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# Proposed Long Range Plan for the Federal Courts: Ambition or Abdication?

MYRA C. SELBY\*

## INTRODUCTION

William H. Rehnquist, the Chief Justice of the U.S. Supreme Court, delivered the following remarks in Wilmington, Delaware on September 18, 1992, on the occasion of the Bicentennial Celebration of the Delaware Court of Chancery:

At the time the states were considering whether to ratify the federal Constitution, Alexander Hamilton published one of the Federalist papers to convince a skeptical audience that the Constitution's mixed judicial system could work. National courts need not overpower or supplant the existing state courts, he argued; instead "the national and state systems are to be regarded as ONE WHOLE." Obviously, Hamilton did not believe that federal and state courts should be consolidated; rather, he understood that the state and federal systems ultimately served the same end—the prompt and fair resolution of disputes. *Two hundred years later, we need to reaffirm the view that our state and federal judicial systems are one resource, and an increasingly scarce one at that. The nation can no longer afford the luxury of state and federal systems that work at cross purposes or irrationally duplicate each other's efforts. Nor can it afford a view that state courts are second-class tribunals in our system of justice.*<sup>1</sup>

It is with this view of the judiciary in mind that I offer my comments on the Long Range Plan for the Federal Courts ("the Plan").<sup>2</sup>

Much of the Plan involves the self-governance of the federal courts, and I will not comment on that aspect of the Plan. However, the Plan does have a significant impact on both state court jurisdiction and on how state court judges function. The Plan's impact on state courts is the focus of this Response.

The Plan describes six core values of the federal judiciary:

- The Rule of Law
- Equal Justice
- Judicial Independence
- National Courts of Limited Jurisdiction
- Excellence
- Accountability<sup>3</sup>

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1. William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 BUS. LAW. 351, 355 (1992) (capitalization of "one whole" in original) (emphasis added).

2. JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE ON LONG RANGE PLANNING, LONG RANGE PLAN FOR THE FEDERAL COURTS (1995) [hereinafter SEPTEMBER PLAN]. Many of the recommendations in this plan have been approved by the Judicial Conference, which is the policymaking arm of the judicial branch. This Article will also refer to two previous drafts of the Plan, one published in March, 1995, JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE ON LONG RANGE PLANNING, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS (1995) [hereinafter MARCH PLAN], and one published in November, 1994, JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE ON LONG RANGE PLANNING, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS (1994) [hereinafter NOVEMBER PLAN]. Unless otherwise specified, all mentions of the Plan refer to the September Plan.

3. MARCH PLAN, *supra* note 2, at 7.

The state courts undoubtedly share in these values. Moreover, the particular value of equality of justice seems to be at the heart of the Plan. The statement on equal justice reads:

Every federal judge takes an oath to "administer justice without respect to persons" and to "do equal right to the poor and to the rich," meaning that bias, partiality, and the parties' economic circumstances may play no role in the administration of justice. Fairness also permeates this core value. Courts should make decisions that comprehend the relevant individual circumstances of litigants, that empathize with their situation, that apply deliberative imagination, that give them ample opportunity to be heard, and that reach a just result. In recent years adherence to this core value has led judges to express concerns ranging from the state of the criminal sentencing guidelines to the ability of judges to give individualized justice when faced with increasing caseloads.<sup>4</sup>

One striking thing about the "vision" of the proposed Plan is that it couches equal justice in terms indicating that it is a future goal: "[T]he federal courts will strive to make the ideal of equal justice a reality."<sup>5</sup> It is not entirely clear how the Plan will achieve this goal, or even bring us closer. A number of the recommendations are framed in terms of judicial federalism, yet there is little doubt that they will shift the workload by moving a large bulk of routine federal cases from the federal courts to the state courts. Though the shift itself may indeed achieve many of the goals of the Plan, it is important to be mindful of the commitment to the core values, particularly that of equal justice.

Many state courts have responded to the federal plan, especially those recommendations involving federal caseload reduction and concomitant state caseload expansion, by asking, "Do we have to take this?"<sup>6</sup> In other words, can the state courts be forced to exercise jurisdiction over federal cases?<sup>7</sup> This response reflects the fact that the courts truly are not one whole, as Hamilton would want, and the fact that the Plan focuses on burgeoning federal caseloads without seeming to acknowledge or to discuss the growth of state court caseloads.<sup>8</sup>

The Plan's shift of some of the workload to the state courts generally involves three types of cases. Part I of this Response will address the effect the proposed changes in criminal jurisdiction would have on state courts. Parts II and III will address the most significant changes in civil jurisdiction: Part II will focus on diversity jurisdiction, and Part III will focus on jurisdiction of civil cases involving workplace injuries. Finally, Part IV will present hypothetical scenarios involving state reaction to the shifting burdens.

