

# LONG RANGE PLANNING: A REALITY IN THE JUDICIAL BRANCH

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## INTRODUCTION

Governmental reinvention is in the air. Elected officials, agency managers, and the public have been swept up in the vision of

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changing government's culture and strengthening its operations. As evidenced by initiatives such as Total Quality Management,<sup>1</sup> the Government Performance and Results Act,<sup>2</sup> and the National Performance Review,<sup>3</sup> forces are marshaled for resolving long-term systemic and operational problems.

Matching these visions for achieving success in government, the federal courts are themselves in the midst of considering significant and comprehensive changes. Long range planning has taken root and is flourishing in the judicial branch. The judiciary has embraced the idea of addressing future problems—to the extent that they can be adequately anticipated—in the present. Commenting on the need for such efforts, Chief Justice Rehnquist said:

Some may well note the irony that at a time when all of us are challenged more than ever just to get through our daily workload, we have chosen to develop a strategic vision and think about what we'll have to do in the future. My response is that we cannot escape the future technological, societal, economic, and demographic changes that may challenge conventional assumptions about how the federal courts system does its business. If we don't look over the horizon, and at least have the discipline and the structures in place to meet anticipated changes, we will simply be swept along in the currents of change.<sup>4</sup>

The consequence of not planning is that external forces, as well as unfocused internal ones, become major causes of change. This is the situation currently facing the federal courts, where the constellation of external and internal forces are on the verge of bringing about significant strategic change.

The courts, particularly the courts of appeals, are confronting unprecedented numbers of new cases. Much has been written about

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1. Total Quality Management (TQM) has become a general rubric for initiatives for increased quality and customer awareness in public and private organizations. Most TQM initiatives trace their conceptual origins to the many writings of Philip B. Crosby, W. Edwards Deming, and Joseph M. Juran. See, e.g., PHILIP CROSBY, *QUALITY IS FREE* (1979); W. EDWARDS DEMING, *OUT OF CRISIS* (1986); JURAN'S *QUALITY CONTROL HANDBOOK* (Joseph M. Juran et al. eds., 4th ed. 1988). In the federal government, the Federal Quality Institute is the clearing-house for TQM and similar efforts.

2. Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285 (codified at 31 U.S.C. § 1101 (Supp. V)).

3. See SUMMARY REPORT OF THE NATIONAL PERFORMANCE REVIEW, *FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS* (1993). For a recent critique of the "reinventing government" initiative, see Peter F. Drucker, *Really Reinventing Government*, 275 *ATLANTIC MONTHLY* 49 (1995).

4. Chief Justice William H. Rehnquist, Remarks at the Supreme Court Seminar on Long Range Planning (Mar. 17, 1992) [hereinafter Seminar Remarks of Chief Justice].

the caseload crisis of the federal courts.<sup>5</sup> The number of cases filed in federal courts began to increase in the 1960s, mirroring both changes in population and increase in governmental activity. Historically, most private organizations expand their workforce in situations of significant business increases. The judiciary, on the other hand, has not reached a consensus about the appropriate level of judicial resource expansion, despite facing a significant increase in demand for its services.<sup>6</sup>

Recognizing this situation, Chief Justice Rehnquist remarked in his 1991 *Year-End Report on the Federal Judiciary*, "[T]he federal courts now stand at a crossroad."<sup>7</sup> Like many other judges, he believes that to increase significantly the number of judges merely because of caseload would bureaucratize the system and significantly reduce personal responsibility and accountability.<sup>8</sup> What concerns the Chief Justice is a degradation in the high quality of justice the nation has long expected and received from the federal courts.<sup>9</sup>

Indeed, many in the judiciary believe the answer to the problem of providing adequate resources does not lie in simply creating more federal judgeships, a move that would in turn require more courthouses and supporting staff. There is concern that a federal judiciary of significantly larger size will be of lesser quality and will be dominated by impersonal rules and procedures. Additionally, there is the risk of an increasingly incoherent body of federal law—one in which even the Supreme Court would be incapable of maintaining national uniformity.

This Article analyzes the development of planning in the federal courts from its beginnings through the final stages of completing the Proposed Long Range Plan for the Federal Courts<sup>10</sup> in early 1995. At each stage, the experience and approach of the Judicial Conference Committee on Long Range Planning are placed within the

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5. See, e.g., RICHARD A. POSNER, *THE FEDERAL COURT: CRISIS AND REFORM* (1985); Levin H. Campbell, *Into the Third Century: Views of the Appellate System from the Federal Courts Study Committee*, 74 MASS. L. REV. 292 (1989); Roger J. Miner, *Federal Courts at the Crossroads*, 4 CONST. COMMENTARY 251 (1987).

6. The judicial resources debate can be delimited by the arguments in Jon O. Newman, *1,000 Judges—The Limit for an Effective Federal Judiciary*, 76 JUDICATURE 187 (1993), and Stephen Reinhardt, *A Plea to Save the Federal Courts: Too Few Judges, Too Many Cases*, 79 A.B.A. J. 52 (1993).

7. WILLIAM H. REHNQUIST, *YEAR-END REPORT ON THE FEDERAL JUDICIARY* 2 (1991).

8. *Id.*

9. *Id.* at 2-3.

10. COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE U.S., *PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS* (Draft submitted to Judicial Conference, 1995) [hereinafter 1995 PROPOSED LONG RANGE PLAN].

general context of long range planning and, in particular, judicial planning.

### I. THE BACKGROUND OF JUDICIAL PLANNING

Court planning has only been successful when judges have both recognized a true need to plan and participated in the process. For example, in the mid-1970s, numerous state court systems embarked on planning efforts largely because the Law Enforcement Assistance Administration (LEAA) funded the enterprise.<sup>11</sup> Most of these start-up efforts proved short-lived once the seed money ran out;<sup>12</sup> few took root.<sup>13</sup>

In contrast, planning was then occurring only on a sporadic basis in the federal court system. The first reason for the paucity of planning was the perceived absence of need for it. Federal judges were a select group, well paid by government standards, highly regarded—in fact, envied—by their state court colleagues, who for the most part lacked the life tenure, intellectually challenging caseload, and generous support services that went along with being a federal trial or appellate judge. Moreover, almost all lawyers, save the very highest-earning, would have gladly accepted appointment to the prestigious federal bench.

Second, the entire weight of tradition in the federal judicial system militated against planning. Judges viewed the courts as fundamentally reactive in nature: the role of the third branch was to adjudicate

11. NATIONAL CTR. FOR STATE COURTS, *PLANNING IN STATE COURTS: TRENDS AND DEVELOPMENTS 1976-1978*, at 14 (1978).

12. HARRY O. LAWSON & BARBARA J. GLETNE, *PLANNING IN THE COURT ENVIRONMENT: PERCEPTIONS AND PROSPECTS 9-10* (1987).

13. Compare NATIONAL ACAD. OF PUB. ADMIN., *LONG RANGE PLANNING IN THE STATE COURTS: SELECTED FEATURES FOR THE FEDERAL JUDICIARY 10-11* (1992) with LAWSON & GLETNE, *supra* note 12, at 9-10. Cf. RALPH N. KLEFS, *FEDERALISM AND ASSISTANCE TO STATE COURT SYSTEMS 1969 TO 1978*, at 91-92 (1978). "Judicial planning committees have been instituted in most of the states and in some have developed into court administrative offices. . . . These federally funded structural changes have generally been accepted as permanent parts of state judicial systems and increased capacity for future improvements in those systems now exists." *Id.*

With respect to state court planning resulting from LEAA funding, it may be posited that the inability of most such state court planning to survive the demise of LEAA arose from its relatively late arrival on the LEAA-funded scene. LEAA launched its state court planning initiative in the mid-1970s in response to complaints that courts had gotten short shrift in its funding process. See JOHN F.X. IRVING ET AL., *REPORT OF THE SPECIAL STUDY TEAM ON LEAA SUPPORT OF THE STATE COURTS 1* (1975). The courts' own concerns about judicial independence in their dealings with both federal and state criminal justice funding agencies were one cause of the problem, as was the comparatively stronger influence on funders of other segments of the criminal justice "system," e.g., police and prosecutors. See Russell R. Wheeler, *Planning in State Courts*, in *MANAGING THE STATE COURTS: TEXT AND READINGS 341* (Larry C. Berkson et al. eds., 1977).

