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## Some Preliminary Thoughts on Long-Range Planning for the Federal Judiciary

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## SOME PRELIMINARY THOUGHTS ON LONG-RANGE PLANNING FOR THE FEDERAL JUDICIARY

by *Thomas E. Baker\**

The hardest strokes of heaven fall in history upon those who imagine that they can control things in a sovereign manner, as though they were kings of the earth, playing Providence not only for themselves but for the far future — reaching out into the future with the wrong kind of far-sightedness, and gambling on a lot of risky calculations in which there must never be a single mistake. And it is a defect in such enthusiasts that they seem unwilling to leave anything to Providence, unwilling even to leave the future flexible, as one must do; and they forget that in any case, for all we know, our successors may decide to switch ideals and look for a different utopia before any of our long shots have reached their objective, or any of our long-range projects have had fulfillment. It is agreeable to all the processes of history, therefore, that each of us should rather do the good that is straight under our noses. Those people work more wisely who seek to achieve good in their own small corner of the world and then leave the leaven to leaven the whole lump, than those who are for ever thinking that life is vain unless one can act through the central government, carry legislation, achieve political power and do big things.<sup>1</sup>

### I. INTRODUCTION

First, I want to thank the Long-Range Planning Committee of the Judicial Conference for the invitation to testify about my preliminary thoughts on planning.<sup>2</sup> Second, I want to assure the Committee

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This essay is an adaptation of testimony presented to the Long-Range Planning Committee of the Judicial Conference of the United States (New York, New York, Nov. 7, 1991).

1. HERBERT BUTTERFIELD, *CHRISTIANITY AND HISTORY* 104 (1949).

2. Members of the Committee include: Judge Otto R. Skopil, Jr., Ninth Circuit Court

that it has no better booster than myself. The importance of this undertaking is not lost on me. The role of the federal courts is central in the life of our country under our Constitution. In large part, my professional career has been spent in various kinds of service to the federal judiciary. My teaching and writing center around the federal courts.<sup>3</sup>

By way of introduction, my statement is organized as follows. First, I will consider the "mission" of the federal courts.<sup>4</sup> My view is that there is no single, objectively correct conception of the role of the federal courts and that attempting to develop a once-and-for-all conception would be a waste of time and could, in fact, prevent this Committee from achieving its potential. Second, I will discuss my conception of long-range planning, in terms of a relatively short event horizon (somewhat arbitrarily set at five years) and the absolutely wide-open scope of the range of proposals that are relevant to the work of this Committee (basically anything and everything).<sup>5</sup> Third, I will describe my preliminary thoughts on the role of the Committee to be a kind of permanent Federal Courts Study Committee modelled after comparable Congressional committees.<sup>6</sup> Fourth, this statement will touch briefly on some of the organizational and operational relationships and attitudes that I deem important as you begin the enterprise of judicial branch planning.<sup>7</sup>

## II. THE "MISSION" OF THE FEDERAL COURTS

In the documents that the Committee has provided me, the point is made that "[t]here is at present no clear statement of the 'business'

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of Appeals (Chair); Judge Edward Becker, Third Circuit Court of Appeals; Judge Wilfred Feinberg, Second Circuit Court of Appeals; Judge Harlington Wood, Jr., Seventh Circuit Court of Appeals; Judge Elmo B. Hunter, Western District of Missouri; Chief Judge James Lawrence King, Southern District of Florida; and Judge Sarah Evans Barker, Southern District of Indiana.

3. By way of disclosure, required by candor rather than impelled by immodesty, three of my present involvements ought to be mentioned: (1) since 1990, I have been a member of the Standing Committee on Rules of Practice and Procedure; (2) Judge Keeton, who chairs the Standing Committee, has appointed me chair of a newly-created Subcommittee on Long-range Planning; and (3) I am a principal investigator, along with William K. Slate, II, on a current project of the Justice Research Institute funded by the Federal Judicial Center to study the extensive literature about proposals to reform the United States Courts of Appeals.

4. See *infra* section II.

5. See *infra* section III.

6. See *infra* section IV.

7. See *infra* section V.

or 'mission' in which the federal courts engage or should engage. . . . Without some statement of mission, some statement of fundamental purpose, many of the proposals to reform the jurisdiction of federal courts seem conclusive."<sup>8</sup> With all due respect, I believe that any attempt to articulate the mission of the federal courts in any way that would be helpful to the work of this Committee would be futile. Let me explain why.

