal jurisdiction. *See supra* notes 24-25 and accompanying text.

32 The ninth circuit is the only federal appellate court that utilizes bankruptcy appellate panels. The Committee recommended that all circuits be required to do the same. *See* REPORT, *supra* note 4, at 74-75. The textual reference may be an underestimate because, under the Committee's proposal, only proceedings raising pure questions of law would be subject to appeal from the bankruptcy appellate panels to the courts of appeals. *See id.*

33 *Id.* at 27.

34 *Id.* at 28. 1988 statistics were utilized because they are complete. In 1989 there was a slight decrease in filings in the district court, courts of appeals filings

not a panacea for all of the federal court system's ills. The large number of cases are, however, clearly a source of delay. Also implicated by the crowded docket are concerns about the time available for meaningful judicial reflection, and the appropriate size of the federal judiciary.[35]

V. THE RESPONSE TO THE REPORT AND THE FUTURE

As the Committee concluded preparation of the Report, discussions turned to the need for, and merits of, an initiative supporting discussion and implementation of the Committee's proposals. The Committee decided that a follow-up to the Report was important to assure full consideration of the Committee's recommendations. Accordingly, the Council for Court Excellence, a Washington, D.C. not-for-profit entity, formed the Public Committee on the Federal Courts Report (Public Committee).[36] The Public Committee commenced working through a number of fora, including the Judicial Conference of the United States and the Congress, to ensure that the Report's recommendations are considered, debated and where appropriate, implemented.[37]

Several recommendations already have been enacted, including the creation of the National State/Federal Judicial Council by virtue of action taken by the Conference of (state) Chief Justices and the Judicial Conference of the United States.[38] Additionally, the 101st Congress recently enacted the "Federal Courts Study Committee Implementation Act of 1990 (Implementation Act)."[39] This law, if implemented, would codify certain recommendations contained in the Report.[40] By most

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increased by six percent and filings in the bankruptcy courts grew by eight percent. *See id.*

35 *See id.* at 4-8.

36 *See* Letter from Charles McC. Mathias Jr., President of the Council for the Court Excellence, to the Committee members (Apr. 1, 1990) (inviting them to reconstitute the Committee as a follow-on entity within the structure of the Council for Court Excellence).

37 Minutes of the initial meeting of the Council for Court Excellence Public Committee on the Federal Courts Report (Sept. 24, 1990).

38 Minutes of the meeting of the Judicial Conference of the United States (Sept. 1990).

39 Pub. L. No. 101-650, 104 Stat. 5089 (approved Dec. 10, 1990).

40 Indeed, Senator Grassley described the Report as "the most comprehensive examination of the Federal courts since the passage of the Judiciary Act of 1789." 136 CONG. REC. S17578 (daily ed. Oct. 27, 1990). The Senator also forecasted that the recommendations considered for adoption would "substantially improve the administration of justice in the Federal system." *Id.*

appraisals, however, the proposals actually enacted, while addressing important measures, do not represent the more sweeping of the Committee's proposals. Notable within the Implementation Act are the following:

(1) support for a study of intercircuit conflicts and structural alternatives for the courts of appeals;[41]

(2) a new four year statute of limitations for civil actions arising under an Act of Congress where no period is provided by the law;[42]

(3) an increase in juror and witness fees;[43]

(4) extending the life of the Parole Commission;[44]

(5) a study of the Federal Defender Program;[45]

(6) a clarification of the power of the United States Supreme Court to define "final decision" for purposes of appealability under 28 U.S.C. section 1291.[46]

(7) express authorization for federal courts to exercise supplemental jurisdiction.[47]

The fate of the other recommendations remains uncertain at present. Accepted wisdom suggests that future congressional action will come in the form of individual bills addressing singular discrete recommendations. Certainly, such action would be a more arduous and time consuming process.

In a significant separate initiative, the Judicial Conference of the United States approved the authorization of a three-year controlled experiment allowing media cameras in selected district and appellate courtrooms to cover civil proceedings.[48] The Report had recommended expanded media contact by the courts, and Representative Kastenmeier encouraged the experiment in a letter to Chief Justice Rehnquist immediately after the Committee had filed its Report.[49]

Another of the Report's recommendations, the repeal of the Federal Employers' Liability Act, was independently introduced

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41 Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, § 302, 104 Stat. 5089, 5104 (1990).

42 *Id.* § 313, 104 Stat. 5114 (to be codified at 28 U.S.C. § 1658).

43 *Id.* § 314, 104 Stat. 5115.

44 *Id.* § 316, 104 Stat. 5115.

45 *Id.* § 318, 104 Stat. 5116.

46 *Id.* § 315, 104 Stat. 5115.

47 *Id.* § 310, 104 Stat. 5113 (to be codified at 28 U.S.C. § 1368).

48 Report of the Proceedings of the Judicial Conference of the United States 104 (September 12, 1990).

49 *See* Letter from Rep. Kastenmeier to Chief Justice Rehnquist (Apr. 1990).

in a bill before the United States Congress.[50] In introducing the bill, Senator Bob Kasten (R-WI) noted that the proposal was strongly supported by the Bush Administration and particularly by Samuel Skinner, the Transportation Secretary.[51] Senator Kasten further explained that the "legislation provides that railroad employees would be compensated for work-related injuries under the no-fault, [s]tate workers compensation systems, rather than under the fault-based, litigation-oriented Federal Employers' Liability Act [FELA]."[52]

The well-being of the federal courts is a matter of enormous public consequence. Yet, a crisis of volume in the federal courts is now beyond dispute. Although the Committee conducted perhaps the most comprehensive examination ever made of the federal court system, the congressionally mandated focus of the Report was confined to institutional concerns. The Committee was not instructed to propose changes in substantive law. In a modest way, the Committee did undertake consideration of federal jurisdiction.

The continued growth in federal caseloads, which threaten to impair the quality of justice provided by the federal judiciary, requires serious attention. In particular, inquiry must be made into the numbers and types of cases coming into the federal courts.[53] Those increasing numbers, coupled with the divisiveness of debates which surround any notion of curtailing federal jurisdiction, may breathe continuing life, and give impetus to, the more incremental nature of the recommendations of the Federal Courts Study Committee.

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50 S. 3214, 101 Cong., 2d Sess., 136 Cong. Rec. 15,559 (1990).

51 136 Cong. Rec. 15,558 (daily ed. Oct. 17, 1990) (statement of Sen. Kasten).

52 *Id.*

53 Chemerkinsky and Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. REV. 94, 95.