effectively the cases brought to it. In addition, the judiciary had relatively recently borne the brunt of congressional and executive branch criticism of the perceived activism of the Supreme Court during the tenure of Chief Justice Earl Warren.<sup>14</sup>

Nevertheless, the judiciary, like the other two branches of the federal government, engaged in successful planning in response to specific issues.<sup>15</sup> The Federal Magistrates Act of 1968 and subsequent amendments<sup>16</sup> are excellent examples of such planning, through which the judiciary identified the need for a new judicial office. Judges and staff of the Administrative Office of the United States Courts worked with the other two branches and with stakeholders such as the American Bar Association, to create the office of United States Magistrate, whose current incumbents are known as magistrate judges.<sup>17</sup>

Despite the existence of support structures that could have lent themselves to effective broad-gauge planning if the courts had elected to engage in it—such as the Administrative Office of the United States Courts (established in 1939)<sup>18</sup> and the Federal Judicial Center (established in 1968)<sup>19</sup>—no crisis was perceived or expected. Basic physical demands, such as new or expanded courthouse facilities, were seen as independent of other needs, as were the design and implementation of automated data processing systems.<sup>20</sup> Innovations in procedure were introduced largely through operation of a lengthy rules review process.<sup>21</sup>

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14. In the early 1980s, however, the goal of criticism from the other branches, and in particular from Congress, was to reduce federal court jurisdiction. One congressional commentator described the federal courts as "under siege." See Charles C. Mathias, Jr., *The Federal Courts Under Siege*, 462 ANNALS OF AM. ACAD. POL. & SOC. SCI. 26, 26 (1982). Of course, the problems caused by too many cases had already been observed and discussed. See *National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79 (1976); see also Robert H. Bork, *Dealing with the Overload in Article III Courts*, 70 F.R.D. 231 (1976).

15. Some would argue that single-issue planning is perhaps the surest way to navigate through complex organizational change. See James B. Quinn, *Strategic Change: "Logical Incrementalism,"* SLOAN MGMT. REV., Summer 1989, at 45, 46.

16. See 28 U.S.C. §§ 631-639 (1988 & Supp. V 1993).

17. See generally Peter G. McCabe, *The Federal Magistrate Act of 1979*, 16 HARV. J. ON LEGIS. 343 (1979).

18. See Act of June 25, 1948, ch. 646, 62 Stat. 913 (codified as amended at 28 U.S.C. § 601 (1988)).

19. See Act of Dec. 20, 1967, Pub. L. No. 90-219, 81 Stat. 664 (codified as amended at 28 U.S.C. § 620 (1988)).

20. See, e.g., ADMINISTRATIVE OFFICE OF THE U.S. COURTS, SPACE AND FACILITIES DIV., UNITED STATES COURTS LONG RANGE FACILITY PLANNING: NATION AT A GLANCE (1993 Fall ed.).

21. Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655 (1995).

By the late 1980s, almost all of these factors had changed, and from the standpoint of federal judges, changed for the worse.<sup>22</sup> State court judges had closed the pay gap until the combination of recession and a long-delayed federal salary increase that took effect in early 1991 lifted federal salaries back above state levels.<sup>23</sup> Although the increase meant that even the lowest-paid federal judges were paid more than all state judges save the chief justices of three state supreme courts,<sup>24</sup> the raise barely put the federal judges' pay even with the compensation of low-to-mid-level associates in large law firms.<sup>25</sup>

The caseload began to shift in the criminal direction with the arrival of the "war on drugs" in the 1980s.<sup>26</sup> Enactment of speedy trial legislation meant that the surging criminal docket would now take precedence over the major civil contract and commercial cases with which many judges were most familiar.<sup>27</sup> In some districts, the rapid rise in the criminal caseload threatened to eliminate civil cases from the trial calendar altogether.<sup>28</sup> Except for the increasing number of federal judges who had recently served as U.S. Attorneys, the typical successful lawyer who became a federal court judge had scant experience with criminal practice.<sup>29</sup>

At the same time, as criminal cases assumed a far greater role in federal courts, the discretion of the federal trial judge in sentencing criminal defendants was drastically curtailed with the implementation of sentencing guidelines.<sup>30</sup> Federal district judges saw their control of the criminal adjudicative process pass to the prosecutor, who could largely determine the course of the case through the charging decision.<sup>31</sup>

22. FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 5-6 (1990) [hereinafter *FEDERAL COURTS STUDY*].

23. POSNER, *supra* note 5, at 47 tbl. 2.3.

24. NATIONAL CTR. FOR STATE COURTS, 20 SURVEY OF JUDICIAL SALARIES 10 (Jan. 1994).

25. POSNER, *supra* note 5, at 33.

26. David L. Cook et al., *Criminal Caseload in U.S. District Courts: More than Meets the Eye*, 44 AM. U. L. REV. 1579 (1995).

27. Speedy Trial Act, Pub. L. No. 93-619, tit. I, § 101, 88 Stat. 2085 (1975) (codified as amended at 18 U.S.C. § 3161 (1988)).

28. FEDERAL COURTS STUDY, *supra* note 22, at 36. "Indeed, in some districts, the civil trial is a chimera; . . ." THOMAS M. MENGLER, FEDERAL CIVIL JURISDICTION: A REPORT TO THE LONG RANGE PLANNING COMMITTEE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 3 (1993).

29. Slightly less than half the federal district judges appointed between 1963 and 1982 had prosecutorial experience and significantly fewer appeals judges had been prosecutors. Sheldon Goldman, *Reagan's Judicial Appointments at Mid-term: Shaping the Bench in His Own Image*, 66 JUDICATURE 334, 338 tbl. 1, 334 tbl. 2 (1983).

30. Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, 98 Stat. 2017 (codified as amended at 28 U.S.C. §§ 991-998 (1988)).

31. UNITED STATES GEN. ACCOUNTING OFFICE, SENTENCING GUIDELINES: CENTRAL QUESTIONS REMAIN UNANSWERED 17 (1992).

Nonetheless, Congress continued to add new areas to federal court jurisdiction.<sup>32</sup> Often, legislators responded to constituent demand for action by proposing to assign the adjudicative responsibility for an issue to the well-regarded federal courts, regardless of what further caseload increases would mean to their efficient operation.<sup>33</sup> Given the vast numbers of cases in the state courts, however, even state judges—most likely to appreciate the effect of adding to any court's jurisdiction—reacted to their federal colleagues' complaints with rather limited expressions of sympathy.<sup>34</sup> For example, while the state chief justices originally declared their unconditional willingness to accept the transfer of federal diversity jurisdiction, they eventually amended the declaration with the proviso that the federal government must also grant funds to offset the added expense to the state courts of adjudicating these cases.<sup>35</sup>

Most recently, the federal courts began to show signs of the pressure caused by the rising caseload. The Civil Justice Reform Act of 1990<sup>36</sup> mandated that federal courts adopt plans to reduce civil delay in the face of the onslaught of criminal cases. Economic distress resulted in waves of case filings in the federal bankruptcy courts; these cases more than doubled in the 1980s,<sup>37</sup> leading to major strains in some districts. Automated systems designed to handle a lower level of caseload pressure, for example, were unable to cope with the surge in cases.<sup>38</sup> Other courts still had not installed even their first automated systems.<sup>39</sup>

It was therefore clear that while life tenure helped preserve judicial independence, it did not solve "the problem of ensuring that the courts would have sufficient resources and viability to judge effectively

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32. "During the closing days of the last session, for example, major legislative programs affecting taxes, immigration, and drug abuse were enacted into law. Each of the new statutes eventually will require interpretation and enforcement in federal court proceedings . . . ." Roger J. Miner, *Federal Courts at the Crossroads*, 4 CONST. COMMENTARY 251, 253 (1987).