Calls for a clear statement of the purposes and goals of the federal courts have been heard ever since we have had federal courts.<sup>9</sup> I would second the endorsement of my distinguished colleague, Professor Rosenberg, of the following sound description:

The federal courts' central purposes and functions are to protect the individual liberties, freedoms and rights of these people; to give definitive interpretation and application to constitutional provisions and federal laws, and to assure the continued vitality of democratic processes of government. These are vital functions for the welfare of the nation and its people. No other agency or institution of government can perform these duties as effectively as the federal courts.<sup>10</sup>

Essentially, the federal courts are how the Constitution seeks to "establish justice," in the Preamble's words.<sup>11</sup> There is, however, a Constitutional rub. To have a valid claim on being just, the definition of "mission" must be free from base political motives<sup>12</sup> and ideology.<sup>13</sup> Yet, the demarcation of federal court jurisdiction is given over to the plenary power of one of the political branches, Congress. For the most part, and from the beginning, defining the role of the federal courts has been an exercise in federalism. As a student of federal courts, I believe that only general lessons can be learned from the teachings of history, tradition, legislative and judicial precedents,

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8. Long Range Planning Office, Memorandum from Jeffrey Jackson, Judicial Fellow, Administrative Office of the U.S. Courts, to Long Range Planning Committee File 2-3 (July 1, 1991) (on file with the author).

9. See THE FEDERALIST No. 81 (Alexander Hamilton).

10. Maurice Rosenberg, *The Federal Courts in the 21st Century*, 12 NOVA L. REV. 105, 111 (1991) (quoting DEPARTMENT OF JUSTICE COMMITTEE ON REVISION OF THE FEDERAL JUDICIAL SYSTEM, THE NEEDS OF THE FEDERAL COURTS I (1977)).

11. U.S. CONST. pmbl. See generally Abram Chayes, *How Does the Constitution Establish Justice*, 101 HARV. L. REV. 1026, 1026 (1988) (arguing that the Constitution establishes justice by instituting the federal judiciary as the "custodian of justice").

12. But see Mark Tushnet, *General Principles of the Revision of Federal Jurisdiction: A Political Analysis*, 22 CONN. L. REV. 621 (1990).

13. See generally George D. Brown, *Nonideological Judicial Reform and Its Limits* —

and constitutional law.<sup>14</sup> Judge Henry Friendly taught us these general lessons nearly two decades ago.<sup>15</sup> He described the outer limits of the role of federal courts by defining a minimum model and a maximum model.<sup>16</sup> The minimum model posits that "the best course is to put trust in the state courts, subject to appropriate federal appellate review, save for those heads of jurisdiction, by no means insignificant in case-generating power, where everything is to be gained and nothing is to be lost by granting original jurisdiction to inferior federal courts."<sup>17</sup> At the other extreme, the maximum model "would go to the full sweep of constitutional power" under Article III because "the federal courts provide a 'juster justice' than the state courts, [and] the more cases there [are] in federal courts, the better."<sup>18</sup>

Of course, no one would take either extremist view of federal jurisdiction once and for all. Over the 200-plus year history of the federal courts, Congress has gone back and forth between these models, never fully or completely embracing one or the other, and often enacting jurisdictional legislation containing different provisions which endorse both models simultaneously. This legislative experience cannot be denied. This Committee cannot expect to solve this dilemma, for it is the design of the Constitution.

Over the last ten years, I have travelled down this conceptual blind alley in my own thinking about federal courts. I cannot improve on the account of Professors Chemerinsky and Kramer about their own similar intellectual journey:

We began this article with the intent of constructing an ideal model of federal jurisdiction for Congress to use in allocating judicial resources. After further consideration we conclude that this is not a fruitful approach and, indeed, that the common

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*The Report of the Federal Courts Study Committee*, 47 WASH. & LEE L. REV. 973 (1990) (arguing that the Federal Courts Study Committee should have dealt with the fundamental ideological issues concerning the proper role of federal courts in our nation); Richard H. Fallon, *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988) (describing two competing models of judicial federalism and their influences on federal courts issues, and advocating the acceptance of a middle ground in resolving those issues).

14. See James C. Hill & Thomas E. Baker, *Dam Federal Jurisdiction!*, 32 EMORY L.J. 1, 80-81 (1983); see also RICHARD A. POSNER, *THE FEDERAL COURTS — CRISIS AND REFORM* 169-97 (1985) (discussing the role of federal courts in a federal system).

15. HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* (1973).

16. See *id.* at 11.

17. *Id.* at 8 (footnote omitted).

18. *Id.* at 12 (footnote omitted).

- assumption that there is an objectively "correct" model of federal jurisdiction misconceives the problem. There are objectively identifiable outer constitutional limits on federal jurisdiction — the limits established in Article III of the United States Constitution. But these are extremely permissive, and no one contends that federal jurisdiction should extend this far. Within the limits of Article III, however, the Constitution establishes no objectively "correct" role for the lower federal courts. On the contrary, largely because they could not agree on what role the federal courts should play, the framers of the Constitution left such questions to Congress, essentially making the lower federal courts a resource to be used as Congress deems necessary.

The decisions Congress makes in this regard reflect important value choices and have significant political consequences. . . . History thus underscores that any model identifying the "proper" role of the federal courts has inescapable and far-reaching substantive implications, and, as a result, an unavoidable political dimension. Defining the role of the federal courts is not a scientific inquiry.<sup>19</sup>

### III. LONG RANGE PLANNING IN GENERAL

In this part, I discuss my attitudes toward planning generally as a way of generating public policy and more particularly as an exaggerated hope for judicial policy-making. Perhaps, I should begin with the admission that I read John Naisbitt's pseudo-profound 1982 best-seller *Megatrends*, although I do *not* feel the need to read the sequel. I personally do not pay to have my fortune told, and for many of the same reasons, I think it would be a waste of time and money for the federal judiciary to go to a fortune teller.

#### A. How "long"?

My first reason for calling judicial planning something of an exaggerated hope for federal judicial policy-making is based on what I know about state court efforts at long-range planning. Because these efforts often attempt to make predictions and to define goals too far into the future, they have too often resulted in lists of social science babble that are virtually meaningless. For example, a 1989 Georgetown University study surveyed court experts on what state courts needed to do to prepare for changes over the next 30 years.<sup>20</sup>

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19. Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U.L. REV. 67, 75-76 (footnotes omitted).

20. The survey is discussed in Edward B. McConnell, *What Does the Future Hold for Judges?*, 30 JUDGES' J. 1, 9 (Summer 1991).

Here is the list of proposed courses of action, not in any order of priority:

(1) improve the access to the judicial system; (2) divert classes of disputes to reduce docket pressures; (3) emphasize judicial management of dispute resolution; (4) re-emphasize the courts' service ethos; (5) provide new impetus for judicial education; (6) expand the legal profession's ability to help clients; (7) exemplify equal opportunity in the process of achieving equal justice; (8) reorganize to handle scientifically-intensive, technically complex cases; (9) provide greater authority for courts to innovate; (10) generate public policy promoting dispute resolution; (11) create new judicial and legislative partnerships; and (12) modernize the courts.<sup>21</sup>

My own personal favorite on this list is number (12): the prediction that, in the future, we will have to modernize the courts.

The second reason for my skepticism is based on my own limited experience with futurists during my service as Associate Reporter to the Federal Courts Study Committee. The Study Committee hired the prestigious Hudson Institute to predict the trends that would affect the federal courts over the next three decades. The project relied on data from the Bureau of Census, the Bureau of Justice Statistics, various other Government reports and documents, interviews with relevant experts, and the scholarly literature.<sup>22</sup> The methodological approach was state of the art. The result, in my opinion, was a disappointing and none too helpful document which contained these conclusions: (1) aging of the United States population will result in greater prominence of legal issues relating to the elderly;<sup>23</sup> (2) so long as prosecutions remain a priority, there will be large criminal caseloads, with white collar prosecutions increasing and drug prosecutions decreasing;<sup>24</sup> and (3) civil rights activity will increase, while tort activity will remain high, and intellectual property and professional liability will increase.<sup>25</sup>

The two most important, most general, and most qualified predictions were:

(4) Although there are changes within the legal system itself that might have a dramatic affect [sic] on caseload and complexity, it

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21. *See id.* at 9-10.

22. HUDSON INSTITUTE, TRENDS AFFECTING THE FEDERAL COURTS (Oct. 1989) (on file with the author).

23. *See id.* at 1, 3-5.

24. *See id.* at 6-7.

25. *See id.* at 8-10.

is prudent to assume that the net effect of the likely changes will not be substantial.

