Chapter 2
Conserving Core Values, Yet Preserving Flexibility

A shared vision evokes a sense of mission and a commitment to action. This initial long range plan for the federal courts proposes a vision for the future drawn from history and from the core values that traditionally have defined the federal courts. At the same time, it is balanced by the realization that the federal courts must themselves evolve—as they have throughout the past 200 years—to meet the changing needs of the public they serve. In this sense, the administration of justice must change in response to forces that the law does not create but must recognize.

The Vision

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.

The purpose of this vision is to guide the federal courts in fulfilling the role the Constitution and Congress assign to them. The vision is threatened, however, by troublesome trends and developments of the last two decades, many of which are discussed in more detail throughout the body of this plan. A large measure of the threat derives from competing views of the role of the federal courts vis-a-vis the state justice systems, which combine together with the federal system to make up an increasingly interdependent whole.

In the increasingly complex society of the 21st century and beyond, the federal courts' role in administering justice will require them to balance many worthy but competing goals. Serving both their localities and the nation as a whole, they will seek the best allocations of responsibility between themselves and the state court systems. Balancing service to individual litigants and the public interest, the federal courts will operate with economy and efficiency without sacrificing care for the individual case.

Recognizing the inherent dignity of every human being who participates in the justice process, the federal courts will strive to make the ideal of equal justice a reality. Functioning as interpreters of the law and resolvers of disputes, the federal courts will retain their independence, collegiality and preeminent legal competence and handle impartially the causes of all parties appropriately before them. Finally, while never sacrificing the core values that make them uniquely valuable to the nation, the federal courts will remain open to innovations that improve their services, make them more accessible, and allow them to operate more efficiently.

Mission

What role should the federal courts play in a national justice system increasingly under stress? Answering this question is difficult, because no single "constitutionally correct" role exists for the federal courts. Perhaps because they could not agree on what role the federal courts should play, or perhaps because they saw that the changing needs of the country would require differing roles for the federal courts over time, the framers of the Constitution largely left such questions for Congress.

Today and for the near future, the debate over the appropriate role of the federal courts will pit those who favor increased "federalization" of the law against those who favor limiting federal court jurisdiction. Even federalization opponents, however, acknowledge that policy and efficiency reasons support some selective additions to federal jurisdiction.

At bottom, the debate over the role of the federal courts vis-a-vis the state courts revolves around the larger question of determining the relative spheres of operation of state and federal law. That question is a complex one that is determined by political, legal, economic, social and pragmatic factors. Often it is difficult to draw hard and fast lines between issues appropriately federal and issues for the states. As the authors of one of the papers supporting this planning process noted:

> [The federalization debate] takes place within a jurisdictional framework characterized by a large overlap of state and federal jurisdiction, the absence of a bright line dividing state court and federal court jurisdiction, and a political and historical context that reflects constant shifts of judicial power between the state systems and the federal system.[1]

Now, as they did two hundred years ago, questions of the relationship of state and federal law "cannot fail to originate questions of intricacy and nicety."[2] They include questions of competence, questions of policy, questions of resources, and questions about the impact of federalization choices on other values.

In determining the appropriate role for the federal courts, this plan proposes an emphasis on the wellsprings of what has made the federal courts a unique and valuable resource for the nation. The federal courts have served the nation well because they are special purpose courts, designed and equipped to adjudicate small numbers of disputes involving important national interests. Those disputes frequently call for deliberative consideration by life-tenured judges specially selected for the job of performing what are often difficult countermajoritarian tasks.

Accordingly, the mission, or role, of the federal courts now and for the foreseeable future may be stated as:

> *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 conserving the federal courts as a distinctive judicial forum of limited jurisdiction in our system of federalism, leaving to the state courts the responsibility for adjudicating matters*

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[1] WILLIAM W SCHWARZER AND RUSSELL R. WHEELER, ON THE FEDERALIZATION OF THE ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE 40 (Federal Judicial Center 1994).
[2] THE FEDERALIST No. 82, at 491 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

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that, in the light of history and a sound division of authority, rightfully belong there.

The mission also requires protection 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.

Recent history contains many examples of the federal courts acting in this quintessential role as "keepers of the covenant" and guardians of American constitutionalism. Following the Supreme Court's decision in *Brown v. Board of Education*, a small cadre of federal judges in the South, often at great personal sacrifice in the face of hostile disagreement by a majority of the local citizens, successfully enforced adherence to the law of the land. During the constitutional crisis known as "Watergate," courageous federal judges insisted that even a President elected with one of the largest mandates in history was subject to constitutional limitations. In many less momentous cases, federal judges protected unpopular movements and individuals, punished corruption that seemed immune from accountability under local laws, and reined-in popularly elected officials whose actions had strayed beyond the Constitution's mandates.