33. "There is a general feeling that justice in federal courts is being well administered." John P. Frank, *The Case for Diversity Jurisdiction*, 16 HARV. J. ON LEGIS. 403, 409 (1979).

34. "State courts, of course, have serious problems themselves with growing caseloads." FEDERAL COURTS STUDY, *supra* note 22, at 41.

35. Conference of Chief Justices, Res. 88-M-6-586 and 77-A-1d-e-180.

36. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471-482 (Supp. V 1993)).

37. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 16 tbl. 10 (1991).

38. "In April 1989, the Committee on Judicial Improvements . . . questioned whether the Judiciary could proceed with a comprehensive plan to provide all courts with standardized systems and hardware if automation funding continued at the inadequate levels experienced up to that time." *Information Resources Management Strategic Plan for the Federal Judiciary*, in ADMINISTRATIVE OFFICE OF THE U.S. COURTS, LONG RANGE PLAN FOR AUTOMATION IN THE FEDERAL JUDICIARY 9 (1992).

39. *Id.*

. . . [which is] dependent upon budgetary and other decisions of the legislative and executive branches, and upon the ability of the judiciary itself to respond to changing situations."<sup>40</sup>

All these events created an atmosphere conducive to planning in the federal court milieu. The first step came in 1988 when Congress established the Federal Courts Study Committee (FCSC) to assess the situation and propose recommendations for improvement.<sup>41</sup> The FCSC produced its report in comparatively quick fashion—in early 1990<sup>42</sup>—and a number of FCSC recommendations have been implemented. The FCSC's approach, however, was admittedly limited: "Our proposals are incremental, not radical; . . . But, though incremental, many of the proposals are bound to be controversial because they threaten a status quo to which bench and bar have grown accustomed."<sup>43</sup>

The FCSC also recommended that the federal courts institutionalize planning as an ongoing process. "The courts need a stronger, permanent capacity to determine long-term goals and develop strategic plans by which they can reach those goals."<sup>44</sup> In response to this emphatic proposal, the Judicial Conference of the United States adopted the more specific FCSC recommendation that a special planning committee be formed.<sup>45</sup> The Long Range Planning Committee was duly established, began to meet (twice as frequently as most of the other Judicial Conference committees) in 1991, and was soon accompanied by a newly formed Long Range Planning Office in the Administrative Office of the United States Courts. Ninth Circuit Judge Otto R. Skopil, Jr., was named to chair the Committee, and was joined on the panel by a group of federal trial and appellate judges (including a magistrate judge and a bankruptcy judge),<sup>46</sup> bringing to the task a great deal of experience of service on Judicial Conference committees overseeing court operations.

40. NATIONAL CTR. FOR STATE COURTS, *PLANNING IN STATE COURTS: A SURVEY OF THE STATE OF THE ART* 4 (1976) [hereinafter *PLANNING IN STATE COURTS*].

41. Federal Courts Study Act, Pub. L. No. 100-702, 102 Stat. 4644 (1988) (codified at 28 U.S.C. § 331 note (1988)).

42. FEDERAL COURTS STUDY, *supra* note 22, at 4.

43. *Id.*

44. *Id.* at 147.

45. 1995 PROPOSED LONG RANGE PLAN, *supra* note 10, at app. B, at 151 (History of the Judicial Conference Comm. on Long Range Planning).

46. In addition to Judge Skopil, the committee members are Chief Judge Sarah Evans Barker (S.D. Ind.), Judge Edward R. Becker (3d Cir.), Judge Wilfred Feinberg (2d Cir.), Judge Elmo B. Hunter (W.D. Mo.), Judge James Lawrence King (S.D. Fla.), Magistrate Judge Virginia M. Morgan (E.D. Mich.), Chief Bankruptcy Judge A. Thomas Small (Bankr. E.D.N.C.), and Judge Harlington Wood, Jr. (7th Cir.).



The Long Range Planning Committee was charged with promoting planning, recommending a planning process, coordinating strategy development, and evaluating judicial planning efforts.<sup>47</sup> In 1992, the Chief Justice and the Executive Committee of the Judicial Conference enlarged the Committee's charter to include preparation of a national plan for the federal courts.<sup>48</sup> In the words of the Chief Justice, the Judicial Conference's creation of the Long Range Planning Committee was "a recognition that the judiciary needs a permanent and sustained planning effort."<sup>49</sup>

If any fundamental change in outlook occurred in the federal courts, it might be characterized as recognition that remaining a purely reactive institution meant forfeiting its ability to influence the plans that others make for it. Not only did the courts find themselves on the receiving end of plans made by others, namely, sentencing guidelines and the Civil Justice Reform Act, but in still other areas, the legislative and executive branches determined that executive branch units, e.g., additional administrative law judges and, in the bankruptcy system, the U.S. Trustee program, should perform functions hitherto within the responsibility of the courts. In addition, the President's Council on Competitiveness, in calling for wide-ranging reforms in the legal system, in effect engaged in planning for the federal courts by including recommendations in its report to split the Ninth Circuit and revamp federal appellate en banc procedure.<sup>50</sup>

## II. MODELS FOR FEDERAL COURT PLANNING

All of the foregoing events were critical to the design of a workable planning model for the federal courts because experience in the states has shown that planning is only likely to endure when the judicial leadership views planning as a fundamental need.<sup>51</sup> It was the existence of this need, made manifest by the shifting perception of the image that federal judges held of their position and functions, which served as a direct stimulus for the federal jurists' significant interest in planning.

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47. 1995 PROPOSED LONG RANGE PLAN, *supra* note 10, at app. B, at 151.

48. 1995 PROPOSED LONG RANGE PLAN, *supra* note 10, at app. B, at 151; Chief Justice William H. Rehnquist, Remarks at the Judicial Conference of the U.S. Ct. of Appeals for the Federal Circuit 2 (Apr. 30, 1992) [hereinafter Judicial Conference Remarks of Chief Justice].

49. Seminar Remarks of Chief Justice, *supra* note 4, at 2-3.

50. PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 23-24 (1991).

51. PLANNING IN STATE COURTS, *supra* note 40, at 14.

### A. *State Court Plans*

In looking to the states for planning models, it was noted that few of the states that launched court planning programs in the 1970s persisted in their efforts.<sup>52</sup> Exceptions were Virginia, Minnesota, and Hawaii.<sup>53</sup> Virginia embarked on planning as part of the LEAA grant process in the 1970s, beginning the process of strengthening the state court administrative office, which eventually assumed ongoing responsibility for maintaining planning.<sup>54</sup> The state court system was beginning to feel pressure arising from minimal change in the structure over many years.<sup>55</sup> For example, an unchanged court structure had made Virginia the only state where a losing litigant had no right to at least one full appeal.<sup>56</sup> To remedy this deficiency, the state created an intermediate appellate court.<sup>57</sup> Incidental to defining the role of the state court administrative office was the development of a planning capability.<sup>58</sup> In this way, the office methodically assessed the needs and priorities of the state courts.<sup>59</sup> Ultimately, a futures commission was formed to extend the view of where the system needed to go.<sup>60</sup>

Hawaii took advantage of LEAA funding to support a planning process in the late 1970s.<sup>61</sup> Strong central leadership, headed by a powerful chief justice and an experienced state court administrator, however, had already made a clear commitment to the planning process from its initiation when the state inaugurated a planning-programming-budgeting system (PPBS) for all state agencies.<sup>62</sup> The Hawaii state court system has been engaged in planning for twenty

52. See *supra* note 13 and accompanying text (discussing inability of planning by most state courts to survive end of LEAA).

53. See NATIONAL ACAD. OF PUB. ADMIN., *supra* note 13, at 10. Other states, such as Delaware, Massachusetts, and Rhode Island, have also maintained court planning structures initiated at that time. *Id.*

54. NATIONAL ACAD. OF PUB. ADMIN., *supra* note 13, at app. F, at F-1.

55. "One judge observed that if Patrick Henry returned to the Virginia courts today he would feel very much at home." NATIONAL ACAD. OF PUB. ADMIN., *supra* note 13, at app. F, at F-5.