(5) Technological changes and political choice and judgment are factors of decisive significance in affecting the future. Although they can be discussed rationally, their content is, inherently, impossible to predict.<sup>26</sup>

My point is that the farther one gazes into the crystal ball the more likely one is destined to dine on ground glass. Professor Rosenberg has offered one sure way to avoid having to eat your words of prediction: "In forecasting the future, one should undoubtedly pick a target far enough ahead to assure that mortality will get here first."<sup>27</sup> The other way is to admit that we cannot see very far into the crystal ball. We see into the future as through a glass, darkly. Consider one recent example. I think I do a good job at keeping up with the literature on federal courts. I read law reviews, professional newspapers, congressional committee materials, and various newsletters from the third branch. Yet, I do not recall that any seer, on the bench or in the academy, warned us about the impact of the so-called war on drugs even a short time before the cases began clogging district court dockets in crisis proportions.

How long into the future can we look with any degree of confidence? I agree with the reasoning and the conclusion of the Subcommittee on the Role of the Federal Courts and Their Relation to the States, a subcommittee of the Federal Courts Study Committee:

To forecast growth in the federal caseload, then, one must be able to predict changes in the nation's substantive goals — a hazardous enterprise. It is difficult to predict any but the grossest social, economic, political, or demographic trends more than a few years in advance. It is even harder to predict what kinds of laws are likely to emerge and how these laws will affect the federal courts. Such difficulties frustrate long term planning for the federal judiciary, making it irresponsible to offer solutions purporting to look more than a few years ahead.<sup>28</sup>

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26. *Id.* at 14.

27. Rosenberg, *supra* note 10, at 105. Although Professor Rosenberg somewhat pessimistically titled his article "The Federal Courts in the 21st Century," he settled on the year 2033 for his prediction year. *Id.*

28. *Report to the Federal Courts Study Committee of the Subcommittee on the Role of the Federal Courts and Their Relation to the States* (Mar. 12, 1990), reprinted in 1 FEDERAL COURTS STUDY COMMITTEE WORKING PAPERS AND SUBCOMMITTEE REPORTS 1, 136 (July 1, 1990).

The Committee should look with some trepidation on predictions and proposals that are longer than five years in the future.<sup>29</sup> Indeed, even the most hierarchical and authoritarian societies we have seen in our lifetimes could not push planning much beyond five-year plans.

These observations are not meant to suggest that this Committee should not even attempt to see farther into the future. Indeed, no other institution is better qualified by purpose and motivation to contemplate the long term future of the federal judiciary than this Committee. My point simply is that thinking farther ahead — ten or fifteen or twenty years or more from now — obliges a tentative and even a cautious mindset. You cannot lose sight of your assumptions and the qualifications on which your predictions are based. Furthermore, the process itself may be more worthwhile than any plan that results. Judicial machinery designed for 2020 thus may be likened to the automotive industry's futuristic prototypes, those radically designed cars that more resemble space ships and which are featured at auto shows. None of them make it into actual production. But they get our attention and get us to think about alternative futures. Most importantly, we will learn design principles, that is, how to develop designs for future federal judicial machinery, in the process.

Another important point related to the time frame of the Committee is that one of the underlying themes in the Report of the Federal Courts Study Committee was a restrained sense of urgency. The federal court system is stressed and some problems are more pressing than others. Other groups, most-assuredly, will look to this Committee for leadership in setting the priorities for reform. Just how you should go about setting these priorities and exactly what problems should be given priority are questions I leave to the future wisdom of this Committee and your advisors.<sup>30</sup>

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29. The Federal Courts Study Committee itself approximated a five-year window for dealing with the most pressing issues of the caseload crisis in the United States Courts of Appeals. See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 109 (April 2, 1990).

30. I might highlight one obvious priority. The Federal Courts Study Committee devoted substantial time and attention to the "crisis of volume" in our federal appellate courts and concluded, "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." REPORT, *supra* note 29 at 109. See generally Thomas E. Baker, *On*

### B. How wide-ranging?

My answer to the Johnny Carson styled question of how wide-ranging the Committee's planning effort should be, can be contrasted to the modesty of my suggestion of a five-year time horizon. Like a good teacher who encourages students that there is no such thing as a bad question in a classroom, the Committee should serve as a forum for the consideration of any and all suggestions and ideas for improving the federal courts. These ideas include "strategies" for performing the larger role of the third branch and "tactics" for performing functions of adjudication and law-making.<sup>31</sup> Within this context, we can posit intermediate goals, as distinguished from ultimate ends. Planning, by definition, seeks to improve on the outcomes of ad hoc crisis management. We want to find ways for our federal courts to do what they do more efficiently and more promptly, and so we concern ourselves with the problems of cost and delay. We need to explore ways to make the federal courts more resilient, to have a built-in capacity for coping with growth and change.

