SYMPOSIUM

THE FUTURE OF THE FEDERAL COURTS

April 9, 1996

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WELCOMING REMARKS

PROFESSOR ROBBINS: Mr. Chief Justice, distinguished members of the panel, guests, colleagues, ladies and gentlemen, good evening. My name is Ira Robbins; I am a Professor of Law here at the Washington College of Law of American University. To celebrate the Centennial of the Washington College of Law, we have had two full days of academic panels on numerous topics concerning the future of law and legal education. Now, in what is a momentous event for the law school and what I trust will be a significant component of the ongoing debate concerning the federal judiciary, I am proud to commence our Plenary Panel on "The Future of the Federal Courts."

It is my pleasure to open the session by welcoming you and by introducing the dean of our law school. Claudio Grossman joined the faculty of the Washington College of Law in 1983 as Professor of Law and director of our newly established international legal studies

program. Starting with just one student, in twelve years he developed that program into one that is now ranked ninth in the United States with more than 150 students from fifty countries. Claudio Grossman was named dean of the law school in 1995. Dean Grossman is the author of many books and articles on international law, human rights, and the law of international organizations. He has also served as legal counsel to victims of human rights abuses in the Americas in several landmark cases. In recognition of his work in international human rights, Claudio Grossman was elected in 1992 to serve on the Inter-American Commission on Human Rights, which investigates human rights abuses as part of the Organization of American States ("OAS"). In further recognition of his contributions in this area, last month the General Assembly of the OAS elected Dean Grossman President of the Inter-American Commission on Human Rights. It is my great pleasure to present my colleague, Claudio Grossman, Dean of the Washington College of Law.

(Applause)

DEAN GROSSMAN: Thank you, Professor Robbins. Mr. Chief Justice, President Ladner, honored members of the judiciary, alumni, students, colleagues, and friends, I am pleased to welcome you this evening, and I am delighted that you are able to join us in the new home of the Washington College of Law. All of us at the law school are honored that the Chief Justice and the distinguished panelists are able to join us in celebrating our Centennial.

Our new state-of-the-art facility is one of the most advanced in the country and in the world. At every seat of every classroom and the library, students have access to computerized legal research services. This sophisticated technology allows us to bring the most up-to-date teaching materials into every classroom and creates opportunities to better fulfill our educational mission.

One hundred years ago, Ellen Spencer Mussey and Emma Gillette became the first women to establish a law school in the United States, or for that matter, in the world. Their idea was to provide access to legal education on the basis of equality for both men and women. They also believed that lawyers and the legal system had an essential role to play in the advancement of human dignity. Their powerful message has inspired this institution to develop nationally and internationally recognized programs in clinical education, international law, business law, law and government, women and the law, and environmental law.

To highlight the continued vitality of our founders' message, we have organized the Centennial around the theme of the past, present,

and future of legal education and the legal system. Our community has organized a five-day academic program attracting leading academicians, practitioners, judges, and others to discuss substantive legal issues such as: securities litigation; legal education; race and gender; crime and justice; work and family; and the international protection of human rights. To complete the celebration, nothing could be more fitting than to have William Rehnquist, Chief Justice of the United States, give the Keynote Address and to have this distinguished panel discuss the future of the federal courts.

An independent and impartial judiciary is the cornerstone of any democratic society. Yet it is something that often is taken for granted. Instead of merely quoting some text that highlights the point of the judiciary's importance, allow me to share with you a personal experience. As a human rights lawyer, I represented families in Honduras whose fathers had disappeared. They were important cases, one of which was the first case brought to the Inter-American Court on Human Rights. Understandably, when we met with the families, they were very emotional. They often would cry when speaking of their loved ones who had disappeared. We were very concerned about what would happen during the first open hearing before the court. I was surprised, however, to see that the families were very calm and serene in testifying. After the hearing, they told me why they had been so calm. They said, "It is the first time that we are being heard." For the first time after many years, they were in the presence of independent and impartial judges. This event had restored their faith in the rule of law and in the importance of the judiciary. Indeed, I think it gave them faith in humanity.

I am sure that your discussion tonight will further enhance our faith in and understanding of the importance of an independent and impartial judiciary. Although the term "independent" is difficult to define, as it is a very complex concept, an essential component of it is the need for a permanent and informed process of open discussion and debate, such as the one we will have here tonight.

Finally, I am very pleased to introduce Professor Ira Robbins, my colleague, without whose assistance this program would not be possible. Professor Robbins is the Barnard T. Welsh Scholar and Professor of Law and Justice at the Washington College of Law, where he teaches in the areas of Criminal Law, Post-Conviction Remedies, Conflict of Laws, and Judicial Administration. He has also written many books and law review articles and was selected Teacher of the Year at American University in 1985 and University Teacher/Scholar of the Year in 1987. Professor Robbins has served as the Acting

Director of the Education and Training Division of the Federal Judicial Center, and regularly provides training sessions for both federal and state judges. I now will turn the program over to Professor Robbins.

Thank you very much.

(Applause)

PROFESSOR ROBBINS: Thank you very much Dean Grossman. I appreciate the wonderful introduction.

It has been said that the federal judiciary is facing a crisis of volume.[1] The recently issued *Long Range Plan for the Federal Courts*[2]—the first long-range plan ever for the federal judiciary—predicts that, based on current case filing rates, in twenty-five years we will need four times as many judges as we now have to meet the ever-mounting caseload.[3] That would mean that more than 3000 federal judges would have to be appointed in the next 300 months. Is that realistic? How would this growth affect the quality of justice in the United States? Instead of increasing the number of judges, should we amend jurisdictional statutes to reduce the number of cases? Alternatively, should we concentrate on developing more efficient case-management techniques? Put differently, do we truly need structural change; or can we not only survive, but also thrive, with creative fine-tuning? These are some of the issues that we will address in the Washington College of Law's Centennial Symposium on "The Future of the Federal Courts." In short, we will discuss the broad question of reforming the federal courts so that they can continue to serve the nation as the judiciary enters its third century of service.

Without further ado, ladies and gentlemen, distinguished members of our panel and of our audience, it is a grand understatement to say that I am honored and delighted to present our keynote speaker, an

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1. *See* JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 9-10 (1995) [hereinafter LONG RANGE PLAN] ("Huge burdens are now being placed on the federal courts. . . . [C]ivil case filings [in the district courts] have increased 1,424%, with most of that growth in the period since 1960. Most remarkably, since 1904 annual cases commenced in the federal appeals courts have increased more than 3,800%."); *see also id.* app. A (discussing current caseload of federal district and circuit courts and forecasting future trends in volume).

2. The *Long Range Plan* is the product of Chief Justice Rehnquist's "recognition that the judiciary needs a permanent and sustained planning effort." *Id.* at vii. It is the "first comprehensive plan for the future of the federal courts." *Id.* at 1.

3. *See id.* at 18 (stating that if Appendix A, entitled "Current Trends and Projections," is accurate, "more than 4,000 federal judges might be necessary to handle the federal courts' docket in 2020"); *id.* app. A, tbl. 1, at 161 (speculating that in 2020, there may be 2410 district judges and 1660 appellate judges).

individual who truly needs no introduction, the Honorable William H. Rehnquist, Chief Justice of the United States.

(Applause)

CHIEF JUSTICE WILLIAM H. REHNQUIST: KEYNOTE ADDRESS

It is a great pleasure to be here this evening and to participate in American University's celebration of the Centennial of the Washington College of Law. Since the federal judiciary celebrated its bicentennial only a few years ago, this is an appropriate occasion to speak about the future of the federal courts. But I think it will be helpful in trying to forecast the future of the federal courts to look briefly at how they have evolved over the more than two hundred years they have already been in existence.

The federal court system in the United States got off to a remarkably slow start two hundred years ago. The Supreme Court ruled quite early in the game that there were no common-law crimes in the federal courts and, therefore, no criminal prosecutions could be initiated unless authorized by an act of Congress criminalizing certain conduct, and Congress simply did not pass many criminal statutes. The federal trial courts had no "federal question" jurisdiction until 1875. This meant that if an individual wished to bring a lawsuit claiming that a right secured to him by the Federal Constitution had been violated, that lawsuit had to be brought in state court. The Supreme Court of the United States could review a decision by the highest court of a state that decided a federal question, but the lower federal courts were not involved. Thus, for nearly the first century of their existence, the staple of the business of the lower federal courts was admiralty cases and cases in which jurisdiction was based on diversity of citizenship.

But this distribution of business between the state court systems and the federal courts changed quite dramatically after the Civil War. In the aftermath of that conflict, the so-called Civil War amendments to the Constitution were adopted, and of those the Fourteenth Amendment has been a prolific source of judicial business. In 1875, federal district courts were given federal question jurisdiction, so that from then on, cases involving constitutional claims could be initiated in the federal courts. Finally, the public's view of the appropriate role for the federal government changed after the Civil War. Although the change moved in fits and starts at first, it inexorably moved in the direction of greater federal regulation of the citizenry. Until well

after the Civil War, the general view was that the federal government should provide for the common defense, coin money, carry the mails, and pay for itself by collecting customs duties. But the increasing pace of the Industrial Revolution, the rapid spread of the railroad into every nook and cranny of the nation, and the increasing size of manufacturing enterprises all provoked calls for regulation of what was increasingly a commerce which paid scant attention to state borders.

Before the turn of the twentieth century, Congress passed the Interstate Commerce Act, giving a federal commission some control over railroad rates and practices, and the Sherman Antitrust Act, forbidding conspiracies in restraint of trade. As we moved into the twentieth century, the inventions of the automobile and the airplane continued the transportation revolution. The pace of increase in federal regulation continued, driven partly by the interstate nature of so much of the country's business and partly by a number of reform movements seeking to ameliorate the plight of those who did not share in the generally rising tide of prosperity. The typical pattern was for reform movements to originate in the states, only to discover that the practices which they sought to prohibit or limit could not be prohibited or limited to their satisfaction without the intervention of the federal government.

First came concern about wages, hours, and child labor in factories. States adopted maximum hour and minimum wage laws, and laws prohibiting child labor. But as often as not, the manufacturing plants which would be affected by these laws would pick up and move to a state which did not have such laws. Congress, viewing this phenomenon with dismay, finally itself enacted federal prohibitions against child labor and later a federal maximum hour and minimum wage law. This pattern has continued in various areas of the law. A wave of reform led to the enactment by the states of "blue sky" laws in the first part of this century, regulating the issuance and selling of stock and punishing fraud. But these laws were deemed inadequate, and the federal government stepped in as a part of President Franklin Roosevelt's New Deal to enact federal regulations in that field. In the 1950s, many states enacted fair employment practice laws and anti-discrimination laws governing public accommodations and the like. But some states chose not to enact such laws, and dissatisfied reformers went to Congress to nationalize this field of lawmaking. The result was the federal Civil Rights laws enacted in the 1960s, and every one of these laws was a source of added business for the federal courts.

The wave of federal regulatory statutes also brings with it related problems that give rise to legal disputes. First, disputes arise as to whether an agency or commission that is empowered to issue regulations under a statute has exceeded its authority with respect to one or more particular regulations. Federal courts must decide these questions, as well as basic questions of statutory interpretation. Second, because of the Supremacy Clause in the Constitution, every time Congress enacts a new statute dealing with some phase of the economy, it very likely supersedes some of the laws of the various states which previously governed that area. For example, in 1974 Congress enacted the modestly titled Employees Retirement Income Security Act, which had as its basic purpose the introduction of some federal supervision over employer plans to provide various health and retirement benefits to employees. In the twenty-two years in which the statute has been on the books, our Court has decided twenty-one cases involving the question of whether or not that federal law preempted a particular state law dealing with this same general subject matter. And that, of course, is only the tip of the iceberg; if the Supreme Court has decided that number of cases, the federal appeals courts have decided fifteen or twenty times that number of cases dealing with preemption under this one particular federal statute.

The result of this two-hundred-year evolution has been that although ninety-five percent of the judicial business in the United States is still transacted in state courts, there has been a remarkable increase in the business of the federal courts because of these changes which I have described. And the federal courts are now awash in the most recent of these changes, which is the federalization of more and more crimes which once were thought to be matters of exclusive concern to the states.

More than forty years ago when I began the practice of law in Arizona, there were not many federal criminal statutes on the books. The staple of the criminal business of federal courts outside of the metropolitan areas was prosecutions for transporting a stolen car in interstate commerce, using the mails for interstate communications to commit fraud, and a very few similar crimes.

But that landscape has entirely changed in the last generation. Congress, understandably concerned with the increasing traffic of drugs and the violence resulting from the use of guns, has legislated again and again to make what once were only state crimes federal offenses. The same sort of dissatisfaction with state treatment of the cases in this area of the law has been obtained as earlier was obtained

with welfare legislation and civil rights laws. Congress has been of the opinion that even though these gun and drug crimes could be prosecuted under state law, the state penal systems were too lenient in paroling serious offenders after having served only a fraction of the time to which they were sentenced. So Congress stepped in, prescribed very severe sentencing guidelines for federal crimes, and federalized countless crimes involving drugs and guns.

All of this means that in talking about the future of the federal courts, we must understand that Congress probably will continue to enact new legislation that provides new causes of action for litigants on the civil side of the docket and new federal crimes to be prosecuted on the criminal side of the docket.

It is the federal district courts and the courts of appeals that are being hit hardest by this ever-increasing wave of litigation. The Supreme Court's docket is actually down from what it was several years ago. With the district courts, it is largely a question of having enough judicial manpower to adjudicate the incoming cases. The same is true to a large extent of the courts of appeals, except that indefinite enlargement of the number of judges on the courts of appeals poses problems of collegiality, maintaining a coherent body of law in the circuit, and the like. The majority of federal judges, if the Judicial Conference of the United States accurately reflects their views, thinks that the federal judiciary should remain a limited and somewhat specialized system of administering justice.

Possible alternatives to indefinite enlargement of the courts of appeals would be the creation of specialized appellate courts for a particular subject matter, restriction of jurisdiction as Professor Robbins suggested, or the limitation of the automatic right of appeal from district courts to the courts of appeals. We have on our panel tonight two distinguished judges of the courts of appeals, Judge Reinhardt and Judge Becker, and a distinguished district court judge, Judge Barker, who can discuss these aspects of the federal courts more knowledgeably than I can.

It would be a mistake to think that just because a certain kind of judicial business has always been conducted in a particular way in the past, it therefore should be conducted that way in the future. The federal courts, like other governmental institutions, must, when necessary, change with the changing times. A Long Range Planning Committee of the Judicial Conference, of which both Judges Becker and Barker were members, has recently peered into the future and come up with a number of recommendations for how the federal judiciary can cope with the changes that the future will assuredly

bring. But all of the planning and discussion by judges as to the future of the federal judiciary has a somewhat tentative, conditional air about it: in this area we are not masters in our own house, and any major change will have to be approved by Congress.

I have said that the judiciary must change with the changing times. But there are a very few essentials that are vital to the functioning of the federal court system as we know it. Surely one of these essentials is the independence of the judges who sit on these courts, as Dean Grossman commented.

Article III of the Constitution guarantees to federal judges the right to continue in office during good behavior and prohibits the diminution of their compensation. But these two constitutional provisions did not settle every question about the independence of the judiciary. As a result, several actions by Congress over the years have fleshed out the constitutional provision in a manner akin to the development of the "unwritten constitution" in Great Britain.

Article I of the Constitution provides that civil officers, including judges, may be impeached by the House of Representatives for "high crimes and misdemeanors," and if convicted by the Senate, may be removed from office. The term "high crimes and misdemeanors" was sufficiently amorphous to leave open the possibility, at the time of the adoption of the Constitution, that a federal judge could be removed from office not only for conduct that was criminal, but also for rulings from the bench that seemed flagrantly wrong.

But an important episode early in our nation's history effectively resolved this question. This was the impeachment trial of Justice Samuel Chase, then an Associate Justice of the Supreme Court, in 1805. Chase had been appointed to the Supreme Court by George Washington in 1796, but in those days the Supreme Court docket was even lighter than it is today; Supreme Court justices spent most of their judicial time riding the circuit, trying lawsuits in tandem with the resident judge. Chase was an interesting fellow. He was a striking figure physically—over six feet tall, with a ruddy complexion which earned him the sobriquet, behind his back of course, of "Old Bacon Face." He was able but imperious, and totally lacking in the patience necessary for a trial judge.

Two years after Thomas Jefferson took office as President in 1803, Chase delivered a partisan charge to a grand jury in Baltimore. Jefferson, learning of this, wrote to his lieutenants in the House of Representatives suggesting that they do something about it. The House proceeded to impeach Chase on a number of counts. The first count was the charge to the Baltimore grand jury. Other counts were

based on his conduct in the trial of John Fries for treason in Philadelphia in 1800, and still others were based on his conduct in the trial of James Callender in Richmond for violation of the Sedition Act in that same year. Chase's trial before the Senate began in February 1805, and it was presided over by the Vice President, Aaron Burr. Burr himself was a fugitive from justice at this time, having killed Alexander Hamilton in a duel at Weehawken, New Jersey, the preceding summer. Criminal indictments were out for him in both New Jersey and New York, which caused one wag to remark that whereas in most courts the criminal was arraigned before the judge, in this court the judge was arraigned before the criminal.