56. COMMISSION ON THE FUTURE OF VIRGINIA'S JUDICIAL SYSTEM, COURTS IN TRANSITION 37-38 (1989).

57. *Id.* at 4.

58. Letter from Kathy L. Mays, Director of Judicial Planning, Office of the Executive Secretary, Supreme Court of Virginia, to Dave Hernandez, Trial Court Administration, Boise, Idaho 1-6 (Nov. 21, 1990) (on file with author).

59. *Id.*

60. See NATIONAL ACAD. OF PUB. ADMIN., *supra* note 13, at 17.

61. NATIONAL ACAD. OF PUB. ADMIN., *supra* note 13, at app. C, at C-1.

62. THE JUDICIARY, STATE OF HAWAII, COMPREHENSIVE PLANNING IN THE HAWAII JUDICIARY 33, 97 [undated].

years, uses sophisticated analytical tools for trend analysis, provides for both executive branch and public input into the process, links planning to the budget cycle, and, while aiming at projecting for a ten-year span, realistically produces estimates ranging up to six years ahead.<sup>63</sup>

Minnesota is another example of a state court system that began planning in the 1970s and has seen its process evolve into an ongoing, effective part of the state judicial administrative apparatus.<sup>64</sup> By organizing a Judicial Planning Committee (JPC) under the LEAA legislation and arranging for a state supreme court justice to chair the JPC and for legislators to serve as members, the Minnesota courts maximized the usefulness of the planning unit, accomplishing many improvements during its years of activity.<sup>65</sup>

### B. *Planning Outlines*

Relatively uncomplicated planning models have been suggested to the courts, based largely on experiences in other public agencies, nonprofit organizations, and the private sector. One of the simplest early outlines of planning proposed for use by courts reduced the process to three steps:

- Documenting and prioritizing system needs;
- Formulating goals, objectives, and actions; and
- Plan implementation and evaluation.<sup>66</sup>

Experience in planning for nonprofit organizations led one analyst, after noting the difficulties of measuring performance, discerning cost-benefit relationships, and defining the products in that realm, to propose a six-step planning process:

- Define planning concepts and technology;
- Gather data to determine planning course;
- Use simple, concise terms to express goals, objectives, and action plans;
- Develop sound evaluation plan for feedback;
- Consider contingency planning for making changes in process; and
- Compose planning committee membership to produce effective, ongoing process.<sup>67</sup>

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63. See NATIONAL ACAD. OF PUB. ADMIN., *supra* note 13, at 17.

64. See LAWSON & GLETNE, *supra* note 13, at 30.

65. See LAWSON & GLETNE, *supra* note 13, at 30.

66. See NATIONAL CTR. FOR STATE COURTS, *supra* note 11, at 17-18.

67. See Timothy S. Brady, *Six Step Method to Long Range Planning for Non-Profit Organizations*, 32 MANAGERIAL PLAN. 47 (1984).

More recently, an eight-stage planning process was proposed for courts:

- Agree on and initiate process;
- Identify missions, mandates, and goals;
- Establish a vision;
- Conduct trends analysis and construct scenarios;
- Conduct organizational assessment;
- Develop management strategies;
- Implement strategic plan;
- Monitor, evaluate, and modify performance.<sup>68</sup>

The essential elements of these processes are similar; inclusion of some steps and omission of others will result from careful assessment of individual planning situations. As with other procedural aspects of the planning process, it is less important that one of these particular processes is employed than that a structured approach of this kind is followed.

### III. ACCOMMODATING FEDERAL COURT STRUCTURE

Planning manuals and experts uniformly stress that involvement of top leadership is critically important to the success of the process in any organization.<sup>69</sup> The complex matrix of leadership in the federal court system makes effecting this involvement peculiarly difficult. First, and most important, though the structure of case adjudication authority in the system is clear—running from trial court, to appeals court, to the Supreme Court—administrative authority is dispersed.

Budgetary authority for the federal courts is vested in the Director of the Administrative Office of the United States Courts under the supervision of the twenty-seven judges who are members of the Judicial Conference of the United States.<sup>70</sup> The Conference also possesses broad policy responsibility for the judicial branch, effectuated mainly through Conference action, following inquiry and report by one of the twenty-five conference committees.<sup>71</sup> Oversight authority within any of the thirteen circuits, on the other hand, is arguably exercised by the circuit judicial council.<sup>72</sup>

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68. CENTER FOR PUB. POLY STUDIES, LONG RANGE STRATEGIC PLANNING IN THE COURTS 2-2 to 2-8 (1992).

69. "There can and will be no effective formal strategic planning in an organization in which the chief executive does not give it firm support and make sure that others in the organization understand his depth of commitment." GEORGE A. STEINER, STRATEGIC PLANNING: WHAT EVERY MANAGER MUST KNOW 80 (1979).

70. See 28 U.S.C. § 605 (1988).

71. *Id.* § 331.

72. See *id.* § 332(d)(1) ("Each judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit.").

This complex structure of regional operating authority and national budgetary and "policy" authority also includes a central administrative office, the Administrative Office of the United States Courts, which reports to the Judicial Conference.<sup>73</sup> The Director of the Administrative Office, however, is also directly assigned many duties by statute.<sup>74</sup> Movement toward budget decentralization has occurred relatively recently, and is to be replicated in the personnel sector. Circuit executives in each circuit are charged with carrying out the administrative policies set by the council.<sup>75</sup>

The entire governance scheme, however, is tempered by a tradition built over two centuries by highly independent judges insulated by life tenure. While the Judicial Conference of the United States and the circuit councils ostensibly are able to declare policy for administration of the courts, this tradition supports the trial courts, and their individual district judges, in operating on a day-to-day basis much as they deem appropriate. Many of the governing statutes provide, for example, for circuit council involvement only when the district judges in a particular district are unable to agree among themselves.<sup>76</sup>

Within the district courts themselves, however, there is variation in how other operations are overseen. Because district judges often assign specific cases to them, magistrate judges, who are functioning at the same level as bankruptcy judges, work closely with the district judges. Probation officers are also necessarily very closely tied to district court proceedings.<sup>77</sup> Although bankruptcy courts and judges are also part of the district court,<sup>78</sup> district judges frequently allow them to operate largely on their own. The autonomy afforded to bankruptcy courts and judges is due to both the vast caseload administered by the bankruptcy courts and the lack of day-to-day contact most district judges have with the specialized jurisdiction of bankruptcy courts.

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73. *Id.* § 601.

74. *Id.* § 604.

75. *Id.* § 332(e)-(f).

76. *See, e.g., id.* § 134(c) (stating that judicial council of circuit may determine that court business requires district judge to live in particular part of district, but council decides which judge only if district judges cannot agree); *id.* § 137 (stating that district judges are to determine rules and orders to apportion work, but council may do so if judges cannot agree).

77. This direct relationship to the district judges has meant, however, that judge-related duties, such as preparation of presentence reports, may take precedence over other tasks in which the judge is not so directly involved, such as supervision of probationers.

78. *See* 28 U.S.C. § 151 (1988). The brief separate existence of the U.S. Bankruptcy Court was ended by the Supreme Court's finding that the broad direct grant of jurisdiction to the bankruptcy court violated Article III of the Constitution. *See* *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84-87 (1982).

The effective independence of the federal trial courts stands in stark contrast to the presumed responsibility for administration vested in the Judicial Conference of the United States and the circuit judicial councils. Until 1980, no district judges sat on the judicial councils; membership parity with circuit judges came only in 1990.<sup>79</sup> Federal administrative effort tended to focus on the appellate level. This may be because circuit executives are statutorily tied to the circuit judicial councils.<sup>80</sup> New state-level court administrative offices, on the other hand, tended to concentrate their involvement at the trial court level.

Despite the vagaries of the federal court governance structure, the judicial culture appears to impel "judges [to] respect the decisions arrived at through consensus of their peers."<sup>81</sup> "Over time, however, a tradition has developed in which the Judicial Conference has exercised authority in making decisions for the courts that are usually accepted. This is reinforced by the fact that the Judicial Conference allocates resources within the judiciary."<sup>82</sup> In the end, the combined impact of the twin traditions of deference and consensus within the federal judiciary offers the greatest basis for design of a successful planning program in the federal courts.