Planning for the federal judiciary necessarily contemplates a range of reforms from the minor and mundane to the major and profound. The advent of this Committee, however, signals a policy hope that this new entity will take planning beyond the traditional levels of existing bodies in Congress and in the judiciary. We already have committees in the Congress and the Judicial Conference with responsibility for responding to short term needs and fine-tuning kinds of reform. This Committee is the forum in which even seemingly outlandish ideas can be considered. For example, although I am not persuaded, some have argued for the privatization of the judicial function along the lines of public policy experiments in prison privatization and other areas.<sup>32</sup>

The breadth of the charge from the Judicial Conference may seem to be somewhat unhelpful or even daunting, as this Committee

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*Redrawing Circuit Boundaries — Why the Proposal to Divide the United States Court of Appeals for the Ninth Circuit Is Not Such a Good Idea*, 22 ARIZ. ST. L.J. 917, 946-61 (1990) (advocating that Congress accept the Committee's recommendation to study structural alternatives to the current appellate court system and specifically endorsing the idea of consolidating courts of appeals).

31. See Memorandum, *supra* note 8, at 6-7.

32. See generally Miller, *Deregulate the Judiciary!*, NATL. L.J., July 17, 1989, at 13 (arguing for a deregulation of the public dispute resolution system and a substitution of a market system in which parties would hire private judges).

begins its duties. But I would hope that you come to think of it as an academic freedom and an opportunity. In a most direct way, this Committee will contribute to the process by which the third branch responds to its own Constitutional responsibility to establish justice in the context of public expectations and the demands of the two co-equal political branches.

The proper orientation for the task before this Committee may be summed up in this observation from one of the classic studies of the federal court system:

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 generation.<sup>33</sup>

You must determine the judicial needs of our generation and help find ways to meet those needs.

#### IV. THE ROLE OF THE LONG RANGE PLANNING COMMITTEE

A summary of my views on the proper role of this Committee may be helpful. As you know, you owe your inception, at least in your present incarnation, to the Federal Courts Study Committee. In its report, the Study Committee noted that its own charge to develop a long-range plan for the future of the federal judiciary was a Congressional recognition of a planning void in then-existing Congressional and judicial branch arrangements.<sup>34</sup> The Study Committee apparently intended that this Committee would operate as something of a permanent version of the Federal Courts Study Committee.<sup>35</sup> The Study Committee further envisioned that this Committee would be "an entity to oversee and coordinate the planning function," a function the Study Committee understood to be "distinct" and "embrac[ing] the full range of the judiciary's administration. . . ."<sup>36</sup> The expectation was that "the planning process will be a part of the mainstream of the judiciary's governing process, rather than an isolated, abstract function."<sup>37</sup>

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33. FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT — A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 107 (1927).

34. *Report, supra* note 28, at 146-47.

35. *See id.* at 147 ("The courts need a stronger, permanent capacity to determine long-term goals and develop strategic plans by which they can reach those goals.").

36. *Id.*

37. *Id.* at 148.

More directly, the charge from the Judicial Conference sets out the role to be played by this Committee, and it merits full quotation:

To coordinate the planning activities of the judiciary. Promote, encourage, and coordinate planning activities within the judicial branch.

Advise and make recommendations regarding planning mechanisms and strategies, including the establishment of a coordinated judiciary planning process.

In consultation with and participation by other committees, members of the judiciary, and other interested parties, coordinate the identification of emerging trends, the definition of broad issues confronting the judiciary, and the development of strategies and plans for addressing them.

Evaluate and report on the planning efforts of the judiciary.<sup>38</sup>

Thus, as this Committee begins its work, you are the beneficiaries of high expectations and an expansive list of duties.