More than fifty witnesses testified before the Senate. The charges pertaining to the Fries trial did not amount to much. At the most, they showed Chase to be headstrong and somewhat domineering, a trait not unknown in other federal judges either then or now. The charges in connection with the Callender trial were a good deal more serious. Callender was charged under the Sedition Act with bringing President John Adams into disrepute, inasmuch as he called him a toady to British interests in a long and incredibly turgid book entitled *The Prospect Before Us.* The evidence showed that Chase had actually taken the book with him from Baltimore, where he lived, to Richmond in order to allow the grand jury to consider it, and that during the stagecoach trip from Baltimore to Richmond he referred to Callender as a "scoundrel" to another passenger. In his defense, it may be said that in those days it took four days to travel in a stagecoach from Baltimore to Richmond, and you presumably had to talk about something with your fellow passengers.

After all the evidence was in on March 1, 1805, the Senate convened to vote on the articles of impeachment against Chase. At that time, there were thirty-four senators, twenty-five of whom were Jeffersonian Republicans. If these senators voted a party line, there would be the necessary two-thirds majority to convict Chase and remove him from office. Happily, they broke ranks on this question. On the articles based on the Fries trial, the vote was sixteen to convict and eighteen to acquit. The vote on the articles relating to the Callender trial was eighteen to convict and sixteen for acquittal. On the count based on the Baltimore grand jury charge, the House managers came closest to prevailing; nineteen senators voted guilty, and fifteen voted not guilty. But even this number fell four votes short of the two-thirds majority required by the Constitution, and Chase therefore was acquitted on all of the counts against him.

This decision by the Senate was enormously important in securing the kind of judicial independence contemplated by Article III. Coming only two years after the seminal decision of the Supreme Court in *Marbury v. Madison*, it coupled with the authority of the federal courts to declare legislative acts unconstitutional the assurance to federal judges that their judicial acts—their rulings from the bench—would not be a basis for removal from office by impeachment and conviction. And that has been the guiding principle of the House of Representatives and the Senate from that day to this; federal judges have been impeached and convicted—happily, only a very few—but it has been for criminal conduct such as tax evasion, perjury, and the like.

This principle only goes so far. It obviously does not mean that federal judges should not be criticized for the decisions which they make; they are frequently so criticized by the media and by law reviews, and there is certainly no reason why other citizens should not engage in the same practice. And the doctrine of judicial independence does not mean that the country will be forever in sway to groups of non-elected judges. When vacancies occur through death or retirement on any of the federal courts, replacements are nominated by the President, who has been elected by the people of the entire nation, and subject to confirmation by the Senate, whose members have been elected by the people of their respective states. Both the President and the Senate have felt free to take into consideration the likely judicial philosophy of any nominee to the federal courts. Thus, there is indirect popular input into the selection of federal judges.

This principle is perhaps best illustrated by President Franklin Roosevelt's experiences with appointments to the Supreme Court. Dissatisfied with the decisions of that Court which invalidated some provisions of his New Deal program, he asked Congress to enact what soon became known as a "court-packing plan," which would have allowed him to replace any Justice over seventy who did not retire with an additional Justice, up to the number of fifteen. This rather bold effort to change the philosophy of the Court was rejected by the Senate in 1937. But although Roosevelt lost that battle, he eventually won the war by serving three full terms as President and appointing eight of the nine members of the Supreme Court. This simply shows that there is a wrong way and a right way to go about putting a popular imprint on the federal judiciary.

The framers of the United States Constitution came up with two quite original ideas. The first was the idea of a chief executive who was not responsible to the legislature, as a Chief Executive is under

the parliamentary system. The second was the idea of an independent judiciary with the authority to declare laws passed by Congress unconstitutional. The first idea, a President not responsible to Congress, has not been widely copied by other nations in the western world when they have come to review their systems of government. But the second idea, that of an independent judiciary with the final authority to interpret a written constitution, has caught on with many other nations, particularly since the end of the Second World War. It is one of the crown jewels of our system of government today.

Change is the law of life, and the judiciary will have to change to meet the challenges which will face it in the future. But the independence of the federal judiciary is essential to its proper functioning and must be retained.

Thank you very much.

(Applause)

PLENARY ACADEMIC PANEL: THE FUTURE OF THE FEDERAL COURTS

PROFESSOR ROBBINS: Thank you, Chief Justice Rehnquist, for your important and provocative address. It is certain to have important repercussions as certain corners of our society are questioning the independence of the judiciary.

We will continue our panel discussion from the bench rather than from the podium. After all, when else in my lifetime will I get to sit en banc with such an impressive panel?

(Laughter)

I do not want to use too much of our valuable time introducing our speakers, but I do want you to know what an outstanding panel we have convened to discuss the important and timely topic of the future of the federal courts. I am delighted and honored that the nation's true leaders on these issues will be addressing us this evening. I will introduce all four of the panelists at this time, rather than before each one speaks.

On my far right—I will refrain from making the obvious political joke at this point—

(Laughter)

On my far right is the Honorable Edward R. Becker, Judge of the United States Court of Appeals for the Third Circuit. Judge Becker is a former federal district judge, having served on the United States District Court for the Eastern District of Pennsylvania from 1970 to

1981, when President Reagan appointed Judge Becker to the United States Court of Appeals for the Third Circuit.

Judge Becker has written in many areas, including complex litigation, federal sentencing guidelines, evidence, antitrust law, and law and economics. Judge Becker has served as chairman of the Judicial Conference of the United States Committee on Criminal Law and Probation Administration. Significantly, for tonight's purposes, Judge Becker was a member of the Long Range Planning Committee of the Judicial Conference of the United States.

Lawyers who have evaluated Judge Becker over the years have written many interesting comments. One wrote, "He's the star of the Third Circuit." Another wrote, "He asks fascinating questions, whether you think they relate to the case or not."

(Laughter)

Yet another wrote, "His only problem is that he tries to write the definitive law review article with each opinion." Judge Becker, if the lawyers on the Third Circuit don't want your opinions, we would be happy to publish them in one of our four law journals.

I should say that, when I was a law clerk at the Second Circuit some twenty-three years ago, Judge Becker was the talk of the courthouse among judges and law clerks alike. One notable story regarding the judge comes from early in his career when, as a federal district judge, he was confronted with a motion to dismiss. The arguments for both sides, for whatever reason, had been written in verse. Judge Becker, not one to shy away from creative challenges, wrote his entire opinion—including headnotes and footnotes—as a poem.[4] Welcome, Judge Becker.

(Applause)

To my immediate right is the Honorable Stephen Reinhardt, Judge of the United States Court of Appeals for the Ninth Circuit. After an already distinguished career that included law firm practice and serving as president of the Los Angeles Police Commission, Judge Reinhardt was appointed to the United States Court of Appeals for the Ninth Circuit in 1980 by President Carter. Judge Reinhardt also served as Secretary of the 1984 Los Angeles Olympics Organizing Committee. In 1987, the California Trial Lawyers Association voted Judge Reinhardt the Appellate Judge of the Year.

I'm sure that many of you have read about Judge Reinhardt recently. Last month, he authored a 109-page ruling striking down a Washington-state ban on assisted suicide, the first such ruling by a

4. Mackensworth v. American Trading Transp. Co., 367 F. Supp. 373 (E.D. Pa. 1973).

federal appeals court.[5] Judge Reinhardt wrote for the 8-3 majority of his en banc court that "[t]here is a constitutionally protected liberty interest in determining the time and manner of one's own death."[6] Perhaps we will see that case go on to the High Court. Indeed, just two weeks ago, the Supreme Court granted certiorari in two of Judge Reinhardt's cases.[7]

JUDGE REINHARDT: That is an average week.

(Laughter)

PROFESSOR ROBBINS: Let's see, fifty-two weeks, two a week, the Supreme Court takes about 100 cases a year—they are *all yours.*

JUDGE REINHARDT: It does seem that way.

PROFESSOR ROBBINS: In one of those two cases, Judge Reinhardt ruled that an English-only provision of the Arizona Constitution that generally prohibited use of any other language by officers and employees of the state while performing their official acts violated the First Amendment.[8]

In addition to his work on the Ninth Circuit, Judge Reinhardt has written numerous articles on civil rights, the death penalty, and the purposes and future of the federal courts. Judge Reinhardt, I welcome you.

(Applause)

To my immediate left is the Honorable Sarah Evans Barker. Prior to her appointment to the bench, Judge Barker was the United States Attorney for the Southern District of Indiana. In 1984, President Reagan appointed Judge Barker to serve on the United States District Court for the Southern District of Indiana. On January 1, 1994, Judge Barker became Chief Judge of that court.

Like Judge Becker, Judge Barker also served as a member of the Long Range Planning Committee of the Judicial Conference of the United States.[9] In addition, Judge Barker has served as a member of the Executive Committee of the Judicial Conference.

Among her noteworthy decisions was one in which she ruled that a newly enacted Indianapolis ordinance regulating pornography, however laudable the City Council's efforts were to protect the rights

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5. *See* Compassion in Dying v. Washington, 79 F.3d 790 (9th Cir.), *cert. granted,* 117 S. Ct. 37 (1996).

6. *Id.* at 793.

7. *See* Yuiguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1994), *cert. granted sub nom.* Arizonans for Official English v. Arizona, 116 S. Ct. 1316 (1996); Bennett v. Plenert, 63 F.3d 915 (9th Cir. 1995), *cert. granted,* 116 S. Ct. 1316 (1996).

8. *See Yuiguez,* 69 F.3d at 923.

9. *See infra* note 12 (listing members of Long Range Planning Committee).

of women, was unconstitutional and violated the First Amendment.[10] Judge Barker has also ruled that an Indiana law prohibiting write-in votes on election ballots violated the First Amendment free speech and association rights of the voter.[11]

When Judge Barker was sworn in as a Federal District Judge in March 1984, she remarked, "When a judge is sworn in, it is one more ongoing step in the process of justice, a process that is never finished. I sense an awareness of the awesome task before me. I will try to be a person of courage and compassion—honest, fair, and incorruptible." These are characteristics that Judge Barker no doubt acquired as a law student, for I am proud to say that Chief Judge Barker is an alumna of the Washington College of Law. Judge Barker, I welcome you.

(Applause)

To my far left is Professor Charles W. Nihan. Professor Nihan has served as Deputy Director of the Federal Judicial Center, first appointed by Chief Justice Burger in 1981, and subsequently reappointed by Chief Justice Rehnquist in 1986.

In 1991, he was named head of the Long Range Planning Office of the Administrative Office of the United States Courts, assisting the Long Range Planning Committee in preparing the first comprehensive plan to guide the future development, administration, and jurisdiction of the federal court system. Professor Nihan has also served as a member of the Administrative Conference of the United States. Professor Nihan is a member of our adjunct faculty, currently teaching our course in Judicial Administration. He has also written extensively in that area.

In 1991, when Professor Nihan left the Federal Judicial Center, a resolution signed by the members of the Board of the Center, including Chief Justice Rehnquist, noted Professor Nihan's "broad understanding of the federal courts [and] his ability to think beyond accepted and standard practices to envision new approaches." Three years later when he retired from the Administrative Office of the United States Courts, its Director, Ralph Meachum, stated, "Chuck Nihan's term was marked by extraordinary, if not unprecedented, achievement and accomplishment." Professor Nihan, welcome.

(Applause)

As you can see, we have quite a distinguished panel of experts on *many* subjects. We have judges with the combined experience of seventy-six years on the bench, and almost as much in judicial

10. *See* American Booksellers Ass'n, Inc. v. Hudnut, 598 F. Supp. 1316 (S.D. Ind. 1984).
11. *See* Paul v. Indiana Election Bd., 743 F. Supp. 616 (S.D. Ind. 1990).

administration. I would be remiss if I failed to mention that not only are our panelists truly outstanding, but we also are privileged to have a rather distinguished audience, including federal, state, and local trial and appellate judges; representatives from the Federal Judicial Center, the Administrative Office of the United States Courts, and the American Bar Association; faculty from other law schools in the Washington, D.C., vicinity and beyond; and, of course, members of our student body, staff, alumni, and faculty.

We shall now hear the panel's views on what is in store, or what should be in store, for the federal courts. I have asked each panelist to present her or his views in fifteen minutes. We will then allow the panelists to question one another and to receive questions from the audience as well. Judge Becker, I turn the floor over to you.

JUDGE BECKER: This evening's panel has been asked to explore a daunting list of questions: whether the concept of judicial federalism can be maintained as federal jurisdiction continues to expand rapidly; whether the significant and steady increase in the size of the federal judiciary since 1960 threatens the stability and coherence of national law; whether the structure of the federal judiciary is inappropriate for its workload; whether recent procedural innovations designed to deal with the crushing circuit and district caseload are changing the character of federal justice; and whether the federal judiciary truly is a co-equal branch of national government that has the ability to plan for and control its own future. What I will do is give you my quick answers to these questions and then talk in some depth about the size and structure of the federal judiciary, particularly the federal appellate judiciary.

Turning first to the quick answers, let me take up the last question first because it is the easiest to address. Is the federal judiciary truly a co-equal branch of the national government that is capable of effectively planning for and controlling its future? The answer is no. The Long Range Planning Committee[12] on which I served, started

12. *See* LONG RANGE PLAN, *supra* note 1, at 165-66 (stating that in 1990, Federal Courts Study Committee created the Committee on Long Range Planning which "represents the beginning of judiciary-wide long range planning process"). The Committee on Long Range Planning of the Judicial Conference of the United States consists of: Judge Otto R. Skopil, Jr. (Chairman), U.S. Court of Appeals, Ninth Circuit; Judge Sarah Evans Barker, U.S. District Court, Southern District of Indiana; Judge Edward R. Becker, U.S. Court of Appeals, Third Circuit; Judge Wilfred Feinberg, U.S. Court of Appeals, Second Circuit; Judge Elmo B. Hunter, U.S. District Court, Western District of Missouri; Judge James Lawrence King, U.S. District Court, Southern District of Florida; Judge Virginia M. Morgan, Magistrate Judge, Eastern District of Michigan; Judge A. Thomas Small, Bankruptcy Judge, Eastern District of North Carolina; and Judge Harlington Wood, Jr., U.S. Court of Appeals, Seventh Circuit. *See id.* at 175-77.

its work by studying the planning process.[13] We learned that we were different from most other organizations that engaged in strategic or long-range planning. Most organizations are hierarchical; meaning an organization with a boss. These are organizations that have control over their own operations and businesses. The federal judiciary is not hierarchical. The Chief Justice is not our boss. The Chief Judge of the Court of Appeals is not anybody's boss. This country's federal judges are independent and pretty much govern themselves.

Nor do the federal courts have any control over their business. Who controls our business? Congress. Congress fixes our jurisdiction; it also fixes our budget.[14] The lawyers, including those in the Executive Branch, decide what cases are brought before us.[15]

Now, my answers to the second, third, and fourth questions are more tentative. The questions are: whether the significant and steady increase in the size of the federal judiciary since 1960 threatens the stability and coherence of national law; whether the structure of the federal judiciary is inappropriate for its workload; and whether recent procedural innovations are changing the character of federal justice.

The answers to these questions are related to the problem of answering the question whether the concept of judicial federalism can be maintained as federal jurisdiction continues to expand rapidly. That depends on how far federal jurisdiction will continue to expand. Who knows? The question is, what will the future bring? The Chief Justice has stated that the Long Range Planning Committee peered into the future.[16] Well, we peered into the future as best we could, but we do not have any crystal balls, at least no more than anyone else does.

The projections of a quadrupling federal caseload in twenty-five years are quite scary.[17] No one, however, knows whether they will

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13. *See id.* app. B (discussing Committee's long range planning process; setting forth Committee's approach to defining the role of the federal courts; and outlining, chronologically, the steps and procedures taken by the committee in developing the *Long Range Plan*).

14. *See* U.S. CONST. art. I, § 8, cl. 9 (granting Congress authority to create federal courts); *id.* art. III, §§ 1-2 (providing Congress with wide latitude to define jurisdiction of federal courts); LONG RANGE PLAN, *supra* note 1, at 2 ("Congress sets the courts' budgets and the scope of federal jurisdiction . . . .").

15. *See* LONG RANGE PLAN, *supra* note 1, at 2 ("[T]he executive branch determines the government's prosecutorial and civil litigation strategies that have substantial impact on the courts' workload.").

16. *See Keynote Address*, *supra* pp. 270-71.