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4. *Id.* at 7-8.

5. *Id.* at 5.

6. See *infra* part IV.

7. See, e.g., SEPTEMBER PLAN, *supra* note 2, at 1, 5 (noting respectively Recommendation 2 on federal criminal law and Recommendation 12 on federal workplace injury statutes).

8. See, e.g., Randall Samborn, *Accelerating Caseloads Threaten to Swamp Courts Felonies and Domestic Relations Lead Growth in Criminal and Civil Matters*, NAT'L L.J., July 5, 1993, at 10 (noting that from 1984 to 1991 state court civil caseloads have risen by 33%, criminal caseloads by 24%, and juvenile caseloads by 34%); STATE JUSTICE INSTITUTE, STATE COURT CASELOAD STATISTICS, 1993, at 192 (1995) (showing an increase of 113% in Indiana felony cases during the same timeframe); 1 SUPREME COURT OF INDIANA, DIVISION OF STATE COURT ADMINISTRATION, 1994 INDIANA JUDICIAL REPORT 60-61 (showing an overall increase of 24% in Indiana caseload during the same timeframe).

## I. CRIMINAL JURISDICTION

One of the major objections to the Plan from a state court perspective is that the Plan would shift most federal criminal cases to the states. Recommendation 2 reads as follows:

In principle, criminal activity should be prosecuted in a federal court only in those instances in which state court prosecution is not appropriate or where federal interests are paramount. Congress should be encouraged to allocate criminal jurisdiction to the federal courts only in relation to the following five types of offenses:

(a) The proscribed activity constitutes an offense against the federal government itself or against its agents, or against interests unquestionably associated with a national government; or the Congress has evinced a clear preference for uniform federal control over this activity.

(b) The proscribed activity involves substantial multistate or international aspects.

(c) The proscribed activity, even if focused within a single state, involves a complex commercial or institutional enterprise most effectively prosecuted by use of federal resources or expertise. When the states have obtained sufficient resources and expertise to adequately control this type of crime, this criterion should be reconsidered.

(d) The proscribed activity involves serious, high-level, or widespread state or local government corruption, thereby tending to undermine public confidence in the effectiveness of local prosecutors and judicial systems to deal with the matter.

(e) The proscribed activity, because it raises highly sensitive issues in the local community, is perceived as being more objectively prosecuted within the federal system.<sup>9</sup>

This recommendation would have the effect of shifting a significant number of federal crimes from federal court to state court.<sup>10</sup> The Plan clearly discourages federal jurisdiction for crimes with only minor connections to interstate commerce. Thus, many recently federalized crimes would be enforced in state court.

To be fair, it is important to note that there is a separate Recommendation to Congress to reduce the number of federal crimes. Recommendation 3 reads:

Congress should be encouraged to review existing federal criminal statutes with the goal of eliminating provisions no longer serving an essential federal purpose. More broadly, a thorough revision of the federal criminal code should be undertaken so that it conforms to the principles set forth in Recommendation 2 above. In addition, Congress should be encouraged to consider use of "sunset" provisions to require periodic reevaluation of the purpose and need for any new federal offenses that may be created.<sup>11</sup>

From the perspective of a state court judge, however, it is unnerving to think what would happen if Recommendation 2 is adopted without this reaction from Congress. Further, given the recent congressional trend of federalizing crimes, especially those involving drugs and guns, it is unlikely that Congress would react to this recommendation in the way that the Judicial Conference hopes. Thus, where the federal government chose to criminalize an activity and a state chose not to, the Plan would result in the federal government commandeering the state judiciary to enforce statutes which may not be important to that state. It is difficult to see how this serves the core value of judicial federalism.

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9. *Id.* at 1-2.

10. See CONFERENCE OF CHIEF JUSTICES, RESPONSE TO THE DRAFT OF THE PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS ii (1995) (on file with the *Indiana Law Journal*) [hereinafter C CJ RESPONSE].