Moreover, to the extent that the budget decentralization program revises and diffuses the resource allocation process in the courts, the existence of a plan for the federal courts will restore a sharper focus to budget submissions, once the budget and planning cycles are coordinated. Public agencies, often faced with goals and expectations that are hard either to accomplish or even to measure, benefit in the budget review process from adoption of a plan to instill clearer structure into their requests for funding.

While it can be safely asserted that some planning has occurred in the federal courts in the form of the lengthy plans prepared for automation<sup>83</sup> and for provision of necessary court space and facilities,<sup>84</sup> both these planning efforts offer little by way of example to more broadly conceived federal court planning initiatives. The automation plan is a highly technical document containing little assessment of the general environment, while the space planning

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79. See 28 U.S.C. § 332(a)(1) (1988 & Supp. V 1993).

80. See generally JOHN W. MACY, JR., *THE FIRST DECADE OF THE CIRCUIT COURT EXECUTIVE: AN EVALUATION* (1985); JOHN T. McDERMOTT & STEVEN FLANDERS, *THE IMPACT OF THE CIRCUIT EXECUTIVE ACT* (1979).

81. See NATIONAL ACAD. OF PUB. ADMIN., *LONG RANGE PLANNING IN THE FEDERAL JUDICIARY* 6 (1992).

82. *Id.*

83. See *supra* note 38 and accompanying text (discussing automation systems).

84. See *supra* note 20 and accompanying text (discussing courthouse facilities).

effort has proceeded through use of very specific formulae relating number of judges and cases to projected courthouse space needs. Neither of these efforts offer the breadth sought in a more encompassing plan.

In contrast, much can be learned from three recent forays into the realm of more generalized federal court planning: (1) the 1990 report of the Federal Courts Study Committee;<sup>85</sup> (2) the multiple plans produced across the nation by committees striving to implement the Civil Justice Reform Act;<sup>86</sup> and (3) the plan recently approved by the U.S. Court of Appeals for the Ninth Circuit.<sup>87</sup>

#### A. *Federal Courts Study Committee*

The Federal Courts Study Committee worked with remarkable speed to produce an across-the-board set of precise recommendations aimed at improving the operations of the federal courts. Within an eighteen-month period, the committee considered various proposals for improvement advanced by groups and individuals within and outside the court system. With the assistance of reporters, consultants, and advisers, subcommittees produced working reports and hearings were held. In April 1990, the Study Committee issued its final report.<sup>88</sup> Before the end of that year, Congress enacted legislation to implement several of the FCSC recommendations and a number of other recommendations have been included in pending legislative proposals.<sup>89</sup>

All this activity enabled the FCSC to offer the Long Range Planning Committee a useful process model. Each of the steps mentioned in the preceding paragraph is necessary if the planning effort is to acquire the necessary input from system participants and interested observers, and is also critical if the overall planning endeavor is to be perceived as credible.

Most of what the FCSC did, however, was, by its own clear statement,<sup>90</sup> not long range planning. Instead, the FCSC concentrated on spotlighting almost every good idea for short-range change to

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85. FEDERAL COURTS STUDY, *supra* note 22.

86. These have been summarized in JUDICIAL CONFERENCE OF THE U.S., CIVIL JUSTICE REFORM ACT REPORT: DEVELOPMENT AND IMPLEMENTATION OF PLANS BY EARLY IMPLEMENTATION DISTRICTS AND PILOT COURTS app. I (1992).

87. U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, LONG RANGE PLAN (May 1992) [hereinafter NINTH CIRCUIT LONG RANGE PLAN].

88. FEDERAL COURTS STUDY, *supra* note 22.

89. Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, 104 Stat. 5104 (codified in scattered sections of 28 U.S.C.).

90. "[W]e need studies—more ambitious than the time granted to this committee has permitted us to undertake . . ." FEDERAL COURTS STUDY, *supra* note 22, at 13.

improve the operation of the federal courts. Involvement of legislative personnel in the process (several legislators were members of the FCSC)<sup>91</sup> increased the prospect that these specific proposals could be readily enacted into law, and they were ultimately enacted in 1990.<sup>92</sup>

### B. *Civil Justice Reform Act*<sup>93</sup>

The multiple efforts underway across the nation to devise workable plans in accordance with the Civil Justice Reform Act offer a wide range of planning models for careful review by the Long Range Planning Committee. Although these plans are usually focused on procedural events and devices within the civil litigation process, the particular steps recommended in the plans confront many of the most fundamental aspects of federal court litigation.

One such plan contains provisions for early scheduling orders, preparation of a discovery plan jointly by counsel, automatic disclosure, discovery event limitations, elimination of motion hearings, and trial time limits.<sup>94</sup> All these issues are matters integral to the civil litigation process and clearly within its confines, yet they all have major implications for the broader principles underlying the function and role of the federal courts. For this reason alone, these provisions and similar ones in other district plans are significant considerations for federal long range planners.

The Civil Justice Reform Act planning process also merits scrutiny by long range planners for its usefulness as a model for process aspects of federal court planning. Formation of planning committees brought together a range of federal court practitioners, jurists, and academic analysts of the courts.<sup>95</sup> These are the kinds of stakeholders who must be engaged in the long range federal courts planning process.

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91. These members were Senator Charles E. Grassley (R-Iowa), Senator Howell T. Heflin (D-Ala.), Representative Robert W. Kastenmeier (D-Wis.), and Representative Carlos J. Moorhead (R-Calif.).

92. Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, 104 Stat. 5104 (codified in scattered sections of 28 U.S.C.). Others have suggested that the short lifespan of the FCSC was intentionally designed to prevent it from tackling especially complex and controversial subjects such as jurisdiction. See Mark V. Tushnet, *General Principles of the Revision of Federal Jurisdiction: A Political Analysis*, 22 CONN. L. REV. 621, 621 (1990).

93. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471-482 (Supp. V 1993)).

94. See Donald R. Frederico, *The District of Massachusetts' Civil Justice Expense Delay Reduction Plan*, 2 ABA LITIG. MGMT. & ECON. NEWSL. 11 (1992).

95. See 28 U.S.C. § 478(b) (Supp. V 1993) (requiring each district court's advisory group to be "balanced and include attorneys and other persons who are representative of major categories of litigants in such court, as determined by the chief judge of such court").



### C. Ninth Circuit Court of Appeals Plan

The United States Court of Appeals for the Ninth Circuit has played a leading role in approaching the management of its massive geographic expanse and caseload in a systematic fashion. The Ninth Circuit's persistence as a large circuit—both in territory and bench size<sup>96</sup>—while the other large circuit, the Fifth, split, has required special efforts.<sup>97</sup>

The Judicial Council of the Ninth Circuit initiated the planning process for the entire circuit. In generating its own plan, the Ninth Circuit Court of Appeals outlined a formidable and comprehensive strategic plan, setting comprehensive goals, objectives, and implementation strategies, along with specifications for future planning, required information, and organizational plans. The plan recognizes the extensive range of factors that account for a court's overall success in functioning.<sup>98</sup>

## IV. APPROACHING PLANNING

The Long Range Planning Committee is a focal point for the federal courts' planning process. In a system with as much dispersed responsibility as the federal courts, the Planning Committee has encouraged each level and sector of the court structure to participate in the planning effort. By spurring a high degree of activity, the Committee may stimulate each interested Judicial Conference committee, circuit council, and individual court to produce a working plan.<sup>99</sup> The Planning Committee seeks to employ the products of this effort—the plans—to distill an overall, national plan for the federal courts.

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96. The Ninth Circuit currently has 28 judges. *See id.* § 44.

97. *See* Steven Flanders, *Celebrating Size*, 75 JUDICATURE 276 (1992) (reviewing RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS (Arthur D. Hellman ed., 1990)). Flanders notes that the Ninth Circuit has for some years been not only the largest but the slowest of the circuits, making the need for innovation, and presumably planning, all the greater. *Id.* at 277.