17. *See* LONG RANGE PLAN, *supra* note 1, at 129 (outlining possible court statistics of four-fold increase over present-day conditions); *id.* at 18 (stating that if *Plan*'s caseload and judgeship projections are accurate, "more than 4,000 federal judges might be necessary to handle the federal courts' docket in 2020"); *id.* at 9-16 (discussing historical and projected caseloads of

come to pass. There already are some contrary signs. There has been some slowing in the growth of the federal caseload; the criminal caseload is down a bit in the district courts.[18] The pro se cases are up,[19] but so is the entire volume of cases in the courts of appeals.[20] Most of the volume, however, is an increase in pro se cases which are easier to handle.

There also seems to be some awareness in Congress of our plight. Witness the Private Securities Litigation Reform Act of 1995,[21] which is designed, among other things, to cut back on federal court litigation.[22] I, however, submit that there is a new factor, a new kid on the block, the *Long Range Plan*.[23] Perhaps the federal judiciary cannot control its future, but through the *Long Range Plan*, we can influence it.

Let me talk briefly about the *Long Range Plan* and particularly its approach to issues of size and structure. The *Long Range Plan* contemplates a future in which the federal courts are able to conserve what the *Plan* defines as their core values: the rule of law, equal justice, judicial independence, limited jurisdiction, excellence, accountability, and yet the flexibility to respond to new challenges.[24]

The Long Range Planning Committee was aware of these scary predictions about the increase in the caseload.[25] It might have responded in a number of ways. It might have adopted a pliant attitude toward proposals for a substantial increase in the size of the federal judiciary to 2000 or 3000 judges. There are now about 840 active judges.[26] Alternatively, the Committee might have responded

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district courts and courts of appeals).

18. *See id.* at 12. The *Long Range Plan* states: "In 1972, criminal case filings represented one-third of total filings in district courts and criminal trials accounted for 40 percent of all trials. In 1994 criminal filings were only 13 percent of all filings, but 42 percent of all trials." *Id.*

19. *See id.* at 63 n.14 ("In the district courts, prisoner petition filings increased in 71 of 94 districts between 1994 and 1995; approximately 62,000 prisoner petitions, or 26% of all civil filings, were filed in the year ending June 30, 1995.").

20. *See id.* at 15 tbl. 4. Table 4 sets forth the historical, present, and projected number of appeals filed annually in the courts of appeals. In 1980, 23,200 total appeals were filed in the courts of appeals. That number nearly doubled by 1990, jumping to 40,898. By 1995, the number of criminal appeals filed in federal courts increased by almost 10,000, rising to 49,671. *See id.*

21. Pub. L. No. 104-67, 109 Stat. 737 (to be codified in scattered sections of 15 U.S.C. and 18 U.S.C.).

22. *See id.* tit. I (Reduction of Abusive Litigation).

23. *See* LONG RANGE PLAN, *supra* note 1.

24. *See id.* at vii.

25. *See id.* at 15 tbls. 3, 4 (setting forth historical and projected numbers of cases filed in district courts and courts of appeals from 1940 to 2020); *see also id.* at 17-20 (discussing possible scenarios for future of federal courts if caseload projections are accurate); *id.* at 129-40 (suggesting ways of dealing with hypothetical "daunting" scenario).

26. *See id.* at 16 tbl. 6 (positing that there were 816 total federal judgeships in 1995).

favorably to those on the other end of the spectrum who propose a cap on judicial personnel. The Committee, however, adopted a middle ground—a policy of carefully controlled growth in the Article III judiciary.[27]

The size of a judicial institution is largely dependent on the breadth of its jurisdiction. The *Long Range Plan* seeks to define the appropriate scope of federal court jurisdiction according to a principle of judicial federalism that maintains state courts as appropriate forums for dispute resolution absent a clearly established need for a federal judicial forum.[28] To implement this provision, the *Plan* recommends that Congress define and maintain a limited federal jurisdiction.[29] *Long Range Plan* Recommendations Two and Three, which address criminal jurisdiction,[30] and Recommendations Six and Seven, which

27. *See id.* at 38 rec. 15 (recommending carefully controlled growth in Article III judiciary "so that the creation of new judgeships, while not subject to a numerical ceiling, is limited to that number necessary to exercise federal court jurisdiction").

28. *See id.* at 21-39. Chapter 4 of the Long Range Plan, entitled "Judicial Federalism," discusses the appropriate relationship between state and federal courts such that courts may deliver the highest quality of justice. *See id.*

29. *See id.* at 23 rec. 1. Recommendation One of the *Long Range Plan* states:

> Congress should be encouraged to conserve the federal courts as a distinctive judicial forum of limited jurisdiction in our system of federalism. Civil and criminal jurisdiction should be assigned to the federal courts only to further clearly defined and justified national interests, leaving to the state courts the responsibility for adjudicating all other matters.

Id.

30. *See id.* at 24-26 recs. 2, 3. Recommendation Two states, "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." *Id.* at 24 rec. 2. The Recommendation also delineates five types of offenses for which Congress should be encouraged to allocate criminal jurisdiction to the federal courts: (1) offenses against the federal government or its inherent interests; (2) criminal activity with substantial multistate or international aspects; (3) criminal activity involving complex commercial or institutional enterprises most effectively prosecuted using federal resources or expertise; (4) serious, high-level or widespread state or local government corruption; and (5) criminal cases raising highly sensitive local issues. *See id.* at 24-25 rec. 2(a)-(e).

Recommendation Three encourages Congress "to review existing federal criminal statutes with the goal of eliminating provisions no longer serving an essential federal purpose." *Id.* at 25 rec. 3. Such a review should include both a major overhaul of the existing federal criminal code "so that it conforms to the principles set forth in Recommendation 2," as well as the utilization of "sunset" provisions that would "require periodic reevaluation of the purpose and need for any new federal offenses that may be created." *Id.*; *see also id.* at 26 rec. 4 (encouraging Congress and executive branch to work with states to develop policy for determining "whether offenses should be prosecuted in the federal or state systems.").

address civil jurisdiction,[31] define the contours of such a limited jurisdiction.

In Chapter Four of the *Long Range Plan*, the Committee warns against either a single national court system or two systems, the state and federal courts, engaged in "identical business."[32] The *Long Range Plan*, in seeking to preserve the core values of the federal courts[33] and to allow state courts to "remain[] vital and efficient forums to adjudicate matters that belong there in the light of history and a sound division of authority,"[34] makes Recommendations to achieve this goal. The *Plan* recommends extended and improved interbranch coordination, cooperation, and communication between state and federal court systems, as well as strengthening of state justice systems with federal financial assistance.[35] Will these proposals work, by which I mean, will Congress respond? We must wait and see, but we are optimistic.

In response to the interim predictions or projections of caseload growth, the Long Range Planning Committee might have adopted, but did not, several proposals for major changes in the structure of the federal appellate judiciary: the discretionary appellate review of all or of a specified category of cases; the establishment of an

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31. *See id.* at 28-32 recs. 6, 7. Recommendation Six suggests that Congress "exercise restraint in the enactment of new statutes that assign civil jurisdiction to the federal courts and should do so only to further clearly defined and justified federal interests." *Id.* at 28 rec. 6. According to the *Long Range Plan*, federal court jurisdiction should extend only to civil matters that: "(a) arise under the United States Constitution; (b) deserve adjudication in a federal judicial forum because the issues presented cannot be dealt with satisfactorily at the state level and involve either (1) a strong need for uniformity or (2) paramount federal interests; (c) involve the foreign relations of the United States; (d) involve the federal government, federal officials, or agencies as plaintiffs or defendants; (e) involve disputes between or among the states; and (f) affect substantial interstate or international disputes." *Id.* at 28-29 rec. 6(a)-(f).

Recommendation Seven encourages Congress to reduce the number of federal court proceedings based on diversity jurisdiction by: (1) "eliminating diversity jurisdiction for cases in which the plaintiff is a citizen of the state in which the federal district court is located," *id.* at 30 rec. 7(a); (2) "amending the statutes conferring original and removal jurisdiction on the district courts in diversity actions to require that parties invoking diversity jurisdiction plead specific facts showing that the jurisdictional amount-in-controversy requirement has been satisfied," *id.* at 30 rec. 7(b)(1); (3) "raising the amount-in-controversy level and indexing the new floor amount to the rate of inflation," *id.* at 30 rec. 7(b)(2); and (4) "exclud[ing] punitive damages from the calculation of the amount in controversy," *id.* at 30 rec. 7(b)(3).

32. *See id.* at 22 (recommending development of "cooperative federalism in which the federal government and the states work together to promote effective civil and criminal justice systems").

33. *See id.* at 7-9. The *Long Range Plan* states that the "core values" of the Federal Judiciary are the rule of law, equal justice, judicial independence, national courts of limited jurisdiction, excellence, and accountability. *See id.* at 7.

34. *See id.* at 22 (discussing judicial federalism).

35. *See id.* (asserting that to attain goal of judicial federalism, state justice systems must be improved and that doing so "may require significant federal financial assistance to state courts, prosecutors, and law enforcement agencies").

intermediate tier of appellate courts such as a District Court Appellate Panel; the creation of specialized appellate courts; and the comprehensive redrawing of judicial circuits.[36] These proposals, and proposals like them, have been rejected, and will continue to be rejected, unless what the *Plan* describes as a "nightmare scenario" imperils the federal courts.[37] The "nightmare scenario" is a hypothetical situation in which the workload of the federal courts goes through the roof.[38]

This description of the *Long Range Plan* suggests that the Committee on Long Range Planning felt the federal judicial system, as presently constituted, is a national treasure—one capable of accommodating present and future caseload growth, and hence, one that should not be changed drastically. The *Long Range Plan* is a judicious plan, not a radical one, although it does discuss options for major revision under the alternative future or "nightmare scenario" that I described.[39]

I propose to defend the *Plan*'s effort to control the size and to preserve the present structure of the federal judiciary as a whole and the federal appellate judiciary in particular.

I will make several points. First, I defend the view taken by the *Plan* that we cannot tolerate extreme growth in the size of the federal judiciary. In my view, a radical increase in the size of the federal judiciary will lessen its quality and diminish one of the jewels in the crown of the Republic. It is not that there are not thousands of lawyers in the nation who could do the job as well as I and my colleagues; there surely are. The problem is that when the size of the bench is very large, it becomes easy for the political process to appoint candidates of mediocre or even marginal competence. Conversely, when an appointment is of high visibility, the selection will be of high quality. All who have been in politics—and that includes myself—have seen this phenomenon firsthand. It really happens, and yet we cannot afford to have it happen to the federal judiciary. The *Plan* thus advocates that the growth of Article III judiciary should be controlled carefully so that the creation of new

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36. *See id.* at 46 (rejecting proposals that would consolidate existing circuits, create additional appellate structures, or allow Supreme Court to refer cases that involve circuit conflicts to a circuit not involved in the legal dispute).

37. *See id.* (stating that Committee will reject proposals to improve resolution of intercircuit conflict until "situation seriously worsens").

38. *See id.* at 18 (positing that projections outlined in Appendix A of *Long Range Plan* are bleak and that if jurisdiction "continues to grow at the same rate it did over the past 53 years, the picture in 2020 can only be described as nightmarish").

39. *See id.*; *see also id.* at 17-20 (addressing question of how federal courts will operate 25 years from now when, assuming projections in Appendix A of *Long Range Plan* are accurate, their workload may quadruple).

judgeships will not be subject to a numerical ceiling.[40] The growth of the federal judiciary must be limited to that number of judges necessary to exercise federal court jurisdiction.[41] I believe that to be a sound provision.

Second, we must not let the size of the courts of appeal themselves grow too large. As Judge Jon Newman of the Second Circuit has put it, if that Court of Appeals rose to fifty judges, "[i]t will not be a court; it will be a stable of judges, each one called upon to plough through the unrelenting volume harnessed on any given day with two other judges who barely know each other."[42] How large is too large? That is a difficult question. Acknowledging that reasonable minds may disagree about the extent to which a court of appeals may grow without becoming ineffective, the *Long Range Plan* provides a formula.[43] In principle, each court of appeals should consist of a number of judges sufficient to maintain the traditional access to and excellence of federal appellate justice; to preserve judicial collegiality; and to maintain the consistency, coherence, and quality of circuit precedent.[44]

An appellate court, in this special sense, is not merely an administrative entity. An appellate court is a cohesive group of individuals who are familiar with one another's ways of thinking, reacting, persuading, and being persuaded. The court becomes an institution, an incorporeal body of precedent, tradition, shared experiences, and collegial feelings, whose members possess a common devotion to mastering circuit law, maintaining its coherence and consistency, and thus assuring its predictability in adjudicating cases in a like manner.

I commend this approach. In my view, it militates against the creation of jumbo courts of appeals. The *Plan*'s focus on the responsibility of appellate court judges to maintain the coherence and consistency of circuit law[45] confirms this view. It contains the seeds

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40. *See id.* at 44 ("[T]his plan does not suggest a fixed numerical limit to circuit size."); *id.* (advocating "carefully controlled growth" of federal judiciary as method of preserving "sound judicial federalism" and rejecting artificial limit on number of federal judges).

41. *See id.* at 22 ("The appropriate size of the federal judiciary is necessarily a function of its jurisdiction.").

42. Jon O. Newman, *1,000 Judges—The Limit for an Effective Federal Judiciary*, 76 JUDICATURE 187 (1993).

43. *See* LONG RANGE PLAN, *supra* note 1, at 44 rec. 17 ("Each court of appeals should comprise a number of judges sufficient to maintain access to and excellence of federal appellate justice.").

44. *See id.* at 44-45 (discussing preservation of distinct system of federal courts and appropriateness of growth).

45. *See id.* at 7-8 (stating that "predictability, continuity and coherence of the law, the visibility of the decision maker, and judges' acceptance of responsibility that law, rather than personal preference, provides the basis for making decisions" are key features of rule of law,

of an even more precise test, one that I fashioned from my own experience of more than a quarter of a century on the federal bench and over fourteen years on the Court of Appeals. It is as follows: when it becomes impossible, or even too difficult, for each judge of the court to have a personal familiarity with circuit law, the court is too large and should be divided or realigned. To amplify, my court is typical of many courts of appeals in following the practice of the pre-filing circulation of all published opinions.[46] In other words, all opinions that will constitute circuit precedent are submitted to all members of the court before filing so that each judge can review the circulating opinion to see if it is consistent with the fabric of circuit law.

In the statistical year 1995, my court published 353 opinions, covering some 8500 pages of typescript.[47] This is only a small portion of the material we have to read every day. When this reading is added to our manifold other duties of reading, writing, thinking, conferring, and administering, it takes me seven days a week to do my job. Reviewing that number of opinions approaches my limit.

During the same period, the Ninth Circuit, if I may use that court to help frame the issue, published 927 opinions.[48] There is no record of the total number of pages, but it must be staggering. I submit that there is no conceivable way that any judge of that court can read, or even meaningfully scan and digest, anywhere near that number of opinions so as to be abreast of circuit law. In other words, the Ninth Circuit is already far too large. I should add that I am unimpressed with the argument that administrative efficiencies and the use of computers or staff attorneys to keep track of the law would suffice. In the area of knowing circuit law and maintaining its coherence and consistency, judges must do their own work.

The notion of the law of the circuit is not mere rhetoric. The integrity of circuit law is essential to the predictability upon which

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which is core value of judiciary that *Long Range Plan* is "dedicated to conserve and enhance"); *see also id.* at 44 rec. 17 (allowing circuit restructuring only if empirical evidence demonstrates that circuit court is unable to deliver coherent and consistent law).

46. *See* 3D CIR. R. 5.6.2 (requiring authoring judge to circulate draft opinion "to other two members of panel with a request for approval or suggestions they may desire to make with respect to the draft opinion").

47. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES, STATISTICS DIVISION, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: REPORT OF THE DIRECTOR, LEONIDAS RALPH MECHAM 50 tbl. S-3 (1995) [hereinafter JUDICIAL BUSINESS] (demonstrating that during 12-month period ending Sept. 30, 1995, Third Circuit published 346 written and signed opinions and seven written, reasoned, and unsigned opinions).

48. *See id.* (showing that during 12-month period ending Sept. 30, 1995, Ninth Circuit published 909 written and signed opinions and 18 written, reasoned, and unsigned opinions).

lawyers and litigants must rely in making important business and personal decisions. Instability in circuit law creates unnecessary litigation and results in high social costs. Instability results in the loss of collegiality that inevitably occurs on jumbo courts. Collegiality, I remind you, does not refer to social relations, but the intangible, yet very real process of getting to know your colleagues and how they think, of developing a relationship of trust and an ability to compromise. Large appellate courts, in general, lack collegiality because of the large number of panel combinations that they generate. The number of combinations in the Ninth Circuit exceeds 3000, and if it goes as large as they think it can go,[49] it would exceed 25,000. Therefore, my comments suggest that we must seriously reconsider, not just the division of some circuits, but perhaps a major realignment of circuit structure and the creation of additional circuits.