11. SEPTEMBER PLAN, *supra* note 2, at 2.

It is imperative that implementation of these two recommendations be tied together in some fashion. If the first is allowed to take effect without the second, the result would be disastrous for the state courts. Alternatively, if jurisdiction is gradually withdrawn while Congress gradually repeals federal criminal laws which do not serve essential federal purposes, then state courts may not be overburdened with federal criminal cases. The end result should be very few federal criminal statutes, with most falling into one of the five categories of exceptions, and with the federal courts retaining jurisdiction over most remaining federal crimes.

An additional concern with this part of the Plan is the odd position in which it would place the U.S. Attorney. State trial courts have a special relationship with local prosecuting attorneys and the state Attorney General offices. In Indiana, for example, the prosecutor and the trial judge are elected officials,<sup>12</sup> and thus occupy important positions within the fabric of the local community. If federal crimes are forced into state courts, the U.S. Attorney would have authority within the state courts, yet would be an outsider without this local connection. The result is an injection of federal law and personnel into the state system. Although this would fit with Hamilton's image of state and federal courts acting as "one whole," having the federal prosecutor come into state courts to prosecute federal crimes would require some adjustments within current court relationships.

## II. DIVERSITY JURISDICTION

The Plan would considerably restrict diversity jurisdiction cases in federal courts in two ways: "eliminat[ion of] diversity jurisdiction for cases in which the plaintiff is a citizen of the state in which the federal district court is located,"<sup>13</sup> and restrictions on the amount-in-controversy.<sup>14</sup> The latter would require the party to plead specific facts to demonstrate that the amount-in-controversy requirement had been satisfied, would raise the amount-in-controversy limit (to an unspecified amount), index it to the rate of inflation, and would exclude punitive damages from the calculation of the amount-in-controversy.<sup>15</sup>

Although this is also a workload shifter, it is less troublesome from the judicial federalism perspective because it actually favors judicial federalism. This recommendation would return to state court many cases which do not involve federal law. Further, the restrictions on plaintiff citizenship would return cases involving state law to the plaintiff's home court system. Additionally, the Conference of Chief Justices ("CCJ") points out that reduction of diversity jurisdiction cases would dramatically reduce federal court dockets, while not dramatically increasing the number of cases in state courts.<sup>16</sup>

Originally, the CCJ opposed this amendment.<sup>17</sup> Although the "CCJ has clearly stated the willingness of state courts to absorb diversity cases,"<sup>18</sup> the original version of this recommendation was highly objectionable. In reference to the two restrictions mentioned above, the November Plan had carved out an exception for mass tort cases. The CCJ

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12. IND. CONST. art. 7, § 7 (judges); IND. CONST. art. 7, § 16 (prosecuting attorney).

13. SEPTEMBER PLAN, *supra* note 2, at 3 (Recommendation 7).

14. *Id.*

15. *Id.* at 3-4.

16. CCJ RESPONSE, *supra* note 9, at v.

17. *Id.*

18. *Id.* The CCJ had not opposed recent increases in amount-in-controversy.

believed that this would shift caseload to the state courts, while preserving a particularly interesting area of the law for the federal courts.<sup>19</sup> In response to this objection, the Judicial Conference has withdrawn this mass tort exception.

As it now reads, this, by far, is the least objectionable of the workload-shifting recommendations. Historically, federal jurisdiction over diversity cases has been restricted five times by increasing the amount-in-controversy.<sup>20</sup> For the most part, implementation of the Plan would simply be a continuation of this historical trend.

### III. WORKPLACE INJURY CIVIL CASES

Recommendation 12 shifts most workplace injury cases under FELA<sup>21</sup> and the Jones Act<sup>22</sup> to state courts. Further, ERISA<sup>23</sup> cases would shift to state courts unless application or interpretation of federal statutory or regulatory requirements are at issue.<sup>24</sup> This is one of the most troublesome aspects of the September Plan,<sup>25</sup> even though it reflects changes born from comments on earlier drafts. The earlier drafts would have eliminated all federal administrative jurisdiction as well as federal court jurisdiction in civil workplace injury cases.<sup>26</sup> The September Plan, however, calls for the establishment of an administrative remedial process for any new programs dealing with employee benefits. These administrative remedies must be exhausted before a state court action may be filed,<sup>27</sup> but the Plan designates state courts as the primary fora for the review of these claims. Thus, this part of the Plan still raises a number of questions.