Perhaps part of the uncertainty or generality in the definition of this Committee's mission can be laid off on the more generalized uncertainty about the definition of the mission of the federal courts. And, as I have suggested, if you try to overcome that larger uncertainty, I think you will fall into a conceptual trap.<sup>39</sup>

But what characteristics should your Committee aspire toward in performing these duties? The theme of coordination is most prominent. In order to coordinate planning in the third branch, you must monitor the on-going efforts of other entities and provide liaison between them and your Committee and among them with each other. Continuity likewise is critical to successful planning. As Judge Wallace once emphasized, "It is not enough to develop a plan. There should be a method to reevaluate the plan as circumstances change, new facts are found, and new projections are developed."<sup>40</sup> In addition to being a catalyst for the planning of other entities, your creators clearly expect you to be creative in your own right, to develop and propose plans.

You have this much in common with a unicorn: until now, you have been a mythical creature; and now that you have come to life,

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38. Memorandum, *supra* note 8, at 1.

39. See *supra* text accompanying notes 8-19.

40. J. Clifford Wallace, *Working Paper—Future of the Judiciary*, 94 F.R.D. 225, 235 (1981). See generally J. Clifford Wallace, *The Future of the Judiciary: A Proposal*, 27 CAL. W. L. REV. 361, 362-63 (1991) (proposing a plan whereby the needs of the judiciary are reevaluated annually).

you have been endowed with mystical powers. Respectfully, I suggest that you would be better off if you thought of yourself as the work horse of judicial reform: one of the familiar Congressional judiciary committees.

My suggestion is that you organize your Committee along the legislative model. You could have subcommittees, organized thematically. You might consider the organization of the Federal Courts Study Committee, which divided itself into a Subcommittee on Administration, Management and Structure; a Subcommittee on Role and Relationships; and a Subcommittee on Workload. Certainly, there are other ways to divide the planning process, but this schema worked very well. However you subdivide this Committee, each subcommittee should have some permanent dedicated staff: some combination of full-time judicial branch employees and outside advisors.

By this suggestion, once you are organized like a legislative branch committee, I recommend that you behave like one in how you operate. You should hold hearings and publish the proceedings. You should draft committee reports on planning issues. You should commission studies by the Federal Judicial Center, the Administrative Office, and others. You should draft appropriate legislation. Of course, eventually all this work product must be sent through the judiciary chain of command of the Judicial Conference. In short, the best analogy of your role is that you should seek to perform the function of a legislative committee, but a legislative committee in and for the third branch.

#### V. ORGANIZATION AND OPERATIONS

In this part, I will introduce some of the organizational and operational issues that I anticipate. This discussion necessarily will be brief, given my limited experience in such matters. And I suspect that my effort will amount to an analysis of the obvious. My thoughts are conceived relationally, in terms of other organizations and groups with which you must relate.

Inside the third branch, I have already alluded to your Committee's relationship to other committees of the Judicial Conference and to the Judicial Conference itself.<sup>41</sup> In addition, the Federal Judicial Center<sup>42</sup> and the Administrative Office of the United States

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41. See 28 U.S.C. § 331 (1988).

42. See 28 U.S.C. §§ 620-629 (1988).

Courts<sup>43</sup> must be effectively involved in your Committee's work to expect any success at planning. Because planning requires data collection and information collection, these existing entities with proven ability and expertise must be enlisted in addition to your permanent staff. Professor Thomas Reed Powell often complained of the kind of social science where "counters don't think, and thinkers don't count."<sup>44</sup> I do *not* mean to suggest that the Administrative Office does not think; I do *not* mean to suggest that the Federal Judicial Center does not count. What I do mean to suggest, however, is that one valuable function of this Committee would be to help integrate and better coordinate the planning efforts of these two separate entities. The list of your projects currently underway with each of these entities suggest that you already are ahead of me on this concern.<sup>45</sup> It is incumbent on your Committee to involve non-article III personnel in the third branch in the planning effort, so that you are adequately informed and so that broad-based support will exist for reform proposals.

Between the judiciary and Congress, this Committee will have to feel its way, so as not to encroach on the primary and preemptive role of the Judicial Conference, while at the same time performing some information gathering and liaison with legislative branch reformers. For example, if a planning committee had been in place, I suspect the recent controversy over the so-called Biden Bill would have played out differently.<sup>46</sup>

With the same caveat about the primacy of the Judicial Conference, this Committee ought to consider how it should relate to the Executive Branch and to any parallel entities in the Department of Justice. For example, perhaps with the approval of the Executive Committee for such a politically sensitive subject, you might conduct a study of the impact on the courts from delays in the appointment and confirmation of federal judges.

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43. See 28 U.S.C. §§ 601-612 (1988).