98. NINTH CIRCUIT LONG RANGE PLAN, *supra* note 87.

99. Several of the Judicial Conference committees have prepared their own plans, including the Committee on Administration of the Bankruptcy System and the Committee on the Administration of the Magistrate System. *See* JUDICIAL CONFERENCE OF THE U.S., FINAL REPORT AND RECOMMENDATIONS OF THE LONG RANGE PLANNING SUBCOMMITTEE OF THE COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (1993); COMMITTEE ON THE ADMIN. OF THE MAGISTRATE JUDGES SYS., JUDICIAL CONFERENCE OF THE U.S., REPORT AND SUPPLEMENTS TO THE LONG RANGE PLAN FOR THE MAGISTRATE JUDGES SYSTEM (1994). These are recent products spurred by the present planning efforts; other committees, such as the Committee on Automation and Technology, have produced plans for many years. *See, e.g.*, LONG RANGE PLAN FOR AUTOMATION IN THE FEDERAL JUDICIARY, *supra* note 38.

Rather than finding itself bound by the contents of these particular plans, the Planning Committee remains free to select the most wide-ranging and well-founded ideas from each unit's plan for inclusion in the system-wide planning document. It may be that the Planning Committee will choose, at times, to provide direction to the units. One advisory group suggested that "[j]udicial councils, circuits and districts should be encouraged to do their planning with projections and assumptions that best reflect their current and anticipated future circumstances. Departures from using national assumptions should be explained."<sup>100</sup> Instead of promulgating "projections and assumptions" at the outset, the Committee might offer practical guidance to planning units. This has occurred through preparation and dissemination of a planning handbook.<sup>101</sup> As the process proceeds, of course, projections will be prepared and assumptions drawn from experience; all may then be transmitted to the participants in the process for their use.

#### A. *Gathering Issues*

Whether or not the Planning Committee ever chooses to set "specific 'givens'"<sup>102</sup> at the start (which it has not to date), the initial phase of any level of the planning process is likely to feature the generation of all possible issues that deserve to be addressed. Because this was the first time such a request had been made,<sup>103</sup> breadth was preferred over an early attempt to focus perspective. It was then the Planning Committee's task to review the universe of proposed issues to identify those of sufficient *relevance* and *importance* on the national level for inclusion in the plan produced for the entire system. This process resembled the procedure of "scanning the environment" suggested by management analysts "to identify problems and opportunities on which strategic decisions may be needed."<sup>104</sup> As at other stages of the planning process, the Planning Committee included in the mix its own proposals of possible planning issues.

There were alternative ways of proceeding at this stage. For example, in the past decade, New Jersey's judicial leadership identified

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100. NATIONAL ACAD. OF PUB. ADMIN., *supra* note 13, at 17.

101. *See generally* LONG RANGE PLANNING OFFICE, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, PLANNING HANDBOOK FOR FEDERAL COURTS (1994).

102. *Id.*

103. In this regard, the Long Range Planning Office benefitted from obtaining the archive of proposals and comments submitted to the group that most recently gathered ideas regarding improvement of the federal court system, namely, the Federal Courts Study Committee.

104. ROBERT N. ANTHONY & REGINA E. HERZLINGER, MANAGEMENT CONTROL IN NONPROFIT ORGANIZATIONS 14 (1980).

one major subject or issue each year for a large-scale planning effort.<sup>105</sup> This issue then became the subject of a special task force report with recommendations to the annual judicial conference, appeared on the agendas of bar association meetings and conventions, and gained from the concentrated attention of all concerned, including the public.<sup>106</sup> One state supreme court justice reasoned, "[I]n this way we analyze a problem but at the same time we build a state-wide consensus toward a solution."<sup>107</sup> In the federal courts, however, one-issue incremental planning would not respond to the need for an overarching plan capable of addressing the array of current pressures on the system. Nevertheless, the possibility of focusing the entire system's attention on one major issue for a clearly defined period should not be overlooked in appropriate situations.

Exercising its assignment to decide what issues are important or overarching enough to merit inclusion in the national plan,<sup>108</sup> the Long Range Planning Committee sought, from 1991 to 1993, to delimit the range of the federal courts' first long range plan. Issues selected for inclusion could then be prioritized and examined further by the Committee for formulation of goals, objectives, and strategies.

The Planning Committee afforded the proposals of the various units (e.g., a Judicial Conference committee or a circuit council) that submitted plans and identified issues a good deal of consideration. When the Planning Committee agreed that a proposed issue was significant, it relied heavily on the work of the body proposing the issue, because that unit likely provided well-conceived goals, objectives, and strategies due to its expertise and familiarity about the issue. The experience that the Planning Committee gains from its continuing assessments of proposed plans enables it to reach informed judgments as to which sets of goals and strategies appear most likely to accomplish the intended results.

When forming a national plan, the Planning Committee must also resolve differences between and among the plans prepared by councils, committees, and other planning units. By establishing liaison relationships with other Judicial Conference committees and circuit councils, not only has the Planning Committee maintained effective contact with each of these units, but it has placed itself in a

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105. See Telephone Interview with Robert D. Lipscher, New Jersey State Court Administrator (Apr. 9, 1992).

106. *Id.*

107. NATIONAL ACAD. OF PUB. ADMIN., *supra* note 13, at 19 & D-1 to D-6.

108. *Relationship Among Plans in the Federal Judiciary*, in LONG RANGE PLANNING OFFICE, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BRANCH PLANNING GUIDE 17-25 (William M. Lucianovic ed., 1993).

position to function in a mediating role among the various planning units in situations where views diverge.

For general reference in developing a national planning process, the Committee established the following criteria for initially identifying a long-range issue. The national plan should be

- strategic in scope—its consequences are long term and affect the nature and core purpose of the federal judiciary;
- national in character—the issue transcends district and circuit boundaries; and
- extended in time—dealing with the issue would require at least three years (more than two budget cycles).<sup>109</sup>

The Planning Committee also reviewed recommendations from several committees and commissions established to study the judiciary.<sup>110</sup> In addition, the Planning Committee analyzed hundreds of letters sent by judges and others to the FCSC. To ensure that issues and suggestions were current, Planning Committee Chairman Skopil sent letters to all judges and senior staff within the judiciary, asking them to identify the long-range issues they believed to be of greatest importance to the judiciary.<sup>111</sup>

Additionally, the Committee requested that the Federal Judicial Center conduct structured surveys of all federal judges, state judges, and a random sample of attorneys on opinions about a wide range of strategic issues facing the judiciary.<sup>112</sup> At the Planning Committee's request, the Long Range Planning Office of the Administrative Office conducted a survey of all federal senior circuit judges and senior district judges, as well as federal judges who would soon be eligible to take senior status, in order to discern these groups' views about their own status and role in the judicial system.<sup>113</sup>

These early efforts energized the judicial leadership to support and become involved in strategic planning. Building on this energy, the Planning Committee provided each Conference committee with a

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109. *Id.* at 22-23.

110. In addition to the REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990), these included COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975) [hereinafter HRUSKA COMMISSION]; REPORT OF UNITED STATES DEPARTMENT OF JUSTICE COMMITTEE ON REVISION OF THE FEDERAL JUSTICE SYSTEM (1977) [hereinafter BORK COMMITTEE]; and FEDERAL JUDICIAL CTR., REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972) [hereinafter FREUND COMMITTEE].

111. See 1995 PROPOSED LONG RANGE PLAN, *supra* note 10, at 152-54.

112. See FEDERAL JUDICIAL CTR., PLANNING FOR THE FUTURE: RESULTS OF A 1992 FEDERAL JUDICIAL CENTER SURVEY OF UNITED STATES JUDGES (1994) (reporting and analyzing completed surveys).