Again, this Recommendation shifts cases from federal to state courts. However, unlike the federalism arguments above, the Plan cites competency of the state courts as the primary reason for the shift.<sup>28</sup> The Plan indicates that state courts have developed expertise in adjudicating worker's compensation cases. But are state courts really better equipped to handle such cases? Several problems come to mind.

First, the rationale for moving these cases to state courts is suspect. Although many state courts have developed expertise in workplace injury litigation, this Recommendation would transfer all federal worker compensation claims to state court dockets. What if the federal government simply refused to pay a claim? Would the plaintiff have no federal court remedy? Further, are state courts truly better equipped to handle such cases? North Dakota may have a great system for dealing with its own workplace claims, but are its courts really more competent than the federal courts when dealing, for example, with a Jones Act claim?

Also, as argued by the Association of Trial Lawyers of America ("ATLA"), the federal courts have developed highly effective means for dealing with such cases, and it is unclear why the federal courts should discard these means.<sup>29</sup> ATLA points out that these

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19. *Id.*

20. See SEPTEMBER PLAN, *supra* note 2, at 25-26.

21. 45 U.S.C. § 51 (1994).

22. 46 U.S.C. § 688 (1988).

23. Employee Retirement Income Security Act, Pub. L. No. 93-400, 88 Stat. 829 (1994).

24. SEPTEMBER PLAN, *supra* note 2, at 5.

25. ASSOCIATION OF TRIAL LAWYERS OF AMERICA, COMMENTS ON THE PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 7 (1994) [hereinafter ATLA COMMENTS].

26. MARCH PLAN, *supra* note 2, at 34-35; NOVEMBER PLAN, *supra* note 2, at 29.

27. SEPTEMBER PLAN, *supra* note 2, at 5.

28. MARCH PLAN, *supra* note 2, at 35-36; NOVEMBER PLAN, *supra* note 2, at 29-30.

29. ATLA COMMENTS, *supra* note 25, at 7.

cases account for only 6.7% of the civil filings in district courts. Yet virtually all FELA case law is federal, and the federal courts have developed case law which would be extremely difficult to translate into state systems without serious injustice. Such federal caselaw, specifically in the areas of damages, defenses, and comparative fault,<sup>30</sup> may not mesh well with state law. Further, damage recoveries in many state court systems are "appallingly low," and are inconsistent from state to state.<sup>31</sup>

Additionally, uniformity was one of the motivating goals behind the original ERISA legislation.<sup>32</sup> Yet, the likely result of the Plan is that citizens of different states would recover different amounts under the same statute. So much for the goal of equal justice. Of course, ERISA claims involving "application or interpretation of federal statutory or regulatory requirements"<sup>33</sup> could still be raised in federal court. Is this exception big enough to swallow the rule, at least where ERISA claims are concerned?

Also, this jurisdictional limitation may send a worrisome message to state courts and claimants. Is it appropriate for federal court judges to express opinions regarding jurisdiction over specific subject areas? The areas of jurisdiction discussed in Parts I and II above are relatively neutral with respect to the subject matter. Recommendation 12, however, deals with a specific, fairly narrow, subject area; that is, employment-related laws. This change of jurisdiction easily could be interpreted as the Judicial Conference's assessment that this subject area is somehow less important (or less interesting). If so, does this also send the message that the litigants' claims, or the state courts that must adjudicate them, are second rate?

Finally, it is worth mention that Recommendation 14<sup>34</sup> asks Congress to provide for some federal financial assistance to state courts. At first blush, this would appear to be significantly more palatable than an unfunded mandate, but this is only true if such funding were block granted to the states without any strings attached. Placing conditions on this funding would certainly have some impact on the independence of state courts. Funding, although helpful, seems to defeat the goal of judicial federalism, and depending on the strings, it could be just as unpalatable as an unfunded mandate.

#### IV. SEVERAL HYPOTHETICAL SITUATIONS

Recently, an interesting hypothetical has been proposed in which a state court refuses to take jurisdiction over certain federal cases.<sup>35</sup> Because state courts are courts of general jurisdiction, this is not as easy as it may sound. If a state court has jurisdiction over the same or similar types of cases under state law, it cannot disclaim jurisdiction of the corresponding federal claims.<sup>36</sup>

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30. *Id.*

31. *Id.* The scheduled monetary award for traumatic amputation of a foot in some states may be as low as \$27,000 (Indiana), while in other states may be six figures or higher. *Id.*

32. See, e.g., *Proposed Law on Federal Courts Would Hurt Employee Plans*, ERIC Says, Pens. Rep. (BNA) No. 48, at 2670, 2671 (Dec. 4, 1995).