44. H. FRIENDLY, *supra* note 15, at 15.

45. See Memorandum, *supra* note 8, at 11-13.

46. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (Dec. 1, 1990). See generally THE BROOKINGS INSTITUTE, JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY (Robert A. Katzman, ed., 1988) (discussing relations between Congress and the judiciary, explaining the sources of tension between the two branches, and proposing ways to improve the relationship).

Obviously, liaison with state courts and state court organizations such as the National Center for State Courts and the Conference of Chief Justices, must be within the organizational contemplation of your Committee once again with due regard for the primary role of the Judicial Conference and its other committees such as the Committee on Federal-State Relations. The framers understood that state and federal courts are part of "ONE WHOLE" system.<sup>47</sup> In our day, federal judicial planners must be aware that the system of state and federal courts "articulates as a system."<sup>48</sup>

Your Committee should be encouraged to make some overtures towards the legal academy and other organizations who have some expertise in court reform. Besides the American Bar Association,<sup>49</sup> the American Law Institute<sup>50</sup> and the American Judicature Society are two other likely objects of such outreach. As for the law teachers, there is a loosely organized section of the Association of American Law Schools for Federal Courts teachers. Here I must admit to some personal ambivalence. On first impression, great potential seems to exist for fruitful participation by legal academics.<sup>51</sup> I sometimes grow impatient, however, with the lack of interest by some of my colleagues. In this regard, I think Judge Edwards had a point when he addressed the annual meeting of law teachers a few years ago. Using examples from federal judicial planning, he told us that legal education, as presently constituted, is "falling short of any meaningful effort to 'shape the legal profession.'"<sup>52</sup> Still, I am hopeful that this Committee will receive the same generous assistance from my fellow law professors that they provided the Federal Courts Study Committee.

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47. THE FEDERALIST No. 82 (Alexander Hamilton) (emphasis in the original).

48. F. FRANKFURTER & J. LANDIS, *supra* note 33, at 2-3.

49. See generally AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON FEDERAL JUDICIAL IMPROVEMENTS, THE UNITED STATES COURTS OF APPEALS: REEXAMINING STRUCTURE AND PROCESS AFTER A CENTURY OF GROWTH (1989) (proposing changes in the appellate structure accompanied by further investigation and research).

50. See generally AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969) (proposing limits on the scope and exercise of federal jurisdiction and revisions of the procedures for invoking that jurisdiction).

51. See generally Kenneth F. Ripple, *The Judge and the Academic Community*, 50 OHIO ST. L.J. 1237 (1989) (advocating collaboration between academic lawyers and judges and emphasizing the shared responsibility of the two professions).

52. Harry T. Edwards, *The Role of Legal Education in Shaping the Profession*, 38 J. LEGAL EDUC. 285, 285 (1988).

Finally, I might suggest two realistic limits on the organization and operation of your Committee. First, I think you should be true to your own educational backgrounds and professional experiences. You are accomplished lawyers and jurists. You are not social scientists, except as part time amateurs, and you should not try to be something that you are not. The Federal Courts Study Committee recommendation that is the origin of this Committee recognized how important organization and staff would be to your undertaking: "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."<sup>53</sup> Second, this Committee must always keep in mind that Congress wields the whip hand for judicial reform under the Constitution. Whatever you propose, even with the endorsement of the third branch hierarchy, necessarily is subject to legislative, and hence political, scrutiny.<sup>54</sup> This political reality ought to be taken into account as you begin to shape your agenda and as you set your priorities.

## VI. CONCLUSION

To my judicial audience, this statement may have the smell of the scholar's lamp, and its smoke may do more to cloud than its light to illuminate. In giving testimony such as this, law professors sometimes have a tendency to move back and forth between naivete and arrogance. My purpose here is to help the organizational effort of your Committee as you conceptualize your Committee's charge. If I might close, as I began, with a quotation from a theologian, I urge you to hold on to this thought as you begin your task of long-range planning for the federal courts:

We do not know enough about the future to be absolutely pessimistic.<sup>55</sup>

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53. REPORT, *supra* note 29, at 147-48.

54. "Ultimately, federal jurisdiction is politics." Thomas E. Baker, *Shaping a Court System for the '90's*, TEX. LAW., May 20, 1990, at 32.

55. Martin E. Marty, *The Many Faces of Technology, The Many Voices of Tradition*, in TRADITIONAL MORAL VALUES IN THE AGE OF TECHNOLOGY 131 (W. Lawson Taitte ed., 1987).