113. See RICHARD B. HOFFMAN, REPORT ON RESPONSES OF SENIOR JUDGES AND ACTIVE JUDGES ELIGIBLE OR SOON TO BE ELIGIBLE FOR SENIOR STATUS (1994) (presenting results of survey).

comprehensive list of potential strategic issues and asked each committee to recommend the appropriate priorities. Each committee was then able to decide whether it would be willing to examine any issue and develop that portion of the judiciary's long range plan. The planning-issues list offered a means by which the Conference committees could enter the planning process.<sup>114</sup> Wide participation in the planning process was gained as Conference committees produced plans or submitted issue reports to the Long Range Planning Committee for possible inclusion in the national plan.

As a result of its research, the Planning Committee identified several dozen major topics and scores of smaller individual issues that are long range in scope and national in character that could appropriately be included in the national plan. While not eliminating any issue from the planning cycle, the Planning Committee selected four issue areas as the cornerstone of ideas for long term improvements in the judicial branch: jurisdiction, judiciary size, structure, and governance.<sup>115</sup> These primary areas in turn rested on the Committee's identification of six core values of the federal judiciary: the rule of law, equal justice, judicial independence, national courts of limited jurisdiction, excellence, and accountability.<sup>116</sup> The initial process reinforced the Committee's view that the substance of the plan should be developed by judges serving on Judicial Conference committees.

### *B. Involving Stakeholders*

Outreach efforts to build commitment and consensus were not limited to canvasses within the judiciary. The Planning Committee made significant efforts to involve the other two branches of government. In September 1993, the Chief Justice and the Attorney General agreed that the Associate Attorney General would serve as liaison to the Long Range Planning Committee.

The Planning Committee conducted a series of retreats at which invited guests offered testimony and comments. One retreat involved

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114. Ten Judicial Conference committees became engaged in the planning process following the circulation of the issues list. These were the committees on Automation and Technology, Administration of the Bankruptcy System, Budget, Court Administration and Case Management, Criminal Law, Defender Services, Judicial Branch, Administration of the Magistrate Judges System, Rules of Practice and Procedure, and Security, Space, and Facilities.

115. See 1995 PROPOSED LONG RANGE PLAN, *supra* note 10, at 1. Chapter 4 ("Judicial Federalism") is devoted to jurisdiction; Chapter 5 ("Structure") to structure; and Chapter 7 ("Governance: Management and Accountability") to governance. Size is considered in both Chapters 4 and 5.

116. See 1995 PROPOSED LONG RANGE PLAN, *supra* note 10, at 7-9.

state judges, legal and other scholars, congressional staff, and members of the private bar. Another involved a mixed judiciary-bar-academe audience. As the judiciary's first long range planning cycle approached its mid-1995 completion, the Long Range Planning Committee published a draft long range plan for public comment.<sup>117</sup> The draft plan elicited more than 120 written comments and attracted seventy-four witnesses to testify at three public hearings held across the country.

### C. *Defining the Mission*

The significance of mission statements as a part of the planning process tends to be exaggerated by the very people who find such statements useless. The lesson to be learned from this tendency is the need to avoid overemphasis on the mission statement. It is first necessary to understand what a mission statement is and what it provides: it identifies the organization's purpose and serves as a helpful reference point; and it enables people throughout the system to assess every operation from the viewpoint of how their particular function serves the organization's fundamental purpose. It takes plenty of reflection to produce a good statement, a task better undertaken in segments over a longer time period, in order to permit the necessary distillation.

The Long Range Planning Committee established a context for planning by developing a mission statement for the federal courts, which served not only as a value statement about the role of the courts, but also as a guide for selecting potential planning issues.<sup>118</sup> Although the Committee fully believed that judges individually understood the core purpose of the courts, never before did the federal judiciary have an administrative process that specified the values supporting the mandates and core purpose of the courts. The Committee drafted the following statement:

The mission of the federal courts is to preserve and enhance the rule of law by providing to society a just, efficient, and inexpensive mechanism for resolving disputes that the Constitution and Congress have assigned to the federal courts. That unique mission requires a commitment to preserving the federal courts as a

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117. COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE U.S., PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS (Nov. 1994) (Draft for public comment).

118. See JOHN M. BRYSON, STRATEGIC PLANNING FOR PUBLIC AND NONPROFIT ORGANIZATIONS (1988). Bryson writes that "[a]greement on purpose can also help parties . . . disconnect ends from means and thus be clear about what problems are to be addressed before solutions can be explored." *Id.* at 98.

distinctive judicial forum of limited jurisdiction in our system of federalism, leaving to the state courts the responsibility for adjudicating matters that, in the light of history and a sound division of authority, rightfully belong there.

The mission also requires preservation of judicial independence to ensure that the judicial branch can carry out its constitutional role in a governmental system of checks and balances, to preserve and protect the individual rights and liberties guaranteed by the Constitution, to interpret and enforce treaties, federal statutes and regulations, and to ensure that cases are decided fairly and impartially.<sup>119</sup>

The judicial branch must still formulate the ultimate version of this statement. Clearly, there is no single correct role for the federal courts. In its draft form, however, the statement informs external audiences about three centrally held values: (1) federal jurisdiction reflects the concept of federalism; (2) the independence of judges is of primary importance in the operation of the courts; and (3) the system's goal is to provide quality justice which is just, efficient, and inexpensive.<sup>120</sup>

Vision statements inhabit a more speculative realm than mission statements. Vision statements involve a particular brand of brainstorming, requiring participants to envision the contours of an idealized future in terms of the system's functioning. How would this system appear if everything were running perfectly and according to all desired goals? Beginning the planning process by seeking answers to this question (or, more exactly, continuing to engage in this activity throughout the planning process) may seem unproductive, but will often yield useful ideas for incorporation in more concrete, realizable strategies.

The Planning Committee was able to focus many implementation strategies in the Long Range Plan by articulating the following vision statement for the federal courts:

The federal courts of the future will conserve their core values even during periods likely to be characterized by rapid change and uncertainty. The federal courts of the future will provide a base of stability for society, yet maintain flexibility to serve the nation's changing needs.<sup>121</sup>

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119. 1995 PROPOSED LONG RANGE PLAN, *supra* note 10, at 6-7.

120. 1995 PROPOSED LONG RANGE PLAN, *supra* note 10, at 6-7.

121. 1995 PROPOSED LONG RANGE PLAN, *supra* note 10, at 5.

*D. Measuring Issues with Data*

Once the planning process gathers and clarifies all potential issues and ideas proposed for inclusion in the plan, the search for supporting data to determine where the courts are performing and where social trends are moving begins. Although the federal courts gather a broad range of statistical information,<sup>122</sup> planners are likely to encounter difficulty in matching existing data assembled for different purposes (usually relating to statutory or other reporting requirements) with the highly specific, and at the same time more speculative, subject matter proposed for the plan.

Two steps are prerequisites to successful plan drafting: decisions are required regarding what data must be collected, and a format must be chosen for analysis of the collected data to ascertain trends with implications for the courts. For example, deciding what demographic information is useful is a much more difficult task in the issue-identification stage than in the subsequent stage of assembling data with respect to particular goals. Education levels, population density, and work-force characteristics all arguably influence the work of the courts. Less readily identifiable is the effect any particular trend will have in the more limited realm of the federal courts.

The inability of previous forecasting efforts<sup>123</sup> to assay caseload trends in the federal courts compels caution in creating any strong expectations for success in this area. It is likely that much of the inability to forecast court trends successfully stems from the underlying difficulty of relating demographic or other general data to the very particular functions performed by the courts. With limited subject matter jurisdiction, the federal courts pose a still more elusive target for such caseload forecasting schemes. Consequently, planners will be forced at some point, preferably early in the process, to recognize that supporting data may not be available with regard to many important issues arising in the planning effort.<sup>124</sup>

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122. See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 2 (1994) (reporting judicial activity within courts of appeal, district courts, bankruptcy courts, magistrate judges, and pretrial activity).

123. See, e.g., COMMITTEE ON LAW ENFORCEMENT AND THE ADMIN. OF JUSTICE, FORECASTING THE IMPACT OF LEGISLATION ON COURTS (Keith O. Boyum & Samuel M. Krislov eds., 1980); Jerry Goldman et al., *Caseload Forecasting Models for Federal District Courts*, 5 J. LEGAL STUD. 201 (1976).