Finally, I want to defend two other decisions of the *Long Range Plan*: the rejection of discretionary appellate review[50] and the rejection of the establishment of a new intermediate tier of appellate courts.[51] The notion of one appeal of right, in my view, is deeply embedded in our legal culture. It is a sound principle that engenders confidence in our legal system—a valuable precaution against error. Discretionary review is touted as a device to get rid of the easy cases, but you have to read that easy case in order to exercise your discretion. The kinds of cases that would not receive review under such a regime are generally the easy cases. In my considerable experience, it is no more work to decide a case with a summary order than to exercise your discretion not to hear it, and it is much better for our polity to do so.

The Long Range Planning Committee also rejected the proposal for a new tier of appellate courts.[52] The new tier recommendation usually takes the form of a new court, staffed in part by district judges for the review of so-called error-correction cases, in contrast to cases involving the development of the law. District judges, however, already have enough to do, and, in my experience, a case that looks at first like an error-correction case often, upon scrutiny, will turn out to involve an important legal principle.

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49. *See* LONG RANGE PLAN, *supra* note 1, at 163 app. A, tbl. 2 (speculating that by 2020 there could be 303 judgeships in Ninth Circuit).

50. *See id.* at 2 (stating that one immutable characteristic of appellate review is "access to at least one meaningful review for litigants aggrieved by a decision of a trial court or federal agency"); *id.* at 132 (noting that elimination of right to appeal should be pursued only as last resort in context of confronting alternative futures of federal courts).

51. *See id.* at 46 (rejecting explicitly creation of "new appellate structures").

52. *See id.*

I am not sure we can go on in the face of a steadily increasing workload without more, perhaps quite a few more, appellate judges. I do underscore, however, that the *Long Range Plan* rejects the notion of a cap[53] but respects the notion of modest growth.[54] There is room for some expansion in the size of the federal appellate judiciary. We can absorb more appellate judges—a modest number—now. I would submit that we should strive mightily to avoid a significant increase in the size of the federal judiciary.

The federal judiciary has performed magnificently in the history of this nation; consider, for example, its stewardship in the period following *Brown v. Board of Education* and during the constitutional crisis known as Watergate. Our society must have faith in its courts. The federal courts have earned that trust. Some believe that the accomplishments of the district courts in desegregation in the South during the 1970s would not have been possible had the district courts been so large that the public would not have had confidence in their incumbents and hence in their judgments.[55] The federal appellate courts will fail in their mission in the next national crisis, as they would have failed in the South, if they become diluted by sheer size. Let us hope that will never happen. Thank you.

(Applause)

PROFESSOR ROBBINS: Thank you, Judge Becker, for your opening remarks. I shall now turn the floor over to Judge Reinhardt.

JUDGE REINHARDT: I guess I should start with a disclaimer. I have zero years of experience in judicial administration, and I am not a member of the Long Range Planning Committee. So, I'm the only objective person on the platform.

(Laughter)

I do not want to get drawn into a long discussion about the size of the courts because we have more important problems. I think the judges in the South who fought for civil rights were respected and did what they did because they had integrity, courage, and belief in principles. That is what matters now, not how you organize the courts, what the structure is, or how many judges there are. What we need on the courts are people who believe in justice, in the Constitution, and the rights of individuals.

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53. *See id.* at 44 ("[T]his plan does not suggest a fixed numerical limit to circuit size.").

54. *See id.* at 14, 22, 44 (articulating concept of "carefully controlled growth" in Article III judiciary as absolutely necessary to preserve core values of federal courts).

55. *See id.* at 7 (describing federal judges as "keepers of the covenant" and discussing nation's confidence in federal courts).

I want to start with a preliminary remark about the Chief Justice, for whom I always have had the greatest respect. He was appointed to the Court as a man of tremendous conviction. He was known as the Lone Ranger because he was the only judge who supported the conservative views that he brought to the Court. He stuck with those views and those convictions, and he did not accept the theory that conservatism was dead, just because we were in a new era. He stayed and fought for those principles, and he stayed there until he won—at least temporarily. He stayed on the Court until he had five votes, and then he did exactly what he said he believed in. That is the kind of judge that I really have the greatest respect and admiration for.

Now, to talk about the problems that do concern me about the future of the judiciary. I think the federal judiciary is threatened in three basic ways. First, the role of the federal courts is being diminished and weakened by decisions of a highly conservative, states' rights-minded judiciary. These judges have sought, with increasing success, to limit the influence and effectiveness of federal courts. They have also sought to reduce access to the federal courts by those most in need of their protection—the poor, the weak, the oppressed, and minorities of all kinds. This threat is manifested principally by judicial revisionism of the Constitution and of jurisprudential principles, both substantive and procedural. It ranges from a rewriting of the Commerce Clause to a test-tube rebirth of the Tenth and Eleventh Amendments, a revival of the pre-1930s anti-Federal government view, and the cry, "just leave it to the states." It is also a two-sided campaign of instituting procedural obstacles to access to the federal courts and of raising substantive barriers to the vindication of individual rights.

The procedural doctrines employed range from standing, mootness, ripeness, prejudice, waiver, estoppel, procedural default, and retroactivity principles. These doctrines are used to attack the historic right to habeas corpus as well as to bar ordinary citizens from obtaining relief under federal statutes. They also are used to ensure that federal policies are not carried out, particularly when states follow policies of unspoken nullification and when a timid federal government is unwilling to take the lead in vindicating federal legislation.

The Chief Justice spoke about history—the state of the judiciary forty years ago.[56] Forty years ago when I graduated from law school, we revered the federal courts and we revered the Supreme Court, then led by Chief Justice Earl Warren, because that Court had a

56. *See Keynote Address, supra* pp. 268-69.

commitment to the Constitution and the courage to do what no other branch of government did—to stand up for the rights of people and to end slavery in this country, then functioning under the "separate but equal" guise.

In law school we learned that the federal courts existed to give the individuals in this nation rights that they never had. We also learned of some of the great circuit courts, for instance, the Fifth and Second Circuits. We admired those judges because they stood between every individual and an oppressive government. They gave life, breadth, and meaning to a Constitution that protected the people in this nation who needed protection from arbitrary government.

We grew up in a period during which Franklin Roosevelt said that we needed a New Deal because the states never had, and never would, afford the people the rights they needed. That President believed that, for many reasons, we could not leave these problems to the states to solve, either in their courts or in their political bodies. The debate over states' rights, which was used as an answer to the civil rights movement when I was in law school, is today mirrored in the federal courts, in the halls of Congress, and in the White House. It is not improper that this debate takes place in the three bodies of government: the legislature, the executive, *and the judiciary*. Our courts do, in fact, stand between government and citizens. Our courts do have a function of interpreting the Constitution and of determining what words like "due process" mean and what kind of fundamental rights the people in this nation have. That is the role of the federal courts.

There also is the question of the structure of government. The Constitution is a document that speaks with great strength as to the structure of government. There are legitimate differences among people, both in Congress and in the courts, about what that structure should be. Those are issues that come before our courts that are of the greatest importance. They are not as dramatic as the abortion or the civil rights issues, but the issues of government structure can, in the end, have as great an effect. Whether we dismantle the federal government pursuant to a Contract With America or by an implicit repeal of the Commerce Clause, it is the same type of important issue that this nation faces, both in the federal courts and in the rest of our political bodies.

I think that the historic importance of the federal judiciary since the 1930s, as well as the role the federal judiciary has played in making this a nation that allows people to be free from oppressive governmental action and allows them to recognize their individuality,

greatness, and worth, is threatened. I think that we weaken the role of the federal courts and shut off individuals' access to them by adopting procedural rules and regulations and by trying to lessen the jurisdiction of the federal courts.

Those who oppose a substantial increase in the size of the federal courts will tell you that we cannot find these highly-qualified, wonderful judges who are such marvels. Rather, they will tell you that the courts have to stay small and efficient and that we really are the pearls. The federal judicial system is a national treasure because we have found these wonderful men—and now some women—who are far superior to the other candidates out there. Yet we say, in the same breath, "Ship all the cases to the state courts because they can handle them." Well, how will the state courts find all those judges who can handle these cases? We say, "Ship out all the death penalty cases. Do not worry; state court judges understand the Constitution just as well as we do." Of course, state judges happen to be elected and have to run for reelection. And, they have to go before voters who find their decisions quite unpopular.

You will find, if you talk to state supreme court justices, that they believe that capital punishment cases are like having an alligator in the bathtub. When you are deciding a capital punishment case, and you are up for election, no matter how hard you try to be objective, you cannot ever be sure whether your decision is being influenced by the fact that you are running for reelection. That is why we have the writ of habeas corpus. That is why federal courts have played an important role in protecting individual rights and protecting people from being executed unfairly. That is why federal courts historically have overturned a substantial percentage of state court convictions in capital cases, and that is why it is so important that the writ of habeas corpus be maintained. That is the first threat I see to the courts.

I believe the second threat to the judiciary is to its independence. The Chief Justice gave an excellent historical discussion of the importance of our independence.[57] The *Long Range Plan* has beautiful quotes about the importance of the judiciary. How can it be that in a country with this tradition of an independent judiciary we have three prominent leaders—the head of the Senate Judiciary Committee,[58] the President of United States,[59] and the Republican

57. *See Keynote Address, supra* pp. 271-74.
58. Senator Orrin G. Hatch (R-Utah).
59. President William J. Clinton.

candidate for President,[60]—who seem to have no comprehension of this fundamental principle? How can that be?

When a judge has a case under consideration, you have these three people putting pressure on him, threatening him with what his actions will be.[61] The head of the Senate Judiciary Committee says, after a judge whom he threatened has changed his mind, "Well, the judge changed his mind because 150 Republican congressmen put pressure on him." Is that what the head of the Senate Judiciary Committee wants from federal judges? It is difficult to understand how members of the legislative and executive branches can pressure members of the judiciary, and it is time for us to be alert and concerned about their actions. This is not a partisan issue. It is a serious problem when our political leaders think it is appropriate to threaten judges. One of the saddest parts is that the judge who changed his mind in response to political pressure may well have been right the first time; he may well have been right the second time. Nobody will ever know. However, when the *New York Times* has several front page stories stating that a district judge bowed to pressure and apologized for his decision[62]—and every newspaper in the nation played it that way[63]—how are we ever going to tell the public that this is not the way that federal judges behave?

Fortunately, there are some people who are reminding our political leaders that it is inappropriate to threaten federal judges. The

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60. Senator Robert J. Dole (R-Kan.).

61. Judge Reinhardt is referring to the criticism that Judge Harold Baer, Jr., District Judge for the Southern District of New York, received after he ruled, on January 24, 1996, to suppress 80 pounds of narcotics that police officers had seized from a suspect's rented car. *See* Don Van Natta, Jr., *Judge's Drug Ruling Likely to Stand*, N.Y. TIMES, Jan. 28, 1996, at 27. Not long after Judge Baer found the evidence inadmissible, Senator Robert J. Dole, soon to become the Republican presidential candidate, called for the judge's impeachment, commenting that the judge had "'turned loose a drug dealer.'" Katharin A. Seelye, *A Get Tough Message at California's Death Row*, N.Y. TIMES, Mar. 24, 1996, at 29. President Clinton's press secretary, Michael D. McCurry, also indicated that if Judge Baer did not reverse his suppression ruling, the President might ask for his resignation. *See* Alison Mitchell, *Clinton Pressing Judge to Relent*, N.Y. TIMES, Mar. 22, 1996, at 1. Three months after his original ruling and "an avalanche of criticism and calls for his ouster," Judge Baer reversed his decision. *See* Don Van Natta, Jr., *Under Pressure, Federal Judge Reverses Decision in Drug Case*, N.Y. TIMES, Apr. 2, 1996, at 1 [hereinafter Van Natta, Jr., *Under Pressure*].

62. *See* Van Natta, Jr., *Under Pressure*, *supra* note 61, at 1 (indicating that Judge Baer reversed his decision in response to political pressure and stating that he expressed regret in his opinion).

63. *See, e.g.*, John J. Goldman, *Judge Bows to Pressure, Changes Ruling on Drug Seizure*, L.A. TIMES, Apr. 2, 1996, at A8 (stating that Judge Baer reversed himself after having been "roundly criticized"); John M. Goshko & Nancy Reckler, *Controversial Drug Ruling Is Reversed*, WASH. POST, Apr. 2, 1996, at A1 (stating that Judge Baer reversed himself after his earlier ruling "provoked widespread criticism"); Barry Neumeister, *Judge Reverses Ruling; Change Follows Political Pressure*, CHI. SUN-TIMES, Apr. 2, 1996, at 14 (stating that judge changed his decision after receiving criticism from local, state, and national politicians).

president of the American Bar Association sent a letter to President Clinton and Senator Dole trying to remind them of this. But we are approaching an election campaign, and there is not much hope of improvement unless a lot of people in this country recognize that this type of conduct is a serious threat to the independence of the federal judiciary that will continue if our political leaders are allowed to get away with it. We have to stop it now. People have to speak up, even judges who are not used to taking positions on public issues. The current Chief Judge of the Second Circuit, as well as three other former Second Circuit Chief Judges, have had the courage and the decency to speak up publicly,[64] and I hope they will be joined by lots of other judges because this is only the beginning of the attack.

This country has grown in population, ideas, laws, and problems. We have expanded all kinds of rights and protections. We have expanded the number of prosecutors tenfold.[65] I do not know where those prosecutors are going to try their cases because we do not want to expand the number of judges. This does not make a lot of sense to me: we have more problems, more cases, and more people, but we do not want to have more judges to keep up with them. There is something fundamentally wrong here. I am not quite sure why. I do not know what it is with federal judges. We are basically a very conservative group. We do not like change. We like ourselves, and we like to have nice fraternal meetings where we know our dear brothers, and yes, where we understand each other.

I am going to tell you that despite what you may think, our relations on the Ninth Circuit are absolutely excellent. We are all very friendly; we like each other—perhaps because there are more than just a few of us crammed together in one building. We disagree very strongly, but there is plenty of collegiality—more than enough, as far as I am concerned.

In any event, I am in a very small minority. Most judges think we are just fine. They believe that we are just the right size, and that what we ought to do if we get more and more cases is to spend less and less time on each case. For example, these judges think that we should reduce the amount of oral argument, as we have; reduce the size of briefs, as we have; and reduce the number of opinions that we

64. *See* Don Van Natta, Jr., *Judges Defend a Colleague from Attacks*, N.Y. TIMES, Mar. 29, 1996, at B1 (reporting rare public statement made by Chief Judge Jon O. Newman, Judge J. Edward Lumbard, Judge Wilfred Feinberg, and Judge James L. Oaks, that Senator Dole's criticism of Judge Baer went "too far").

65. *See* LONG RANGE PLAN, *supra* note 1, at 12.

publish, as we have.[66] That is all fine, but why do we not have enough judges to give enough time to the cases? I have read the *Long Range Plan.* I have listened to my dear friend Jon Newman, with whom I went to prep school and to law school.[67] I have listened to Judge Becker. I do not understand the problem with increasing the size of the federal judiciary.

Why is it that as the caseload, the size of the country, and the number of prosecutors, crimes, and laws all increase dramatically, the only thing that should not change is the number of judges? Whatever it is, I hope you all understand it, because I do not.

(Applause)

PROFESSOR ROBBINS: Thank you, Judge Reinhardt.

Let me just tell you how 3000 new federal judges translates to a law school professor at a law school where we place about twenty percent of our graduating students into clerkships—3000 new judgeships; 6000 new clerkships. Need I say more?

(Laughter)

I now will turn the floor over to Chief Judge Barker.

JUDGE BARKER: I will not leap to the bait and try to answer all the questions that have been propounded by my brother, Judge Reinhardt. I will say that Judge Becker and Judge Reinhardt give a new definition to collegiality and probably illustrate, in their diversity, what is so great about the federal judiciary—that we occupy a rather large tent after all.

District judges see the world of federal courts and litigation from a perspective that is different from the vantage points of the members of the Supreme Court and the courts of appeals. After all, we are where federal litigation begins and where most of it ends. In fact, it is more fact than boast when I provide you this reminder that most of the work in the court system gets done at the trial level.

I want to try to identify and explain the perspective of the district court, to explicate its uniqueness in this debate, and, in this context, to relate it to one very important aspiration set out in our *Long Range Plan.* Some believe that the position of the federal trial judge is less elevated than the positions of our appellate colleagues. I would not

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66. *See id.* at 11 ("The caseload increase has forced the [federal] courts to adopt a wide variety of new procedures and practices to cope with the influx.").

67. Jon O. Newman, Chief Judge of the United States Court of Appeals for the Second Circuit, has authored several articles concerning the health of the federal judiciary. *See, e.g.*, Newman, *supra* note 42; Jon O. Newman, *Determining the Size of the Federal Judiciary Requires More Than a Mission Statement,* 27 CONN. L. REV. 865 (1995); Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System,* 56 U. CHI. L. REV. 761 (1989).

put it exactly that way. In fact, I would suggest that if you are talking to other district judges, you should *not* put it exactly that way.

