Chapter 3
An Alternative Future for the Federal Courts?

Tiers of Justice

The year is 2020. Congress has continued the federalization trends of the eighties and nineties, and federal court caseloads have grown at a rapid rate. In the United States Court of Appeals for the 21st Circuit, Lower Tier, a recently appointed federal judge arrives at her chambers, planning to consult the latest electronic advance sheets in Fed7th in order to determine the applicable law of her Circuit and the upper tier court of appeals for her region. With nearly a thousand court of appeals judges writing opinions, federal law in 2020 has become vaster and more incoherent than ever.

This is only the judge's fourth month on the job, even though she was nominated by the President three years earlier; the appointment and confirmation process has bogged down even more than in 1995 because of the numbers of judicial candidates that the Senate Judiciary Committee must consider every year. Her predecessor was only on the bench for a year and a half before resigning in protest because he felt that he was only a small cog in what had become a vast wheel of justice.

IF the federal courts are in crisis or approaching crisis now, how will they operate 25 years from now when, assuming the continuation of present trends, projections suggest that their current workload may double, treble, or quadruple?

The trend projections described in the previous chapter and Appendix A reflect one possible prediction of federal court dockets by assuming that the factors influencing caseload growth in the past will continue to do so in the future. Certainly those 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. Recent legislative trends suggest that federal caseloads will continue to grow rapidly. Nonetheless, whether the caseload increases at the rates anticipated by the projections, or at some other rate, many of the same implications will follow.

To be sure, predictions about what the world, or a small part of it, will look like in 10 or 20 years are more properly the realm of futurists (or perhaps science fiction writers) than judges who operate in the here and now. As the Federal Courts Study Committee noted, the difficulty in predicting future demands for federal judicial resources lies in the dual challenges of predicting "any but the grossest social, economic, political, and demographic trends more than a few years in advance—if that far," and with ascertaining the relationship between those

trends and the future business of the federal courts.[1]

As but one example of the problem, neither planners nor sociologists can know with certainty whether the drug problems that currently plague this country—and which are the cause of many other related criminal and societal ills—will continue, moderate, or decline. Even assuming that the drug crisis persists in all its tragic manifestations, it is not possible to predict how the nation's leaders will respond to it: Will the nation, as some have urged, refocus some of its prosecutorial resources on education and rehabilitation? More radically, will we witness the decriminalization of some of the substances that are currently proscribed? Or will the status quo remain undisturbed?

The district courts and courts of appeals currently devote substantial judicial resources to resolving criminal drug cases. The extent of their future involvement in the adjudication of criminal drug offenses is a political question about which planners can only speculate.

A Possible Scenario for the Future

The projections—under the assumptions set out in Appendix A—are bleak indeed. If the federal courts' civil and criminal 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. Should that occur, in twenty-five years the number of civil cases commenced annually could reach 1 million (in 1995 the civil filings in the district courts numbered about 239,000), while the criminal filings could reach nearly 84,000 (in 1995 they numbered about 44,000). At the same time, annual appeals could approach 335,000 (in 1995 they numbered almost 50,000). This situation is starkly shown in Table 7.

Based on current formulas for determining judgeship needs, these levels of case filings might require a district court bench of over 2,400 judges, while the appeals bench would be over 1,600 judges. In other words, were such a scenario to become the future reality, more than 4,000 federal judges might be necessary to handle the federal courts' docket in 2020.

Table 7

Case Filings and Judgeships
(12 months ending June 30)

	1995	2020
District Courts		
Civil Filings	239,013	976,500
Criminal Filings	44,184	83,900
Total	283,197	1,060,400
Courts of Appeals		
Criminal Appeals	10,023	43,000
Prisoner Petitions	14,488	149,600
Other Appeals	25,160	142,200
Total	49,671	334,800
Judgeships		
District (by formula)	649	2,410
Circuit (by formula) (excludes Federal Circuit)	167	1,660

Numbers alone do not adequately illustrate this picture. A federal judiciary of 4,000 judges would necessarily require a different structure. The current structure of twelve regional courts of appeals (excluding the Court of Appeals for the Federal Circuit) could not be maintained in 2020, given that, on average, each of these courts would have to consist of about 100 judges. Similarly, with that many appellate judges and many more circuits, it seems virtually impossible that the Supreme Court would be able to discharge its responsibility for resolving intercircuit conflicts. Another judicial "tier," at least, would likely be needed. The Su-

[1] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 8-9 (1990).

preme Court's role as the ultimate arbiter of federal law would be diminished significantly, as it would be hard-pressed to review even a tiny fraction of the entire federal caseload.