While accomplishing these difficult and delicate tasks, the federal courts have been able to retain the nation's confidence and obtain ready acquiescence to their rulings. They have been able to do so in no small part because of society's faith that federal courts follow certain norms—that federal judges are selected by an exacting process, that federal judges decide cases without improper influences, that their rulings are supported and constrained by well-articulated legal principles, and that those decisions are reviewable by an appellate system that will correct errors, reject arbitrary judicial conduct and be faithful itself to the constitutional limits imposed on the judiciary. If society loses this faith, the federal courts cannot carry out their mission.

Core Values

Society's faith in the federal courts depends upon the courts' adherence to certain core values that this plan is dedicated to conserve and enhance.

Core Values of the Federal Judiciary

- *The Rule of Law*
- *Equal Justice*
- *Judicial Independence*
- *National Courts of Limited Jurisdiction*
- *Excellence*
- *Accountability*

Rule of Law. Our nation accepts as its ideal that we are governed by the rule of law, which stands in opposition to the personal rule of one individual or body of persons. Courts epitomize the concept of a government of law, and the federal courts often serve as a role model for other courts and agencies likewise charged with the duty of enforcing law. Key features of this core value are the 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.

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

Judicial independence. Federal judges must be able to perform their duties in an atmosphere free from fear that an unpopular decision will threaten their livelihood or existence. For that reason the Constitution's Article III provides for life tenure and the protection against salary decreases. As Alexander Hamilton wrote in the *Federalist Papers*, these "are the best expedients which can be devised in any government to secure a steady, upright, and impartial administration of the laws." Although the autonomy to make impartial decisions is at the heart of judicial independence, the concept extends further, as it has become apparent in the interdependent modern world that a judge's ability to function independently can be affected by more than a simple threat of job loss or salary reduction. The federal court system must continue to be in control of its own governance, albeit within the limitations set by the Constitution's system of checks and balances.

National courts of limited jurisdiction, operating within a system of federalism. Unlike the state courts, which are designed to handle all legal disputes within a geographic area, the federal courts were never intended to handle more than a small percentage of the nation's legal disputes. This notion is at the heart of judicial federalism, a concept expressed in more detail later in the plan. Our Constitution's creation of a national government exercising limited, delegated powers explains the importance of this core value, but it needs to be reaffirmed in practice time and again. Chief Justice Rehnquist has frequently noted that although the Framers gave to Congress the ultimate task of developing a role for the federal courts, they left two important guideposts. Federal courts were intended to complement state court systems, not supplant them. And federal courts were to be a distinctive judicial forum of limited jurisdiction, performing the tasks that state courts, for political or structural reasons, could not.

Excellence. Throughout their history, the federal courts have had to decide many of society's most contentious and important issues. The disputes that raise these issues often present a high level of factual, legal and administrative complexity. The federal courts have successfully resolved many of these issues because they have high standards of legal excellence, have obtained superior resources, and attract talented personnel. Excellence has many more components, encompassing the integrity of the nominations process, the training given to judges, resources provided for their support, a limited enough jurisdiction so they can become sufficiently expert with subject matter and procedure, the time available for contemplation and reasoned decision, and the prestige of the office. Public confidence in the federal courts is a vital ingredient of our constitutional system. That confidence

in large part depends upon the courts maintaining their standards of excellence.

Accountability. American government is, at its root, government by the people. The first Chief Justice, John Jay, observed "that next to doing right, the great object in the administration of justice should be to give public satisfaction."[3] Under our Constitution, however, the judicial branch must often resolve disputes according to law rather than the majority's wishes. Preserving the power of the courts to do what is right while sustaining their legitimacy in the eyes of the public is one of the most delicate balancing acts of our constitutional system. If the federal courts alienate the public and lose its support and participation, they cannot carry out their appropriate role. In this sense, life-tenured federal judges, like all other public officials, are finally accountable to the people.