It is true that when litigants come knocking on the federal courthouse door, we have the responsibility to answer their knock. We are, as it were, the butlers of the federal court system. District judges, along with our colleagues, the magistrate judges and bankruptcy judges, open the door and let in these callers. Sometimes we welcome them in from bad weather and sometimes we let them in from out of the night. Either way, they are allowed in at least so far as the foyer and within our protection. Once there, we decide, as a good butler should, how long they get to stay. When they do come, you can be sure that they enter in all their marvelous variety.

Now, appellate judges, by contrast, hear and see in court almost exclusively lawyers, not the litigants themselves. Oral arguments, not the filings but the arguments by pro se appellants and appellees, are relative rarities, and even then much of the immediacy, not to mention the personalities of the litigants, has been distilled into the written record.

It is in the trial courts, including, of course, the bankruptcy courts, that the full spectrum of federal litigants, along with their coteries of lawyers, witnesses, family members, jurors, and sometimes even custodians, in the form of deputy marshals, approach the bench, or ask to approach the bench in one fashion or another, in order to redress their grievances.

Whatever other characteristics these litigants and attorneys appearing before us may have, one common fact about all of them is totally indisputable: they are a diverse lot, both in terms of their modal characteristics and their variety. Their diversity itself and the implications of that diversity will increase and expand dramatically during the next decades. In Chapter Nine of the *Long Range Plan*, the Long Range Planning Committee spells out some of these demographic fundamentals.[68] I will cite just a few of these statistics, as well as reference some other data that are readily available.

Age. One of the primary demographic changes on the horizon is the age change. The American population, as a whole, is aging.[69] In 1990, the median age of American citizens was twenty-eight.[70] Sometime between 2010 and 2020, fifteen to twenty years from now,

68. *See* LONG RANGE PLAN, *supra* note 1, at 114-15 (discussing demographic changes in American population in areas such as age, population, immigration, race, ethnicity, composition of workforce, as well as trends and crime).

69. *See id.* at 114.

70. *See id.*

the median age will have become greater than forty years of age.[71] For those of you who now are forty or older, think for a minute of how you have changed since you turned twenty-eight, socially, professionally, legally, and I ruefully suspect, physically. For those of you who are twenty-eight or younger, look around at the older folks and try to imagine, if you can, what your life will be like when you become older than Jack Benny ever was.

We can forecast with a great deal of certainty and confidence that this shift in the age structure in our national population will in many ways drive what is legislated in Washington and what is litigated in the federal courts. Current debates about health care, Social Security, pensions, employment rights, and welfare already demonstrate that these trends are likely to intensify with inevitable consequences for the work of the federal courts. The aging of the American population will drive many changes.

Gender. One of the most powerful trends of the years since the end of World War II has been in another area: gender. It has been reflected in the increased participation of women in all aspects of the work force.[72] By the turn of the century, more than eighty percent of women between the ages of twenty-five and fifty-four will be in the labor force.[73] For the great majority of these women, work will take them away from home during the day. By the turn of the century, women will account for more than forty percent of the persons coming into the workforce for the first time.[74] We know these trends will materialize into increases in litigation relating to employment rights, equal pay, and sexual harassment, to mention only three areas.

Race and ethnicity. For the nation as a whole, the numbers of representatives of racial and ethnic groups, as defined by the Bureau of Census, are growing approximately seven times faster than the numbers of representatives in the non-Hispanic, white community, both because of birth rates and immigration patterns.[75] By the year 2005, fifty percent of California's population is expected to be comprised of people of color who will speak eighty different languages.[76] Within a few years of 2050, non-Hispanic whites will comprise

71. *See id.*
72. *See id.* at 115 (citing significant increase in number of women in work force during past four decades).
73. *See id.*
74. *See id.*
75. *See id.*
76. *See* LONG RANGE PLAN, *supra* note 1, at 115.

less than fifty percent of the nation's population.[77] These shifts will undoubtedly translate into increases in litigation relating to equal opportunity and discrimination issues, and probably many more areas.[78]

Now, we need not be demographers, futurists, or soothsayers to be able to conclude that these changes will be important for virtually all aspects of American life, including the administration of justice. This is as safe a bet as just about any projection over a half century could be. It is a more troublesome undertaking, however, to go beyond the general to the more specific projections or conjectures regarding the consequences of these changes on the substance, procedure, and administration of law in federal courts during the next century.

The Long Range Planning Committee knew that it had neither the skill nor the time to engage in such projections and debates in its report, and tonight neither do I. The Committee was able to do no more than become generally familiar with demographic trends and with some opinions held by esteemed demographers and forecasters. For this reason, the published plan addresses the question of growing demographic diversity with only a small number of general recommendations, of which three, I think, are most important. They are brief enough that I can read them to you quickly, and you will be able to understand them.

Recommendation Seventy-Eight says, "Since both intentional bias and the appearance of bias impede the fair administration of justice and cannot be tolerated in federal courts, federal judges should exert strong leadership to eliminate unfairness and its perception in federal courts."[79]

Recommendation Seventy-Nine says, "Federal judges and all court personnel should strive to understand the diverse cultural backgrounds and experiences of the parties, witnesses, and attorneys who appear before them."[80]

Recommendation Eighty-One says, "Court interpreter services should be made available in a wider range of court proceedings in

77. *See id.* ("[R]acial and ethnic minority groups are growing more than seven times as fast as the non-Latino white majority."); *see also* Day, *supra* note 86, at xxv-xxvi, tbl. M. The proportion of the total population accounted for by non-Hispanic white members in 2050 is projected to be 51% and declining. *See id.*

78. *See* LONG RANGE PLAN *supra* note 1, at 113 (explaining that demographic changes will change nature and substance of disputes in federal courts).

79. *Id.* at 112 rec. 78.

80. *Id.* at 113 rec. 79.

order to make justice more accessible to those who do not speak English and cannot afford to provide these services for themselves."[81]

There are, of course, other recommendations which, as they are implemented, also will be responsive to the demands for change imposed by an increasingly diverse population and demographic changes.[82] These three, however, are the ones right on point.

Of these three recommendations, only the third contains a standard, namely that language interpretation should be available more widely than it is now.[83] The other two are hortatory. They exhort us as judges and court staff to do the right things, but they do not provide guidance or standards about what the right things are to do. I do not say this by way of an apology for the recommendations generally. Our Committee was not charged with the task of developing tactics or regulations. On balance, given the entirety of our agenda, I do not think that we could have done a lot more in this area, this time around, than we did.

I am hopeful, of course, that the national planning process will continue, and that the issues that face us under the heading of preparing the courts to serve the American population in the twenty-first century will be prominent on the agenda of this continuing process. But for now, allow me to sketch one specific topic that might properly become a focus of court planners' attention during the next rounds of planning.

It is plainly true that in 1996, the groups in charge of planning, policy, and implementation in the federal courts do not include many members of the racial and ethnic groups the populations of which are expected to grow and thus to create the changes that we label "increasing demographic diversity."[84] This is a fact we should not duck. Another fact is that this situation is changing, albeit slowly. However, given the tenure provisions of federal judgeships[85] and the

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81. *Id.* at 116 rec. 81.

82. *See, e.g., id.* at 114 rec. 80 (suggesting that justice "be made fully accessible to individuals with disabilities" and encouraging construction and renovation of facilities "to ensure physical access and remove attitudinal barriers to providing full and equal justice").

83. *See id.* at 116 rec. 81.

84. *See id.* at 111-12 (describing effect changing nature of population will have on work of federal courts).

85. *See* U.S. CONST. art. III ("The judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their continuance in office."); *see also* Harlington Wood, Jr., *Judicial Reform in Recent Improvements in Federal Judicial Administration*, 44 AM. U. L. REV. 1557, 1560 (1995) (outlining Article III and stating that constitutional provision "firmly establishes the judicial branch as independent from the executive and legislative branches").

life expectancies of healthy Americans,[86] it will not change as fast as the population we must serve is changing.

The historic lack of representation of racial and ethnic groups within the judiciary and the admittedly slow pace of change in this regard must be assessed, however, in terms of the following assumption, which I think is fair: despite their current apparent homogeneity, federal court planners and policy makers will do their best to make federal courts responsive to the entire American population of the mid-twenty-first century and not simply to an historically privileged part of it. I have great faith and confidence in my colleagues in this regard, although I know that not all Americans automatically share my view. Like all public institutions, federal courts must continually work to sustain their legitimacy in the eyes of the entire public. I know that virtually every one of my judicial colleagues knows this and believes this, down to their joint and several toes.

These facts and this assumption together create, inevitably I think, a situation in which policy, strategies, and action will be determined, for a while at least, by people who do not have a great deal of firsthand understanding of large portions of the evolving American population. This is a risky situation to be in. Even with the best of intentions, decision makers can err if their understandings are insufficient or just plain wrong. A large dose of modesty is good medicine for all planners and policy makers.

So, how can we, as planners, increase our chances of making the right decisions? Among other things, we are obligated to consult, early and often, in complete candor and openness, with individuals who can help us understand the expectations and aspirations of the public that comes before us.[87] We must do everything possible to prevent our jumping to premature conclusions about differences that some might claim divide various groups from each other. We will be well advised to take great care in the language we use to describe the cultural backgrounds and communities of all the many different groups whose lives are woven into the tapestry of American life. In short, as we strive to accept and appreciate diversity, we must never lose sight of the depth and breadth of our common humanity and the value that such a deep and broad common humanity represents.

Concerning the kind of information and analysis to which we need to attend carefully, a brief example may be helpful at this point. I

86. *See* LONG RANGE PLAN, *supra* note 1, at 114.

87. *See id.* at 111 (stating that federal courts have obligation to provide "equal justice" for increasingly diverse population).

have read—admittedly only a little—about an active field of legal scholarship that operates under the heading of procedural justice studies.[88] Put in an overly simple way, procedural justice scholars study why people obey the law. More accurately, they study people's values, preferences, expectations, and beliefs about the law, in general, and about certain dispute resolution methods, in particular.[89]

Certain recent studies carried on in this tradition suggest an important insight that I think future federal court planners should consider seriously. These studies examine whether we should believe that different racial and ethnic groups have substantially different cultural values with respect to their preferences for resolving disputes. Consider, for example, this quote from a recent publication:

> [M]any East Asian cultures are thought to place substantial value on harmony and conflict avoidance . . . and to prefer indirect or non-confrontational ways of dealing with conflict. European Americans, on the other hand, . . . are thought to be willing to use confrontational procedures if these procedures advance fairness considerations.[90]

Similar comparisons have been made between other ethnic groups, as well as between men and women.[91] Note that the claim being made in these comparisons is that these are differences in basic values. If these claims that there are differences in basic values were strictly true, then, it seems to me federal court planning likely faces a terrible dilemma. Future planning either would have to find a way to frame different sets of procedures to use in accordance with the values of different groups appearing in court; or, failing in that Herculean effort, it would have to accept a certain level of abuse of at least some of these groups' values. This is not a happy prospect.

I submit, however, that the story is not as sad as it would be if the theory of deep value differences among widely diverse population

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88. *See generally* JOHN THIABOUT & LAURNA WALKER, PROCEDURAL JUSTICE (1975) (applying social psychological methods to assessment of fundamental differences between adversarial and inquisitorial decision-making processes used in American and European courts). The work of Thiabout and Walker has created, and continues to create, "a great deal of empirical research on the topic of procedural justice." Mark R. Fondacaro, *Toward a Synthesis of Law and Science: Due Process and Procedural Justice in the Context of National Health Care Reform*, 72 DENV. U. L. REV. 303, 325 (1995). For a comprehensive review of procedural justice research, see Tom R. Tyler, *Procedural Justice Research*, 1 SOC. JUST. RES. 41 (1987).

89. *See generally* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990).

90. E. Allan Lind et al., . . . *And Justice for All: Ethnicity, Gender, and Preference for Dispute Resolution Procedure*, 18 LAW & HUM. BEHAV. 269, 270 (1994).

91. *See generally* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

groups were strictly true. The procedural justice scholars report careful, reliable research that supports a less catastrophic view of the future of courts to do their work. Here is their interesting and hopeful conclusion: in studies of groups they label as African-Americans, Hispanic-Americans, Asian-Americans, and European-Americans, including both men and women, they find substantial overlap in expectations and preferences for various dispute resolution procedures.[92] To begin with, all the groups preferred direct persuasion and negotiation between the parties to more formalized third-party intervention.[93] This should come as no surprise when you consider that nobody really likes a lawsuit, or at least they do not like to go to trial. What is even more significant for us, however, is that all groups seem to share a common sense of fairness, which has both distributive and procedural aspects, against which they evaluate any dispute resolution procedure. Among all these people from all these diverse cultural backgrounds, not to mention the additional diversity with gender differences, there is nonetheless a general valuing of procedures that treat like cases alike and that are perceived to allot to people what they deserve.

I suggest to you that these two values, fair outcome and equal treatment, are exactly the ones that should be most fundamental to the vision of the federal courts in the future in any long range plan. Indeed, in our *Plan*, we explicitly said so in the statement of values relating to equal justice.[94]

All of this means, I think, that properly conceived and properly conducted federal court planning and policy making must be premised on the assumption that our constituents possess this common humanity and this set of shared values. Those shared values, equal justice and fairness, are the bottom line, and that bottom line pushes the diversity issue into manageable dimensions and proportions. Increased diversity surely will impose its own demands on the courts, especially the trial courts where the most immediate and direct accommodations must be made.[95] These demands need not, however, distract or confound future judicial planners. In terms of

92. *See* Lind et al., *supra* note 90, at 286-89.

93. *See id.* at 287.

94. *See* LONG RANGE PLAN, *supra* note 1, at 111 (stating that federal courts have obligation to provide equal justice and that as American population becomes increasingly diverse, fulfillment of that obligation will require courts to recognize and address racial, ethnic, and cultural differences and to remain "scrupulously fair, and free from bias and prejudice").

95. *See supra* notes 79-82 and accompanying text (discussing recommendations put forth in the *Long Range Plan* to accommodate litigants' diverse cultural backgrounds).

the delivery of justice, the good news is that diversity will not matter all that much.

Thus, judicial planners and policy makers must focus on the overarching sense of shared humanity and common values and then be prepared to deliver on those values. Our task will be to make it clear that we are, to borrow words from the old Gospel hymn, "standing on the promises," and once we are there, that we are prepared to deliver on those promises. Stated otherwise, the challenge in the future will be not so much for us to *find* the right things to do, as it will be to *do* them. Thank you very much.

(Applause)

PROFESSOR ROBBINS: Thank you very much, Chief Judge Barker. Let us now go to Professor Charles Nihan.

PROFESSOR NIHAN: I propose to take a slightly different tack than my colleagues on the panel. During the next few minutes, I will tell you what the federal courts will look like ten, fifteen, and twenty years from now. I must admit that I undertake this task with a full appreciation for the considerable wisdom expressed by the great legal philosopher Yogi Berra who said, "Predictions are risky, especially if they're about the future." I can tell you with some precision what the federal courts will look like ten, fifteen, and twenty years from now because the historical trends that have shaped them for the last half century almost certainly will continue to shape them for the next decade and probably the next two decades.

Let me turn first to the short term. It requires neither a futurist nor a Rhodes scholar to conclude: first, that the number of cases filed in the federal courts will continue to increase significantly;[96] second, that the resources available to the judiciary will not increase significantly; and third, Congress will not make significant reductions in federal jurisdiction. To have a meaningful impact upon the workload of the federal courts, Congress would have to substantially eliminate diversity jurisdiction, to substantially eliminate prisoner civil rights lawsuits, and to return prosecution of street crimes to the states. Congress is not going to do that. Indeed, Congress is more likely to expand federal jurisdiction, particularly federal criminal jurisdiction. This is an election year. National politicians who want to appear tough on crime can only vote on federal criminal legislation, and vote they will.

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96. *See* LONG RANGE PLAN, *supra* note 1, at 162-63 app. A, tbl. 2 (projecting that number of filings, of all types, will continue to increase steadily and dramatically from 2000 through 2020).

Fourth, the trend toward federal courts becoming criminal drug courts will accelerate. It is unfortunate that the federal courts have become an unintended casualty of the War on Drugs, but they are a casualty nonetheless. There is little that federal trial courts can do to adjust the amount of time they must invest in processing criminal cases. In 1994, criminal cases accounted for only thirteen percent of all federal filings but forty-two percent of all federal trials.[97] The Chief Justice recently reported that in some districts, eighty percent of the trials held were criminal trials[98] and indicated that the federal courts are being transformed into national narcotics courts.[99]

Fifth, federal courts can control significantly the way they process and decide civil cases, and that is just what they will do. So much for observations about the short term.