33. SEPTEMBER PLAN, *supra* note 2, at 5.

34. *Id.* at 6.

35. Jed Rubinfeld, *The Federal Question 1* (Forum for State Court Judges, The Roscoe Pound Foundation/Yale Law School) (1995) (on file with the *Indiana Law Journal*).

36. See *Howlett v. Rose*, 496 U.S. 356, 369 (1990); *Testa v. Katt*, 330 U.S. 386 (1947).

Arguably, states do not have to provide courts of general jurisdiction, or courts at all.<sup>37</sup> Thus, it is possible to devise a scenario where the states, in order to save their overworked courts, limit the jurisdiction of their courts. A state legislature could decide to impose a dollar amount on drug crimes or could refuse jurisdiction for all claims involving workplace injuries. Arguably, because the state would be limiting jurisdiction of state court claims as well as federal claims, this jurisdictional limitation may pass constitutional muster.

What if the federal statute specifically granted authority to bring such suits, thus raising a Supremacy Clause issue? The state statute may still be acceptable. A recent case, *New York v. United States*,<sup>38</sup> held that Congress cannot "'commandeer' state governments into the service of federal regulatory purposes."<sup>39</sup> Thus, the federal government cannot compel a state legislature to regulate. Although this case involved state legislatures, and not state courts, an argument can be made that the rationale would apply to state courts as well.<sup>40</sup> Thus, even given a federal statute, a state court jurisdictional limitation may be constitutional.

We can even assume that all jurisdictions were working with the purest of motives—that is, how best to use their limited court resources. Although it is unclear whether such a state statute would be constitutional, if it were, this would have a deleterious impact on equal justice. People with legitimate claims under good law would be denied access to justice simply because they would not be able to find a court which has jurisdiction. As each state jumps on the bandwagon to save the parts of the judiciary most important to that state, more individuals would fall through the cracks. This situation would be a nightmare.

A second hypothetical also demonstrates the potential problems with the Plan: What if the state were to set up separate procedures for cases which arise under state law? The state need not refuse to take jurisdiction of the federal issues, but simply put them on a slower timetable. Cases arising purely under state law could be given priority, and placed at the top of the docket, while other cases (those involving federal law and those involving a conflict of law) would proceed in the normal time frame. This scheme would avoid many of the constitutional difficulties above, as this is merely an internal procedure of the court. Still, it would allow the state court to minimize the impact of the Plan.

Although this situation would be good for the state law claimants, it would not be very good for equal justice. Merely because a class of claimants have had their cases removed from federal court, their cases would be placed on the bottom of the state court pile. They would not be denied their day in court, but they would have to wait much longer for access to any court.

Should any of these troubling situations become reality, some federal law plaintiffs would be left without a suitable forum. Many may put the blame on the states, since the states would have more recently changed their procedures. However, the blame more appropriately would lie with the Judicial Conference and Congress, since the lack of access to courts would be the result of a chain reaction resulting from this attempt to protect part of the federal judiciary. As suggested by the title of this Response, I see the

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37. *See, e.g., Kenney v. Supreme Lodge*, 252 U.S. 411, 414 (1920) (stating that "the Constitution does not require the State to furnish a court").

38. 505 U.S. 144 (1992).

39. *Id.* at 175. For further discussion, see Rubinfeld, *supra* note 35, at 7.

40. Rubinfeld, *supra* note 35, at 7-10.



Plan as a partial abdication of the role of the federal judiciary. If Congress created the cause of action, it should be responsible for the costs.

The purpose of these hypothetical situations is not to assess blame, but to point out how far we have strayed from the ideal of the state and federal courts working as "one whole." The Plan was designed to protect the federal court system, with care taken to be responsive to the needs of the state courts. However, these scenarios demonstrate that the discussion must continue in order to close the gap between the ideal of the Plan and the reality of today's courtrooms.

#### CONCLUSION

In conclusion, I applaud the drafters of the Plan for their attempt to preserve the federal court system and keep it vital for the future. However, I am concerned for our state courts. Although judicial federalism is a worthy goal, it should not be elevated above equal justice. The Judicial Conference has listened and responded to the CCJ. I worry that they have not responded enough.