124. See 1995 PROPOSED LONG RANGE PLAN, *supra* note 10, at 121 (using projections from previous 40 years' caseloads and judgeship data to depict its "nightmare" scenario for the year 2020). The preferred scenario of the plan, however, is for controlled growth with flexibility to meet the nation's needs. *Id.*



### *E. Issue Development*

In contrast to the limited degree of reliance that may be placed on statistical data, the theoretical and practical implications of these issues may be examined extensively. Major planning topics for the federal courts include fundamental issues, such as the size of the federal bench, the composition of the caseload, and how the courts should be structured and governed.<sup>125</sup>

In preparing these treatments, planners must expand their purview beyond the traditionally exclusive reliance of the federal courts and Judicial Conference committees on legal academics. In seeking new directions and innovative solutions to some long-festering problems and issues in the federal judiciary, planners should also focus attention on theorists, and draw ideas from the areas of public administration, political science, organizational behavior, and policy studies, as well as regional and urban planning. Planners should also seek the views of court users, including litigants; it is unlikely that lawyers will be left out of the process.

## V. THE PLANNING PRESCRIPTION

"In short, planning identifies the destination and maps out a strategy for arriving at it."<sup>126</sup> This statement provides the simplest and, in the end, most useful description of what planning is. Although much attention must be paid to the particular planning process employed, targeting the destination and determining the strategy to arrive at that destination demand top priority, particularly in a system imbued with the significance of process as one of the core values served by the courts.

Appropriately, this aspect of fashioning a plan for the federal courts will be the most challenging, because difficult decisions must be reached regarding the long-term role of the federal courts. For example, establishing a firm numerical limit on the total number of circuit and district judgeships, which judges may regard as a measure to maintain the high quality of federal court product, may be perceived by litigants as a step to restrict their access to the federal courts. This objective might only be accepted by a consensus if it is seen as part of a general campaign to limit the overall involvement of the Federal Government in state and local affairs.

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125. See 1995 PROPOSED LONG RANGE PLAN, *supra* note 10, at 23-37, 39-50, 67-82.

126. RITA M. NOVAK & DOUGLAS K. SOMERLOT, *DELAY ON APPEAL* 27 (1990).

The federal court environment offers a unique challenge to strategic planners. The National Academy of Public Administration recognized this in a report to the Administrative Office of United States Courts.<sup>127</sup>

Forecasting or managing change is a different endeavor for the federal judiciary than for many other organizations. The unique organizational and collegial decision-making structure that characterizes the courts presents challenges to designing and implementing a planning process that other institutions with more hierarchical lines of authority do not face. [However,] the judiciary generally arrives at decisions by consensus, which is a highly desirable method for developing an effective planning system.<sup>128</sup>

The judicial branch of the federal government does not fit the classic organizational mold, public or private, that has been successful in strategic or long range planning. The federal courts are governed in large part by agreement, consensus, and pride, with no hierarchical structure akin to those found in executive branch agencies or private sector organizations to mandate plan formulation and manage subsequent implementation.<sup>129</sup>

From the outset, the Long Range Planning Committee took full advantage of the judiciary's collegial decisionmaking tradition. Consensus-building took a number of forms, including education, opinion gathering, broad involvement of judges in the process, involvement of members of the bar and academia, and, of particular importance, involvement of representatives of the other two branches of government. The Committee also established a formal network of liaison members between itself and other Conference committees. In sum, the Planning Committee made a concerted effort to reach out broadly and involve those with stewardship responsibility for the federal court system in the planning process.<sup>130</sup>

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127. NATIONAL ACAD. OF PUB. ADMIN., *supra* note 81, at 5.

128. NATIONAL ACAD. OF PUB. ADMIN., *supra* note 81, at 5, 7.

129. Although there is no single correct way to engage in strategic planning, certain organizational and administrative structures greatly facilitate the process. Sources for initiating modern strategic planning include the writings of George A. Steiner. See GEORGE A. STEINER, STRATEGIC PLANNING: WHAT EVERY MANAGER MUST KNOW (1979) (presenting initial concepts of modern strategic planning). The writings of Peter F. Drucker elaborate on the many functions of top organizational management. See PETER F. DRUCKER, MANAGEMENT: TASKS, RESPONSIBILITIES, PRACTICES 611-13 (1974). The structure of the federal judiciary, however, appears to defy many of the ingredients for success alluded to by management theorists. See generally J. Clifford Wallace, *Judicial Administration in a System of Independents: A Tribe with Only Chiefs*, 1978 B.Y.U. L. REV. 39.

130. The Planning Committee's efforts are described in 1995 PROPOSED LONG RANGE PLAN, *supra* note 10, app. B (History of the Judicial Conference Committee on Long Range Planning).

Resolving the fundamental question of what cases belong in the federal courts will bring to the surface the emotions fueled by court users' years of litigating experience. The planning process must accommodate the reality that these kinds of questions are rarely decided through any rational philosophic assessment of their merits. In determining jurisdictional boundaries, for example, federal judges and large law firms, which have previously served as sources of future federal judges, might prefer, on the respective grounds of intrinsic interest and income, to see major commercial litigation comprise a principal part of federal court caseload. Corporate litigants, however, in view of the size of their legal bills and the availability of speedier alternative fora such as private judging and arbitration, may instead choose to opt out of the federal courts.<sup>131</sup>

It is most important to recognize the need to confront in the planning process these thorny issues of great moment. Nothing is accomplished by attempts to finesse the toughest questions. Given the general history of court reform, nothing will happen in the absence of a working consensus among those concerned. While some issues may now appear unresolvable, planning can fulfill two vital needs: (1) providing a rational basis for whatever eventual policy decisions are reached; and (2) insuring that the judiciary's voice is heard in deliberations concerning its future.

In view of the traditional argument that judges should not participate in policy debate,<sup>132</sup> the decision as to whether the voice of the judiciary should be heard has arguably been resolved, in what might be described as the moderate affirmative, by the steady progress of the judicial branch toward developing a viable planning process. The impetus, as previously described, arose from the negative perceptions of judges and court personnel concerning their diminishing position in a public arena that offers little respect to purely reactive institutions.

### CONCLUSION

From this vantage point, it is fair to conclude that it matters less which planning format is ultimately adopted by the federal courts

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131. This potential result coincides with the view expressed by Professor Fiss that "purely private disputes" should be resolved by arbitrators, not courts, because they do not aid in "giving meaning to our public values." Owen M. Fiss, *The Supreme Court, 1978 Term, Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 30-31 (1979).

132. This argument is examined with care by Judge Frank M. Coffin in *The Federalist No. 86: On Relations Between the Judiciary and Congress*, in *JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY* 21, 26-28 (Robert M. Katzmann ed., 1988).

than that one is adopted. The process that has been recommended to, and followed in large part by, the Planning Committee offers much prospect for success, because experience with, and trends toward, decentralization are employed in its design.

If planning in the federal courts is to play a meaningful part, it must serve as a mechanism for careful assessment of the major issues affecting the courts' fulfillment of their constitutional and statutory responsibilities; the process must be accorded a high continuing priority at the policymaking level. In the words of the Chief Justice, "[P]lanning for the future has now gotten its nose under the judicial tent, and we are going to see more of the animal in the future."<sup>133</sup> Indeed, planning is not a one-shot exercise. It involves broad input and consensus. Planning needs to be a continuous process. The Long Range Planning Committee and the Long Range Planning Office need to continue working with other Judicial Conference committees and their staff to implement the plan, to complete periodic updates, and to flesh out issues deferred in the first plan for treatment in future plans.<sup>134</sup>

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133. Judicial Conference Remarks of Chief Justice, *supra* note 48.

134. In March 1995, "[T]he [Judicial] Conference also agreed to maintain a planning mechanism in its decision-making process and promote continued planning at all levels of the federal court system." JUDICIAL CONFERENCE OF THE U.S., REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES COURTS 24 (1995). The Conference approved many of the specific recommendations in the Proposed Plan, subject to Conference members' requesting further study and consideration of any recommendation at the September 1995 Judicial Conference. *Id.* at 23-24.