What is the probable long term future of the federal courts? In my view, the *Long Range Plan*'s most significant contribution to the debate about our federal courts is its comprehensive workload projections, which were developed using regression equations operating on fifty-three years of federal caseload data.[100] By combining these workload projections with the opinions of a number of federal judges about the likely impact of this workload, one can obtain a very valuable and remarkably clear insight into the future. This is not an exercise in crystal ball gazing; rather, it is the hard-headed analysis in which lawyers and business people engage every day.

The conclusions that the Long Range Planning Committee drew from this process are frightening. At least they are frightening to me, because I believe the Committee got it exactly right. Assuming the reasonable accuracy of the projections, the *Plan* predicts that by the year 2020, only twenty-four short years from now, we will see the end of the federal courts as we have known them, the end of quality federal justice, the end of a meaningful distinction between federal

97. *See id.*

98. *See* Chief Justice William H. Rehnquist, Remarks at United States Sentencing Commission Symposium on "Drugs and Violence in America" (June 18, 1993), *available in* LEXIS, News Library, Script File (discussing severe demands War on Drugs has placed on federal courts).

99. *See id.*

100. *See* LONG RANGE PLAN, *supra* note 1, at 162-63 app. A, tbl. 2 (estimating number of trial and appellate filings from year 2000 through year 2020); *id.* at 145 n.1 ("Regression is the mathematical process of computing the coefficients of a relationship between one or more independent variables and a dependent variable to obtain the 'best' fit between actual and estimated values.").

and state courts, and the end of coherent and consistent national law.[101]

Let me quote from the *Plan* itself:

> Federal law would be babel, with thousands of decisions issuing weekly . . . .
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> . . . .
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> . . . [D]elay, congestion, cost, and inefficiency would increase. . . . Those civil litigants who can afford it will opt out of the court system entirely for private dispute resolution providers. . . . [T]he civil jury trial—and perhaps the civil bench trial as well—[will become] a creature of the past. The federal district courts . . . would become an arena for second-class justice.[102]

This clear description of an apocalyptic federal court future places the *Plan*'s overwhelming failure in perspective, a failure that, in my view, will relegate it to serving as a magnet for dust in the offices of academics. It contains no meaningful plan to implement the *Plan*. The Planning Committee has looked into the future; it has identified correctly a number of serious threats to the federal court system; it has identified solutions to those threats; and it has forecast the disaster that will result if the solutions are not implemented. It has not, however, identified an effective implementation strategy. How much worse do future outcomes have to be than those described in the pages of the *Plan* itself to justify immediate, aggressive, all-out action on the part of the judiciary to implement its recommended solutions?

It seems to me that only one of two general conclusions concerning the *Plan* can be true. Either the apocalyptic outcomes described in its pages are simply untrue and were placed there in an editorial attempt to get congressional, media, and public attention; or these outcomes are likely to occur, in which case the failure of the judiciary to act aggressively to avoid them is inexplicable.

Federal judges are the stewards of the federal judicial resource. They are responsible for the long-range welfare of the federal courts. In the instant case, a committee of federal judges had identified an impending, yet completely avoidable, catastrophe. The policy-making

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101. *See id.* at 17-20 (describing two apocalyptic alternatives for future of federal courts). The *Long Range Plan*'s first scenario is one in which the caseload and the number of judges continue to increase drastically until the judicial system would be restructured entirely and the conference and consistency of the law would be lost forever. *See id.* at 18-19. In the alternative vision, the workload and the number of judges increase in the same fashion, but the nation refuses to fund this growth. *See id.* at 19. As a result, each case would receive less attention than it does today, congestion and would delay increase, and the purpose of the federal judiciary would be altered. *See id.* at 20.

102. *Id.* at 19-20.

body of the federal courts[103] has approved the Committee's conclusions and recommendations, yet the judiciary now proposes to stand by passively in the hope that the other two branches of government will take effective action on its behalf.

Remaining passive has a terrible cost; it concedes development of the judiciary's agenda to others, it forces the judiciary into a reactive and predominantly negative posture, and it increases substantially the likelihood that effective action simply will not be taken. The judiciary traditionally has elected to stay out of the political process, and that is exactly as it should be. If, however, the issue before the two political branches is the continued existence of the third branch, the judiciary simply cannot, in my view, continue business as usual. To do so deprives both the legislative and the executive branches of the voices of those who know the very most about the federal courts. Furthermore, it does so at the formative stage of the legislative process when there is significant opportunity for adjustment and compromise without direct, interbranch confrontation.

Permit me, if you will, to return to where I began. What is the future of the federal courts? Absent immediate and aggressive judicial action, it is a future characterized by a rapidly increasing workload, slowly increasing resources, a trial docket dominated by criminal matters, significantly increased bureaucratization, a steady decline in the amount of judicial attention devoted to each case, and a continued blurring of the jurisdictional differences between federal and state courts. Indeed, I predict to you that within twenty-four years, the primary difference between the federal and state courts will not be what they do, but where they get their resources.

Finally, I guess I would be remiss in cataloging the attributes of the future federal judiciary if I did not comment on the issue of the number of Article III judgeships required, an issue referred to by both Judges Becker and Reinhardt in their comments.[104] This is a debate that, for me, is entirely abstract. To determine the appropriate number, one first must know the answer to the question, appropriate to do what? Clear agreement on the role of the federal courts simply must precede an intelligent discussion of its appropriate size. Size is a product of function. It is beyond question that the role of the federal courts is a political decision to be made by Congress, and the *Plan* clearly acknowledges this reality.

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103. Chief Justice William H. Rehnquist presides over the Judicial Conference of the United States, which formulates and executes policies for the entire judicial branch.

104. *See supra* pp. 280-81 (Judge Becker's remarks); pp. 292-93 (Judge Reinhardt's remarks).

The *Long Range Plan*'s most important proposals for resolving the workload crisis call for congressional action, not for judicial action. A range of interrelated recommendations urges Congress to make significant adjustments to federal jurisdiction, thereby preserving the historic balance between federal and state courts[105] and allowing controlled growth in the federal judiciary.[106] It is almost certain that Congress will not respond. First, it is profoundly disinterested in the problems of the judiciary. Congress is, for all practical purposes, oblivious to the judiciary as an institution. Second, Congress is most likely to continue to use the federal courts as a tool to address problems perceived to be national. In the last twenty years, Congress has passed more than 200 statutes expanding federal jurisdiction, addressing matters such as car jacking,[107] child support,[108] computer fraud,[109] street gangs,[110] parental kidnaping,[111] and false identification.[112] Third, Congress is unlikely to act because the federal judiciary's natural allies, the organized bar and state judges, do not support the *Long Range Plan*'s proposed jurisdictional reforms. The organized bar strongly opposes the substantial elimination of diversity jurisdiction. State judges, in turn, oppose this change unless the federal government provides the states with the necessary resources to process the new state cases that will result.[113] It is simply a sad fact that most federal jurisdictional reform will do little more than

105. *See* LONG RANGE PLAN, *supra* note 1, at 21-39. In Chapter 4, the *Plan* describes the historic relationship between the state and federal courts. *See id.* "The state courts have served as the primary forums for resolving civil disputes and the chief tribunals for enforcing the criminal law." *Id.* at 21. The federal courts have retained a much more limited jurisdiction. *See id.* The *Plan* states, however, that as Congress continues to federalize what once were considered state crimes and continues to create federal civil causes of action, the delicate balance between state and federal jurisdiction, referred to as judicial federalism in the *Plan*, is threatened. *See id.* at 22. To preserve the sound division of authority between the state and federal judicial systems—a core value of the federal judiciary—the Committee made 12 recommendations that encourage Congress "to conserve the federal courts as a distinctive judicial forum of limited jurisdiction." *Id.* at 23 rec. 1.

106. *See id.* at 38-39. As a final means of preserving a sound judicial federalism, the *Plan* suggests that "[t]he growth of the Article III judiciary should be carefully controlled so that the creation of new judgeships, while not subject to a numerical ceiling, is limited to that number necessary to exercise federal court jurisdiction." *Id.* at 38 rec. 15. The policy of carefully controlled growth for the federal judiciary is emphasized throughout the *Plan*. *See, e.g., id.* at 14 (noting 1993 endorsement of carefully controlled growth by Judicial Conference of United States); *see id.* at 44 (applying concept of carefully controlled growth to recommendations for courts of appeals).

107. *See* 18 U.S.C. § 2119 (1994).

108. *See* 42 U.S.C. §§ 651-669 (1994).

109. *See* 18 U.S.C. § 1001.

110. *See id.* § 521.

111. *See id.* § 1204.

112. *See id.* § 1028.

113. *See generally* Victor E. Flango & Craig Boersema, *Changes in Federal Diversity Jurisdictions: Effects on State Court Caseloads*, 15 U. DAYTON L. REV. 405 (1990).

take cases out of the federal courts and put them in the state courts. In these times of shrinking federal budgets, the chances of enacting a new federal program to support state courts is, at best, slim. More probably, it is nonexistent.

Finally, I offer for your consideration the opinion that the entire concept of controlling judicial workload by constricting jurisdiction is as false as it is appealing. The number of new cases filed in federal and state courts may be far more a function of the number of lawyers in the work force than it is a function of the number of laws granting jurisdiction.

What about returning prosecution to the states? It, too, will not happen. Prosecutors, both federal and state, will continue to favor federal prosecution whenever possible because the federal system has mandatory minimum sentences, sentencing guidelines, broad asset forfeiture provisions, no parole, available prison space, and adequate prosecutorial resources. States are only too willing to sell their sovereignty. Indeed, if the states have a complaint about the federal prosecution of street crime, it is that there is not enough of it.

Of all the major variables that will define the future of the federal courts—jurisdiction, process, size, structure, resources—the only one that is within the primary control of the judiciary is process. For that reason, changes to process will continue to constitute the judiciary's primary response to caseload increases. Whether this is a good thing is open to question. The very essence of the federal judiciary is being changed substantially to allow a relatively fixed number of federal judges to deal with an ever-increasing caseload. It is being changed by continuous adjustments to process, adjustments that I believe would attract very little support outside the judiciary if put to a vote.

Consider, for just a moment, the significant changes that have taken place in just the federal courts of appeals during the last thirty years. Last year, more than half of the cases filed in the courts of appeals were denied oral argument.[114] Instead, these cases were decided summarily on the papers initially submitted by the parties. Recently, in the Third Circuit, seventy percent of all cases filed in a single year were decided summarily, without oral argument.[115] The opinions issued in these cases are not the traditional reasoned

114. *See* JUDICIAL BUSINESS, *supra* note 47, at 48 (stating that during 12-month period ending Sept. 30, 1995, 60.1% of all appeals filed in courts of appeal were terminated after submission on briefs).

115. *See id.* (asserting that, during 12-month period ending Sept. 30, 1995, 70.3% of all appeals filed in Third Circuit were terminated after submission on briefs).

opinions that address the issues raised by the parties, and many present nothing more than the court's conclusion.

I suggest that those of you who would vigorously oppose proposals to address the appellate caseload crisis by eliminating the traditional right of appeal had better examine whether the federal courts already have not done exactly that. Judge Becker said the Committee considered eliminating appeal as of right, but rejected that proposal. I say to you, the federal courts already have implemented it. I submit that there is little practical difference between a system of discretionary appellate review, in which the court denies a petition for certiorari, and a system in which the parties apparently enjoy a traditional right of appeal, yet their case is decided without oral argument and without a reasoned, written opinion. In both situations—denial of certiorari and this new, truncated appellate process—the parties never have an opportunity to address the appellate judges who will decide their cases and thus never learn the judges' concerns. Furthermore, because the parties do not receive a reasoned opinion, they never have certainty that the issues they raised on appeal actually were considered.

What then is the long-term future for the federal courts? It is truly bleak. I believe that if the federal judiciary does not disavow its traditional non-political posture and take the lead in saving itself by working aggressively with the two political branches, it soon will be a seriously weakened institution, devoting the overwhelming portion of its time to criminal matters and dispensing second-class civil justice to those with insufficient resources to go elsewhere. Thank you.

(Applause)

JUDGE BECKER: Well, if I can interject, Professor Nihan's view of the present state of affairs is wrong. It is a cynical view, and his representation of justice in the United States courts of appeals is wrong and deserves to be condemned immediately—instanter, to use a fancy word.

It simply is not true that merely because a litigant does not receive oral argument or a reasoned, written opinion, that litigant has not received justice. My colleagues on the Third Circuit and I, as well as the judges in courts of appeals across the country, take very seriously our obligation to read the briefs, consider, and discuss the cases. We do it, and we do it in each and every case. I read every page of every brief in every case, and so do my colleagues; and we either exchange memoranda or we discuss the cases, either over the telephone or, more commonly, in conference.

We should, however, grant argument in more cases. I think that the federal courts of appeals need to reverse course in that respect. They do, however, give oral argument in all cases that need it and in all cases that it will help.

We do not have to write opinions in every case, whether for publication or otherwise. Many cases are fact-bound; many cases do not involve new principles; and not every case requires, or even deserves, a written opinion.

Professor Nihan's view is entirely cynical; it says you cannot trust the judges. That is wrong. You can trust the judges. The judges are honest, honorable, and diligent. They work hard. They read the briefs, and they consider the cases. So, it simply is not true that we already have a system of discretionary review.

I also want to respond at some point to Professor Nihan's view of how the federal judges should get into politics, and how we can save ourselves if we do, but perhaps I will save that discussion for later.

JUDGE REINHARDT: The real truth is about halfway between the two of you. The quality of justice is not what it used to be. It cannot be. We have ten times as many cases per judge; we just cannot spend the same amount of time that we used to spend on cases. We never used to waste our time. We do not spend nearly as much time per case as we did. The number of appeals has increased ten-fold in the last thirty-five years.[116] The number of judges has increased by slightly more than two-fold.[117] We do give quicker justice. Maybe the results are not wrong too many times. But with the right number of judges, we would give better justice and better treatment to the litigants who deserve more than this kind of second hand treatment in a lot of cases. It is, however, not nearly as bad as the Professor suggests.

Fortunately, life does not work the way these people who make these projections predict. If I could just put this in some perspective. You hear about these 3000 judges, or perhaps 10,000 judges, and this apocalypse. We have 167 federal appellate judges[118] in this whole country of 300 million people. Now, if we had, instead of 167 judges, 350 judges, neither the judicial system nor the country would collapse.

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116. *See* LONG RANGE PLAN, *supra* note 1, at 15 tbl. 4 (noting that in 1960, 3899 appeals were filed in courts of appeals, but that by 1995, number had risen to 49,671).

117. *See id.* at 16 tbl. 6 (stating that in 1960, there were 313 judgeships, and in 1995, there were 816).

118. *See id.*

Three years ago, I proposed that we go from 167 federal appellate judges to 325,[119] so we can do what Professor Nihan says—spend twice as much time as we do per case. Judging by the opposition to this proposal, you would think that, by going to 300 judges for 300 million people, we were flooding the nation with unqualified federal judges. Why is it that this nation, which spends more on a space shuttle than it does on the federal judiciary, cannot afford another 160 judges, so that each of us can spend twice as much time per case and keep Professor Nihan from getting apoplectic?

It is not such a big problem to create additional judgeships, and the solution is not so difficult. Furthermore, we do need a lot more judges to be able to handle the cases we already have.

I agree with everything Professor Nihan said. Congress is not going to cut back our jurisdiction significantly.[120] Some people want to cut back our jurisdiction in civil cases. They do it indirectly by limiting access to the courts. It is, however, better to have too much access than too little.

I also agree with Professor Nihan that once you find out what your jurisdiction is, use that as a guide to determine the number of judges necessary.[121] We are not going to get Congress to cut back our criminal jurisdiction. I wish they would, but with this wonderful President we have, we have just added fifty capital crimes to the federal courts. We are becoming flooded with capital crimes that are coming to us from the state courts. That was not good enough. Now, they are going to flood us with capital crimes from the federal courts. Well, we can handle all these cases, but we need some more judges; that is all. If we would stop conducting all these damn studies and surveys and stop placing judges on commissions and, instead, give the federal judiciary enough judges, we will do the job.

JUDGE BARKER: I am going to respond to Judge Reinhardt. I resent, in an intellectual way, the premise that the Long Range Planning Committee's recommendations for measured growth in the federal judiciary were based on a sense of elitism or favoritism for the federal bench that emanates from the personalities of the people who have been selected to hold the office. This personality-based rationale did not come into any of the discussions and did not support our

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119. *See* Stephen Reinhardt, *Too Few Judges, Too Many Cases: A Plea to Save the Federal Courts*, 79 A.B.A. J. 52, 53 (1993).

120. *See supra* notes 105-07 and accompanying text (positing that Congress likely will not significantly curtail federal jurisdiction).