Present-day governance mechanisms would need drastic modification. As the courts grew in size, the balance of national, regional and local authority would demand significant adjustment. With growth would come the need for additional mechanisms to ensure management and accountability. Inevitably, pressure would build for the creation of a strong central executive body for the entire court system.

Perhaps the greatest loss, however, would be in the notion of courts as collegial bodies. The current Chief Judge for the Second Circuit Court of Appeals expressed this fear, when he said, "When I contemplate our court in the middle of the next century . . . I despair. It 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."[2]

Finally, no matter how the courts are structured or governed, the vision of coherence and consistency in decisional law likely would be a chimera. Federal law would be babel, with thousands of decisions issuing weekly and no one judge capable of comprehending the entire corpus of federal law, or even the law of his or her own circuit. This possibility is one that planners have to contemplate if today's trends continue.

[2] Jon O. Newman, *1,000 judges—the limit for an effective federal judiciary*, 76 JUDICATURE 188 (1993).

Another Possible Scenario for the Future

As troubling as the above scenario may be, it is probably less so than one in which the nation has found itself unable or unwilling to fund the growth in the federal courts at the same levels it did between 1940 and 1995. Consider, for example the cost of creating and maintaining judgeships. Including salary, administrative expenses, court security and space and facilities, the initial cost of establishing a court of appeals judgeship is over $954,000 (in 1995 dollars). Annual recurring costs would amount to about $813,000. For district court judgeships, these initial and recurring costs are about $937,000 and $775,000, respectively. The costs are similar but slightly less for bankruptcy and magistrate judgeships.

Because of budgetary constraints that will severely reduce discretionary federal spending, future Congresses will not likely permit the judicial budget to grow to fund the projected judgeship needs of the next several decades. If the economic realities of the next 25 years make it impossible to provide the resources necessary to create and maintain a federal judicial system that includes thousands of Article III judges, then we must contemplate a different picture, one that more severely undermines the 200-year old mission of the federal courts.

With scarce resources and many more case filings per judge than currently exist, delay, congestion, cost, and inefficiency would increase. The paperwork burden will affect both the litigants, who would face higher legal fees, and the judges, who would have limited staff assistance. Those civil litigants who can afford it will opt out of the court system entirely for private dispute resolution providers. Already district judges are able to spend fewer of their working hours in civil trials than ever before, and the future may make the civil

jury trial—and perhaps the civil bench trial as well—a creature of the past. The federal district courts, rather than being forums where the weak and the few have recognized rights that the strong and the many must regard, could become an arena for second-class justice.

At the court of appeals level, it might become impossible to preserve the hallmarks of a sound appellate review system:

> [T]he judges do much of their own work, grant oral argument in cases that need it, decide cases with sufficient thought, and produce opinions in cases of precedential importance with the care they deserve, including independent, constructive insight and criticism from judges on the court and the panel other than the judge writing the opinion. These conditions are essential to a carefully crafted case law.[3]

In 2020 we may find a system of discretionary appellate review, of oral argument in only the exceptional case, and of staff personnel playing a dominant role in deciding the majority of the cases or at least identifying the cases that get the full attention of the judges.

In all respects the plan rejects these two apocalyptic alternatives. They are neither desirable nor acceptable. Fortunately, they are by no means inevitable if appropriate action is taken. The plan that follows contemplates conserving the federal courts as a distinctive forum of limited jurisdiction. The plan's proposals for jurisdiction, structure, governance, function, and role all stem from that fundamental objective. Nonetheless, because the future cannot be known and because long range planning also mandates consideration of alternatives to the plan's preferred vision for the future, Chapter 10 addresses alternative planning approaches should the plan's vision not be achieved.

Justice Without Resources?

It is 2020. Federal caseloads have quadrupled in the last 25 years, but the number of federal judges has leveled off at 1000. The federal budget remains in crisis, the product of continued growth in non-discretionary federal spending and the unwillingness to raise taxes. Congress is no longer willing to fund the increasing costs of new courthouses, support staff and judicial salaries necessary to address the rising tide of cases.

Austerity is a way of life in the federal courts. The queue for civil cases lengthens to the point where federal judges rarely conduct civil trials. User fees proliferate and would be judged onerous by 20th century standards. As a consequence, many litigants seek justice from private providers. Overworked and underpaid administrators defer maintenance on courthouses and no longer update library collections. Most vacancies on the federal bench go unfilled for long periods of time because capable lawyers, once attracted to a judicial career, are no longer willing to serve. The federal courts have by and large become criminal courts and forums for those who cannot afford private justice.

[3] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 109 (1990).