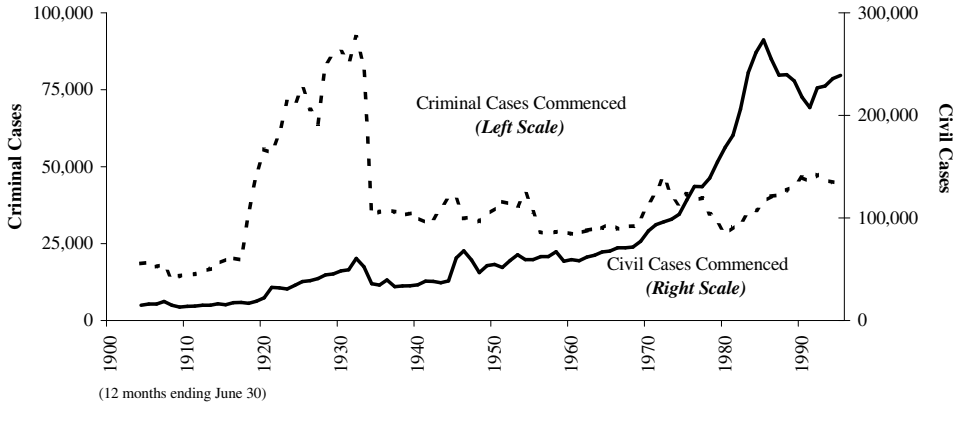
The most powerful popular influence on the federal judiciary is the judicial appointment process, which responds generally over time to changes in electoral majorities. Other elements of accountability are imposed by Congress under Articles I and III of the Constitution. Some specific elements, such as resolving most cases of judicial discipline or disability, reside in internal judiciary mechanisms. Ultimately, however, the federal courts system must ensure its own accountability through the example of its leadership, self-imposed standards of conduct that are more stringent than those for other public officials, a demonstrated ability to make efficient use of the resources it has been given, and the commitment to treat all users of the courts with understanding, dignity, and respect.

The Federal Courts Today

Today, a number of the federal court's core values are in jeopardy, largely for reasons beyond the courts' control. The increasing atomization of society, its stubborn litigiousness, the breakdown of other institutions, and, paradoxically, the very popularity and success of the federal courts, have combined to strain the courts' ability to perform their mission.

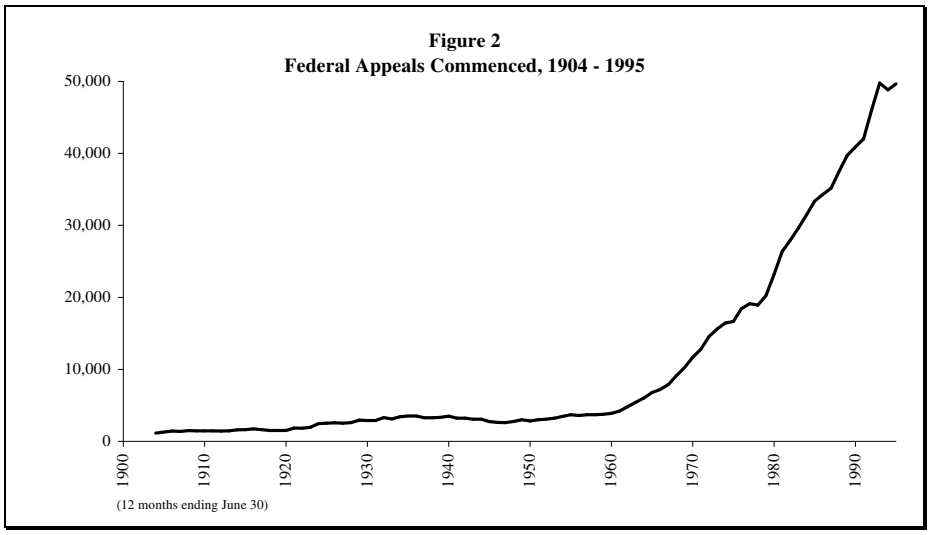
Huge burdens are now being placed on the federal courts. An historical overview of cases commenced in the federal district and appeals courts since 1904 reveals remarkable growth (see Figure 1). The U.S. population has increased slightly more than 200% since 1904. In the same

Figure 1
Civil and Criminal Cases Commenced in U.S. District Courts, 1904 - 1995



[3] Draft letter from John Jay, enclosed in letter from John Jay to James Iredell (15 Sept. 1790), *in* 2 MCCREE, THE LIFE AND CORRESPONDENCE OF JAMES IREDELL 292, 294 (1857).

period, however, while federal criminal cases commenced annually in the district courts have increased a relatively modest 157%, civil case filings have increased 1,424%, with most of that growth in the period since 1960.