121. *See supra* p. 304 (asserting that "size is a product of function" and that before one can speculate about judiciary's size, one must clearly establish its jurisdiction).

decision. One reason that the Long Range Planning Committee reached the conclusion of carefully controlled growth in the federal judiciary relates to the structure of the judiciary[122] and to the way we need to position it to do the work in the manner we think the Constitution requires. The federal courts are supposed to be courts of limited jurisdiction,[123] and you cannot read the size chapters in the *Long Range Plan*[124] and understand them without understanding the federal courts' jurisdiction and the other issues that comprise the *Plan.* It is really a distortion to suggest that the Planning Committee has some venial interest in preserving what exists from encroachment by lesser human beings. That is, as I say, intellectually offensive to me.

I also want to state that when you cite statistics showing that the number of judges has increased by only a small percentage, you ignore the fact that the whole pace of our society has increased. We are more efficient human beings now than we were. We have devised ways of superimposing efficiencies on the judicial process that were not available to us forty years ago. The computer makes a big difference. For example, when a district court receives a brief that a law firm has created overnight, that is in violation of all the page limitations, by the way, and that requests an immediate court response regarding some injunctive or expedited relief, it tells you something not only about the pace at which we are working, but at which we are able to work. Transportation is faster. The way we find the law is faster. So, these statistics showing that the number of judges has increased by only a small percentage really distort the fact that the work is being done more efficiently now than in the past. It is true that we have to operate in many ways on tiptoes, but we have not come to a point at which we have imposed all the efficiencies on this process that are available to us.

PROFESSOR NIHAN: At least I concede the moral high ground to Judge Becker. It seems to me that there can be no doubt that

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122. *See* LONG RANGE PLAN, *supra* note 1, at 41-55 (discussing structure of federal judiciary).

123. *See id.* at 8 (recognizing that federal courts were intended "to be a distinctive judicial forum of limited jurisdiction, performing the tasks that state courts, for political or structural reasons, could not"); *id.* at 21 (stating that state courts traditionally have been primary fora for resolving civil disputes and enforcing the criminal law and that federal courts have had more limited jurisdiction). *See generally* U.S. CONST. art. III, §§ 1, 2 (establishing jurisdiction of federal courts).

124. *See* LONG RANGE PLAN, *supra* note 1, at 9-16 (presenting historical caseload and future projections of federal courts); *id.* at 17-20 (outlining possible scenario of future growth of federal courts); *id.* at 44-46 recs. 17 & 18 (making recommendations related to circuit size and workload).

federal judges are "rationing justice on appeal."[125] It is not that they are bad people. They are doing what everybody else does when they have far more work than they have time. They do some things completely, some things partially, and some things not at all. I recall, quite vividly, a debate between Judge Becker and former Chief Judge Browning of the Ninth Circuit. In that closed-door debate, Judge Browning asserted to Judge Becker that if he and his colleagues were reading the briefs in every case, they simply were not doing their jobs; that the amount of time an appellate judge could invest in a case was limited, and it did not include reading the briefs in every case.

If my view is cynical, I wonder, Judge Becker, how would you disassociate yourself from the language in the *Long Range Plan*, which I quoted earlier?[126]

JUDGE BECKER: Well, I think Judge Browning was playing devil's advocate. I think he was being—

PROFESSOR NIHAN: Well, in that case, that is what I am doing, too.

JUDGE BECKER: He was being audacious. Insofar as the language in the *Plan* is concerned, the language that you cite is conditional. We simply strung the projections out numerically. We did not predict that that is what will happen. We do not know what is going to happen.[127]

If you are talking about incrementally, in the last four or five years, between the time we started our deliberations and the present time, things are not that much worse. For instance, the Eastern District of Pennsylvania, the district court with which I am most familiar, is no busier now than it was four or five years ago. When you talk about the volume of criminal cases, there is one solution to the criminal caseload; it is called the guilty plea. Not all of these cases go to trial. A very small percentage of this increased number of criminal cases goes to trial.

When you talk, however, about having to rely on Congress, it is not just Congress that is responsible for the criminal caseload; it is also the Justice Department. The time may come when the Justice

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125. Judge Learned Hand used this phrase in an address before the Legal Aid Society of New York. *See* Learned Hand, Thou Shall Not Ration Justice (Feb. 16, 1951), *in* 9 CASE BRIEF 4, 5 (Apr. 1951) ("If we are to keep our democracy, there must be one commandment; Thou shall not ration justice.").

126. *See supra* p. 303.

127. *See* LONG RANGE PLAN, *supra* note 1, at 17 (stating that *Long Range Plan*'s caseload projections "provide only a rough approximation of future caseloads and the assumptions underlying the projections are open to challenge, as would be assumptions underlying *any* future caseload projections").

Department may decline some of these prosecutions, or many of these prosecutions, as indeed they have done in certain districts when they see that the courts cannot handle them.

If you are talking about a long-range plan, you are projecting twenty to twenty-five years into the future. Demographically, it has been projected that drug use will decline in the next twenty to twenty-five years, as the average population gets older. Therefore, if you are going to project a straight-up growth in criminal caseload, you better think about whether twenty or twenty-five years from now, for a whole host of reasons, demographic, educational, and otherwise, drug use may decline—like smoking has declined in the past twenty or twenty-five years. If drug use declines, so will the volume of prosecutions.

I do not disassociate myself from anything in the *Plan*; I simply note that we said that if those projections come true—and we are not by any means sure that they will come true—then we have to deal with what we call the "nightmare scenario."[128] The one thing that everybody is overlooking, however, is the impact of what will happen to the federal courts if we let this happen. That leads me to how we get things done.

Now, I am not quite sure how the federal judiciary—which has how many votes?—can influence the politicians in the House or Senate. Although I wish I shared Professor Nihan's confidence that vigorous, aggressive political activity by the federal judiciary would change things, I do not think that is going to happen.

Professor Nihan's comment that we lack an implementation strategy goes back to my very first remarks regarding the federal judiciary's ability, or lack thereof, to control its destiny.[129] We do not have any; we do not control our own destiny. Our destiny is left largely to the Congress, and to some degree, to the Executive.[130] I can only hope that dissemination of the *Long Range Plan* and that symposia, such as this one at the Washington College of Law, will help educate the public and, through the public, the political powers that be about the enormous importance of the federal judiciary as a national institution and the potential threat to the federal judiciary if those in power do not do something.

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128. *See id.* at 17-20 (describing two alternative but equally "nightmarish" scenarios for future of federal courts); *id.* at 129-40 (proposing methods of responding if "nightmarish" future is realized).

129. *See supra* pp. 278-79 (commenting on extent to which federal judiciary controls its own business).

130. *See* LONG RANGE PLAN, *supra* note 1, at 2 ("Congress sets the courts' budgets and the scope of federal jurisdiction; the executive branch determines the government's prosecutorial and civil litigation strategies . . . .").

Chief Justice Rehnquist's opinion in the *Lopez* case,[131] has pointed out the limits on Congress' power under the Commerce Clause to federalize state crimes[132] and has sent a message, or at least will send a message to the legislative branch. So, I think there are a lot of things happening that can reverse the increasing caseload, and I do not share Professor Nihan's total pessimism about our future.

PROFESSOR NIHAN: Well, I would only offer, Judge Becker, that it seems to me that waiting for drug education to drive drug cases out of the federal and state courts is not a plan, but a prayer.

PROFESSOR ROBBINS: I think this would be a good time to open up the discussion to include the audience. Judge Sporkin?

AUDIENCE MEMBER, JUDGE SPORKIN:[133] You must realize that we are a market for society. When a market needs assistance, it does it with privatizing a lot of its civil area. Why do we need all this appellate activity if there is a good clear decision? Private parties arbitrate. They do not worry about appeal from arbitration. They have their decision, and it is over with. For us to have to sit here, hear cases, make decisions, and then have the appellate courts say we are wrong—and they have to make that decision—we are wasting all of that time. Where do you fit in the private initiatives such as arbitration, mediation, and those aspects?

JUDGE BECKER: I respond to Judge Sporkin by pointing out that Chapter Ten of the *Long Range Plan* encourages each federal court to expand the scope and availability of alternative methods of dispute resolution.[134] There are several places in the *Long Range Plan* where we commend alternative dispute resolution.[135] We describe it as a case management tool.[136]

JUDGE REINHARDT: It is still a free country, and anyone who wants to arbitrate can arbitrate. In all of these cases, it takes two to consent to arbitration. There is nothing wrong with having arbitration. I am all in favor of it, but I am opposed to compulsory arbitration. I think that the justice received in the federal courts should be the fairest and finest form of justice you can get.

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131. United States v. Lopez, 115 S. Ct. 1624 (1995).

132. *See id.* at 1630-31 (overturning portion of statute that made carrying firearm in school zone federal offense because education is traditionally state-regulated field and no evidence indicated that gun-use near schools has substantial effect on interstate commerce).

133. District Judge Stanley Sporkin, U.S. District Court, District of Columbia.

134. *See* LONG RANGE PLAN, *supra* note 1, at 134.

135. *See id.* at 70 rec. 39 (recommending that federal courts encourage use of alternative dispute resolution techniques "to assist in achieving a just, speedy, and inexpensive determination of civil litigation").

136. *See id.* at 70-71.

In California, we now have a two-tier system of justice. We have private dispute resolution where all the judges, as soon as they can get their pensions, become private judges. They go off and they handle the cases for the rich people. The poor people get stuck with the judges who are waiting to become private judges. That is not a very healthy or happy system.

Done properly, arbitration is a very important supplement. I am all for improving it and encouraging more people to use it.

JUDGE BARKER: In fact, we have a rather expansive process of mediation in the federal district courts already. In our court at least, the magistrate judges spend enormous amounts of time bringing cases to some sort of settlement before they need to rule on motions or to conduct trials. In fact, in our federal district court, 98.6%—even with your normal body temperature—of our civil cases settle without a trial.[137] That does not mean that they settle without a judge ruling on motions, but at least they do not have to go to trial. So we have a very effective mediation process going on in the courts.

AUDIENCE MEMBER, JUDGE SPORKIN: To say that you cannot give the *Long Range Plan* any statistics regarding alternative dispute resolution does not make sense. Those numbers have to be a factor.

JUDGE BARKER: Alternative dispute resolution is factored into the *Plan*, and we count on those resources. We always are devising new ways to do it. I think that Judge Reinhardt is right, however, that private alternative dispute resolution will take a large section of the docket that is presently before the federal courts. That may be one of the ways we stay afloat. On the other hand, it will change the nature of the work of the courts. The law declaration process will shift because there will be a different sort of clientele in the courts.

AUDIENCE MEMBER, JUDGE SPORKIN: Is that working?

JUDGE BARKER: Yes.

AUDIENCE MEMBER, JUDGE SPORKIN: If we were better, then we would get the cases; if we are not better, then it is going to go private?

JUDGE REINHARDT: If litigants have to wait long enough to get into court, part of the federal judiciary may go private. If the federal courts provide enough opportunity and facilities—if we have enough judges to do the job properly—then people would not have to wait, and they may prefer to have first-class justice, which is what I hope the federal courts will always provide.

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137. *See* JUDICIAL BUSINESS, *supra* note 47, at 165 tbl. c-4A (demonstrating that in District of New Jersey, only 2.4% of civil cases reach trial).

I frankly do not understand this problem of an overwhelmingly large judiciary. We are not talking about an awful lot of people when we talk about 167 appellate court judges in an entire nation. We still have a fairly small judiciary. We are not talking about a voluminous increase. I have not heard any good reason why, but I do think everybody has recognized that we are basically in the hands of the policy makers, and that the judges are not making national policy. I think we probably all agree that Congress is not going to take away a lot of the jurisdiction in criminal law that we would like to lose.

I suggested doubling the size of the judiciary before the 1994 congressional elections.[138] After the election, everybody said, do not spend a dime on anything; instead just dismantle the government. I think we have to wait until we are through with that period, and there will come a time again when people recognize that the government, including the courts, serves a useful function. A time will come once again when people will be willing to spend money for justice as well as for other things. I think we are in a bleak period with regard to increasing the size of the courts and expanding justice, but sooner or later, rather than have a long-range plan, I would like this country to return to the idea of government spending the money to serve the people by giving them justice. The judiciary is a very minimal part of national spending. Nevertheless, until that happens, we are going to be in the same kind of trouble that lots of other people are.

PROFESSOR ROBBINS: Let us take another question from the audience.

AUDIENCE MEMBER: This might be purely academic. Are there any categories of crimes, specific crimes, that you feel are unnecessary and that Congress might attempt to eliminate in order to lessen the judicial caseload?

PROFESSOR ROBBINS: Judge Barker?

JUDGE BARKER: We articulate in the *Plan* some criteria by which you should decide whether something is properly brought into the federal court under the criminal system.[139] Those are pretty good guidelines. There has to be some sort of national interest at stake, for instance. There has to be some reason to use federal resources which are scarcer than state resources. I think the criteria in the *Plan* are a pretty good indication. I would say Congress does not want to look at it in that sort of theoretical way. Their tendency to federalize a

138. *See* Reinhardt, *supra* note 119, at 52-53.

139. *See supra* note 30 (quoting *Plan*'s recommendations regarding types of criminal activity over which federal courts should have jurisdiction).

variety of criminal behavior is a political response. Federal jurisdiction is not as much law as it is politics. The point of the *Plan* was to get people to think more theoretically about it.

From the district court's perspective, federalization of behavior so that it comes into federal court for some sort of remedy or sanction really is only one part of the problem. The other equally intrusive and difficult imposition that is made by Congress, and sometimes by the courts of appeals, is to tell the district court how to do its work. They tell us which cases have to go fast and which ones have to go slow. They tell us that they have to be done within sixty days, or they have to be done within ninety days. Most of these actions have been taken, in my view, because tinkering with the way the federal courts do their work is regarded as having no budgetary impact. We can just tell the judges to go faster, or we can tell them to prioritize these cases over others.

If you just took the criminal sentencing process, it is not the guidelines, per se, that impose the burden on the district court; rather, it is having to go through so many hoops. It is having to try to fact find, by a preponderance of the evidence, on very small, minor, sometimes inconsequential, factors—factors that judges never took into account before, or at least that they did not have to resolve. Now you have to resolve everything, and you have to articulate your reasons. So we have sentencing hearings that last two hours instead of twenty minutes because we have to go through this whole process. We also have the treatment of civil cases that requires us to march to a drumbeat that Congress imposes on all of the courts without any real sense of individualized court culture. That is an enormous problem for the district courts in managing their own business.

PROFESSOR ROBBINS: Let us return to the topic of redrawing the federal circuits. On March 20th of this year, the Senate passed a bill, Number 956,[140] that would establish a commission to study splitting the Ninth Circuit as part of an overall review of the federal appellate court system.[141] Some people say that the Ninth Circuit

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140. Ninth Circuit Court of Appeals Reorganization Act of 1995, S. 956, 104th Cong. (1996); 142 CONG. REC. S2544-46 (daily ed. Mar. 20, 1996).

141. Senate Bill Number 956, as approved by the Judiciary Committee, creates two circuits from the current Ninth Circuit: a new Ninth Circuit made up of California, Hawaii, Guam, and the Northern Mariana Islands, and a Twelfth Circuit composed of Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington. *See* S. REP. NO. 104-197, at 2 (1996). This bill was amended on the Senate floor by Senator Murkowski (R-Alaska), on behalf of Senators Akaka (D-Haw.), Biden (D-Del.), Burns (D-Mont.), Feinstein (D-Cal.), Kennedy (D-Mass.), and Reid (D-Nev.). *See* 142 CONG. REC. S2544-45 (daily ed. Mar. 20, 1996). The amendments deleted the structural changes recommended by the Judiciary Committee and, in their place, established a Commission on Structural Alternatives for the Federal Courts of Appeals. *See id.* The bill then

is too large and overburdened to be an effective judicial unit. Others say that the move to split the Ninth Circuit is simply an effort to remove some states from the reach of California's federal appellate judges, like Judge Reinhardt. Do we really need a commission at the cost of half a million dollars to make recommendations to Congress?

Judge Becker, you spoke about redrawing the circuits. What would that look like? What would the consequences be?

JUDGE BECKER: The current circuit alignment is essentially well over 100 years old.[142] I do not think the Republic would fail if we seriously looked into redrawing the circuits. There was a time early in the history of the nation when New York and New England were in one circuit. Now we have one circuit, the First Circuit, that has six active judges, and if the Ninth Circuit grows to its projected size, it will have thirty-eight active judges. To me, that does not make any sense. We should try to equalize the size of these circuits, at least in terms of judicial personnel.

I think, frankly, that the idea of a commission to study circuit structure is a good one. One of the precepts that we have promulgated with respect to appellate structure favors regional circuits—the idea that there are certain legal cultures in certain areas. But then, consider what Congress has come up with—a proposal that would divide the Ninth Circuit and create a circuit that goes from Alaska to Arizona. Alaska and Arizona are not part of a region. On the other hand, you might say that the Eighth Circuit is not a regional circuit because it includes North Dakota and Arkansas. And you might say that the Sixth Circuit is not a regional circuit because it includes Michigan and Tennessee, which are very different. So, I think it would be a good idea to have a commission that would look at the overall picture.

My view is that the only meaningful way you can split the Ninth Circuit is to divide California in two. You could have the Northern and Eastern Districts of California with Oregon, Washington, and Alaska, and the Southern and Central Districts with Nevada, Hawaii, Arizona, or what have you. You could argue that Montana and Idaho, which are mountain states, should go into the Tenth Circuit.

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was referred to the House Judiciary Committee. *See* 142 CONG. REC. H2663 (daily ed. Mar. 21, 1996).

142. *See* LONG RANGE PLAN, *supra* note 1, at 45 n.8 (stating that apart from the division of the Eighth Circuit in 1929, the division of the Fifth Circuit in 1981, and the creation of the Federal Circuit in 1982, the present circuit alignment has remained unchanged since 1866); *see also* ABA STANDING COMMITTEE ON THE FEDERAL JUDICIARY, THE UNITED STATES COURTS OF APPEALS: REEXAMINING STRUCTURE AND PROCESS AFTER A CENTURY OF GROWTH 1 (stating that basic structure of circuits has not changed since Evarts Act of 1891).

The Republic would survive the division of California. The only problem would be the unpredictability of California law. Judge O'Scannlain, Judge Reinhardt's colleague on the Ninth Circuit, has demonstrated how you could solve this problem by creating an en banc of the two circuits. There are many ways you could handle it, but it is never going to get through without a commission. If you have a commission, it must look at all of the circuits, consider the best method of aligning them, and see what we come up with.

JUDGE REINHARDT: California is a state. We like ourselves. We like being a state, and we do not want to be split. But I think we should combine the states of Pennsylvania and New Jersey into one state. The nation would not crumble, as Judge Becker says. We happen to be a state. I do not want to sound like one of these states' rights people, but we do not want to be split into two circuits.

JUDGE BARKER: Not to worry.

JUDGE REINHARDT: I am not opposed to a study on combining some of these small, piddling circuits. I sat on the First Circuit once, I wrote a dissent, and they were shocked. I mean, it was such a nice, collegial little body where you had a wonderful time, and you were not supposed to disagree. Well, you know, there are various ways to do things. I think there is no harm in taking another look; most of these commissions do not do much more harm than they do good. So we can have another survey, another study. We will get some law professors who will become reporters for these commissions.

JUDGE BARKER: Did you favor the split of the Fifth?

JUDGE REINHARDT: I was not a judge then.

JUDGE BARKER: But I am sure you had an opinion.

JUDGE REINHARDT: No, I did not. I did not have an opinion. I was just a lawyer trying to get justice for people.

I think it is all right to study splitting California, but you are going to raise some difficult problems. For instance, we have never split states—any state. It makes no sense for a state like California or New York to split and have two different circuits. We are going to have to adjust to the fact that we do have big states in this country. I know people from small circuits and small states never like people from New York or California. There is always this rivalry with the large states, and there is the regional problem. The Northwest has felt that they were losing cases because of California judges. The fact is that they were losing the cases before Washington judges and Oregon judges, not California judges. But it was a nice political argument that senators could make—just blame California.

This bill[143] went through the Senate as a purely political way of saying, "We want courts to decide cases the way we want; we want them to decide them the way the timber industry or the fishing industry wants them, or else we are going to split your circuit." There are a few senators who made those speeches on the floor.[144] That is not a way to divide circuits. There is nothing magic about these twelve circuits. If there is a better way to divide them, I certainly am not opposed to it. But nobody, including Judge O'Scannlain, has come up with a decent way of dealing with large states.

I think the other problem is that you do not want to end up with too many circuits. If you do, surely, sooner or later, you will end up with another level of courts, which is not good for anybody.

JUDGE BECKER: I would like to respond, if I may. The Chief Justice's earlier remarks made clear that we do not have a problem if we have a few more circuits, because the Supreme Court has ample capacity now to resolve circuit splits.[145]

More importantly, let us make clear what we are talking about with respect to this fiction of splitting California. The only legal significance of splitting California is that the Northern Circuit and the Southern Circuit might have a different prediction as to California state law. Insofar as federal cases are concerned, there is no difference whether a circuit is inside the state or outside the state. The problem of predicting state law exists anyway. For example, the Third Circuit predicts New Jersey law. New Jersey is across the river from New York whose law is predicted by the Second Circuit. But the Second Circuit probably spends as much time predicting New Jersey law as the Third Circuit does because of New York's proximity to New Jersey. New Jersey does not have a certification statute. One of the proposals we made in the *Long Range Plan* was that all states should have certification statutes.[146] So, if California had a certification statute, and there was a disagreement as to what California law was, the case could be certified to the California Supreme Court and it would state what California law was.

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143. S. 956.

144. *See* 141 CONG. REC. S7504 (daily ed. May 25, 1995) (statement of Sen. Slade Gorton); *id.* at S7505-06 (statement of Sen. Conrad Burns).

145. *See Keynote Address*, *supra* p. 270 (noting that federal district courts and courts of appeals bear brunt of growth in litigation and the Supreme Courts handles fewer cases today than it did in recent years).

146. *See* LONG RANGE PLAN, *supra* note 1, at 32 rec. 8 (encouraging states to adopt certification statutes "under which federal courts (both trial and appellate) could submit novel or difficult state law questions to state supreme courts").

All we are talking about is predicting California state law, and in my view, that is not an insuperable problem. Sure, it would not be desirable to have the Southern Circuit predict California law one way, and the Northern Circuit to predict it another way. If the case presents a matter of any importance, you could have an en banc of the two circuits, and they could settle what California law is. But California could change it the next day. The California Supreme Court has the last word, and they are the ones that can, and should, say what California law is.

JUDGE BARKER: The courts of appeals worry about how to split, and the district courts worry about how to consolidate. In fact, in the *Plan* we talked about some states that have three districts.[147] In my view, it does not make any sense to have three. It does not make any sense to have three different probation offices, three different clerks, and all of that. It particularly does not make sense in metropolitan areas that have one circuit and one district court on one side of the bridge and another circuit and a whole other set of courts on the other side of the bridge. Kansas City has that problem. So does the area between Louisville, Kentucky and Southern Indiana—and many other places.

We tried to address that issue in the *Plan* by suggesting that when we consider these dividing lines, we must have some rational basis for maintaining them.[148] We recognize that it is an enormous political question to abolish districts in a state and it is not likely to happen. We can, however, consolidate some of the collateral resources, and that was one of the things we urged.[149]

PROFESSOR NIHAN: It is hard for me to understand what Judge Becker finds so objectionable about a circuit of thirty-eight judges. It seems to me, that when we look at the proposals to merge courts, split courts, stack courts, or specialize courts, an immutable law of mathematics comes into play. That is, when you are done redistricting the judiciary, you have exactly the same number of cases and the same number of judges to decide those cases as you had when you started. If we split the Ninth, it will not allow judges to be more productive; it will not allow litigation to be processed any faster; it will not allow litigation to be processed more inexpensively. What is the purpose?

147. *See id.* at 51 n.28.
148. *See id.* at 51.
149. *See id.*

JUDGE BECKER: To allow them to be more collegial. Collegiality is not sociability. It makes the court of appeals a meaningful kind of unit. I do not want to spend any more time on it because I discussed it during my principal presentation.

PROFESSOR NIHAN: It sounds to me like collegiality is another way of saying that we are going to structure the courts to provide a working environment that the judges find acceptable. I do not believe that is the way we ought to approach circuit size.

JUDGE BECKER: That statement is simply wrong. Collegiality is not a question of what judges find acceptable; it is, from the point of view of judicial administration, what is sound.

JUDGE REINHARDT: It is the Third and Second Circuit judges using their point of view to tell the Ninth Circuit judges what is acceptable and how they should be collegial. We find the Ninth Circuit perfectly collegial and acceptable, and we will match our decisions against those of the Second or Third Circuits. I tell you our court is doing a fine job, and we do not need any advice about splitting.

PROFESSOR ROBBINS: I'd like to welcome you all to the battle of the network circuits.

(Laughter)

In the interest of time, I am going to ask each panelist to make one final point, and then I will conclude the session. We will go in reverse order this time. Professor Nihan?

PROFESSOR NIHAN: It seems to me that in spite of the fact that the judiciary traditionally has been non-political, it simply must find a way to work effectively with Congress. There is no doubt that federal jurisdiction is a political decision to be made by Congress. I also have no doubt whatsoever that jurisdiction will continue to expand, unless the federal courts can find an effective way of working with Congress. The courts also must show Congress the crisis that federal judges believe will occur if caseload increases, of the magnitude forecast by the *Plan*, which now has been attributed to me, actually come true.

(Laughter)

PROFESSOR ROBBINS: Thank you. Judge Barker?

JUDGE BARKER: I would like to say that the planning process that has resulted in the publication of the *Long Range Plan* is just a beginning step. The Committee knew that, and the Judicial Conference knew that. This *Plan* is the groundwork that we have tried to lay for responsible planning to be ongoing from this point forward. We do not know exactly what shape the next stage should assume. We do

not know whether it should be an implementation stage in that sense; or whether we should start structuring experiments in the federal judiciary to address some of these problems. There is a sense, in having finished this part of the process, that we have a lot on our plate. It will require the best efforts of every judge in the system and of everyone who has hitched his or her wagon to this particular star.

PROFESSOR ROBBINS: Thank you, Judge Barker. Judge Reinhardt?

JUDGE REINHARDT: Well, I guess I just have not hitched my wagon to this procedure because I do not really see this *Long Range Plan* as greatly significant one way or the other. It is not, in the big picture of things in this nation, of great moment. I do not know what it is that they think they are going to change, but I do not mind if they continue to study these plans. We have a Long Range Planning Committee on our court. They make reports every year; they are all very happy.

I think it is good practice to study these things, but to me, that is not the problem that confronts the federal courts. I am concerned about a judiciary that is not giving adequate protection to individual rights. I am concerned about a judiciary whose jurisdiction is being limited more and more. I am concerned about the difficulty of obtaining justice in federal court. Those are the things I think we should worry about. I think we need more judges for one thing: to see if we can deal with the kinds of problems we have. I think it is regrettable when civil rights litigants no longer can win cases in federal courts. I think it is regrettable when civil rights litigants tell you they are going to go to state courts because the federal court has suddenly decided that the Constitution is colorblind, and that blacks no longer have any problems. Those are the kinds of problems that concern me. Largely, however, these are problems that individual judges cannot do much about. It is a question of philosophy, and of Congress' political approach to the courts. I think that we just have to wait and hope that the federal judiciary returns to what it once was—one of the most important institutions in this nation—a leader for fairness and decency. It still is a place that should, and frequently does, protect the individual and the rights envisaged by the Constitution. It is a noble institution that should be preserved and expanded.

I would not worry about trying to limit jurisdiction. I would worry about protecting the traditional, historic jurisdiction that the federal courts have had. I would worry about protecting habeas corpus, and I would worry about seeing that there are enough judges to do justice for all the people in this country. I think we need more judges to

address the kinds of problems that already exist. I would recognize that computers cannot decide cases and that judges do. Judges have to read every single brief that comes before them. Judges have to read the briefs and they have to hear the oral arguments; they should write opinions and they should do justice. That may require more money than we are willing to spend now, but times do change; let us hope that Congress will spend more money later and that we will have enough courts and enough judges—not just enough policemen and prosecutors.

PROFESSOR ROBBINS: Thank you, Judge Reinhardt. Finally, Judge Becker?

JUDGE BECKER: I want to close by agreeing with Professor Nihan. We have to do a better job publicizing our problem and tuning in the Congress because that is the only way we are going to alleviate much more serious problems down the line.

PROFESSOR ROBBINS: This ends our panel discussion on the future of the federal courts, but it is certainly not the end of the debate. That debate is going to continue in the halls of Congress, in the Executive Branch, in the Judicial Conference, in bar association meetings, and in academia as well. I am pleased to say that the debate certainly will continue here at the Washington College of Law.

The quest for both effective and fair justice in the courts of this nation should be a never-ending one. I should add that this discussion should not be restricted to the federal courts. In the coming year, we hope to host a conference on the future of the state and local courts as well.

Personally, as well as on behalf of the Washington College of Law of American University, I thank the distinguished panelists, Chief Justice Rehnquist, Judge Becker, Judge Reinhardt, Chief Judge Barker, and Professor Nihan.

APPENDIX: BIOGRAPHIES OF THE PANELISTS

THE HONORABLE SARAH EVANS BARKER is the Chief Judge for the United States District Court for the Southern District of Indiana. Judge Barker was appointed to the federal judiciary in March 1984, by President Reagan. Judge Barker served as a member of the Long Range Planning Committee of the Judicial Conference of the United States. Prior to her appointment to the bench, Judge Barker was the United States Attorney for the Southern District of Indiana. She also has served as an Adjunct Professor of Law at the Indiana University at Bloomington. She received her B.S. from Indiana University and her J.D. from American University, Washington College of Law.

THE HONORABLE EDWARD R. BECKER is a Circuit Judge for the United States Court of Appeals for the Third Circuit. President Reagan appointed Judge Becker for life on January 22, 1982. From 1970 until 1982, Judge Becker sat as a District Judge for the Eastern District of Pennsylvania. He is a member of the Long Range Planning Committee of the Judicial Conference of the United States. Judge Becker received his B.A. from the University of Pennsylvania and his L.L.B. from Yale Law School. Judge Becker's contributions to legal scholarship include: *Insuring Reliable Fact Finding in Guidelines Sentencing: Must the Guarantees of the Confrontation and Due Process Clauses Be Applied?*, 22 CAP. U. L. REV. 1 (1993), *reprinted in* 151 F.R.D. 153 (1993); *Is the Evidence All In?*, A.B.A. J., Oct. 1992, at 82; *The Federal Rules of Evidence After Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, The Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857 (1992), *reprinted in* 142 F.R.D. 519 (1992); *Flexibility and Discretion Available to the Sentencing Judge Under the Guidelines Regime*, FED. PROBATION, Dec. 1991, at 10; *The Use of "Law and Economics" by Judges*, 33 J. LEGAL EDUC. 306 (1983).

CLAUDIO GROSSMAN is the Dean of the Washington College of Law of American University, the Raymond Geraldson Scholar of International and Humanitarian Law, and the President, Inter-American Commission on Human Rights, Organization of American States.

CHARLES W. NIHAN is an Adjunct Professor at American University, Washington College of Law. Professor Nihan teaches Judicial

Administration and has written several articles in the area including: *A Study in Contrasts: The Ability of the Federal Judiciary to Change Its Adjudicative and Administrative Structures*, 44 AM. U. L. REV. 1693 (1995); and Charles W. Nihan & Harvey Rishikof, *Rethinking the Federal Court System: Thinking the Unthinkable*, 14 MISS. C. L. REV. 349 (1994). He served as the Chief of Long Range Planning, Administrative Office of the United States Courts, and Deputy Director of the Federal Judicial Center. Professor Nihan received his B.A. from the University of Massachusetts and J.D. from Georgetown University.

THE HONORABLE STEPHEN REINHARDT is a Circuit Judge for the United States Court of Appeals for the Ninth Circuit. President Carter appointed Judge Reinhardt to a life term beginning September 17, 1980. In addition to a long and distinguished career in private practice, Judge Reinhardt was a First Lieutenant in the United States Air Force and has authored several articles concerning the future of the federal courts, including: *Developing the Mission: Another View*, 27 CONN. L. REV. 877 (1995); *The Supreme Court as a Partially Political Institution*, 17 HARV. J.L. & PUB. POL'Y 149 (1994); *Whose Federal Judiciary Is It Anyway?*, 27 LOY. L.A. L. REV. 1 (1993); *The Supreme Court, the Death Penalty, and the* Harris *Case*, 102 YALE L.J. 205 (1992). Judge Reinhardt received his B.A. from Pomona College and his L.L.B. from Yale Law School.

THE HONORABLE WILLIAM H. REHNQUIST is Chief Justice of the United States.

IRA P. ROBBINS is the Barnard T. Welsh Scholar and Professor of Law and Justice at American University, Washington College of Law. In 1986, he served as the Acting Director of the Education and Training Division of the Federal Judicial Center. He is the author of numerous books and articles, including: HABEAS CORPUS CHECKLISTS (1996); PRISONERS AND THE LAW (1996); TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES (1990); THE LEGAL DIMENSIONS OF PRIVATE INCARCERATION (1988); THE LAW AND PROCESSES OF POST-CONVICTION REMEDIES (1982); and COMPARATIVE POSTCONVICTION REMEDIES (1980). His most recent article is *George Bush's America Meets Dante's Inferno: The Americans with Disabilities Act in Prison*, 15 YALE L. & POL'Y REV. 49 (1996).