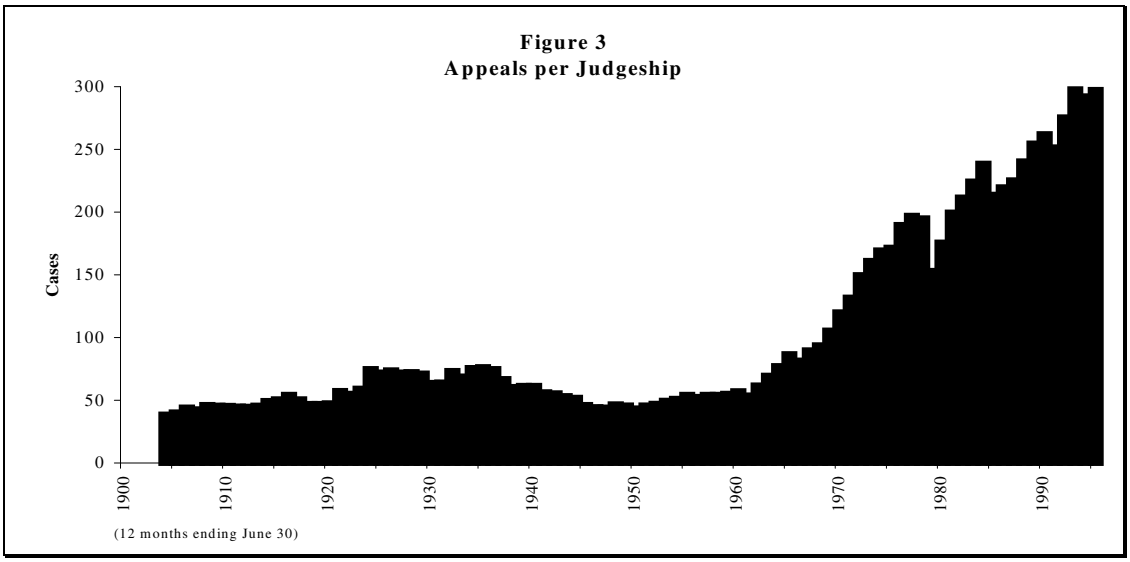


Most remarkably, since 1904 annual cases commenced in the federal appeals courts have increased more than 3,800%. While it took 20 years for the level of appeals to double its 1904 level, and 38 years (1962) to double again, it took seven (1969), ten (1979) and eleven (1990) years for each of the next three doublings. See Figure 2.

Although the number of courts of appeals judgeships has increased from 27 in 1904 to 167 in 1995 (excluding the Federal Circuit) the increase has not kept up with the expanding appellate docket, in large part because the judiciary has not sought the vast increases in judgeships that would be necessary. Figure 3 shows that while in 1970 there were about 130 appeals per judgeship, this had grown to 297 in 1995.

The number of district judges has also continued to increase over the years, but less so than the growth of the caseload. In 1904 there were 75 district judgeships. Their number grew to 649 by 1995. Between 1970 and 1995, district court filings per judgeship increased from 317 to 436. Although complexity is difficult to quantify, most commentators would agree that the average case has increased in complexity.

The criminal caseload has fluctuated widely over the last 20 years. Although



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in raw numbers it is currently lower than in 1972, the nature and complexity of the caseload has changed dramatically. For this reason, a simple snapshot of case filings does not provide a realistic picture of the relative burdens of the criminal caseload in 1995 compared to 20 years ago. The numbers of cases and defendants have not changed drastically over the years, but other factors affect workload as well (see box on next page).

The workload of bankruptcy and magistrate judges has also increased in the past several decades. Tables 1 and 2 highlight the rapid rise of workload in these positions.

To meet the demand of increased judicial workload in the dozen years since 1982, the federal courts' full time permanent work force grew significantly from about 14,400 to about 24,000.

In the last decade, the judicial branch has seen a 170% increase in the size of its budget, due primarily to the growth of its staff. While this is roughly four times the growth of total government spending, it is comparable to the 171% increase in the budget of the Department of Justice. More importantly, the judicial branch budget still constitutes less than one-fifth of one percent of the entire federal budget.

The caseload increase has forced the courts to adopt a wide variety of new procedures and practices to cope with the influx. In the district courts, the heavy burdens of criminal cases have produced significant delays for civil suits in some judicial districts. To their great credit, those courts have responded through employment of case management techniques, alternative dispute resolution procedures, and the outstanding support of magistrate judges and support staff. In the courts of appeals, where the increase in appeals since 1960 has amounted to twice the increase in district court caseload growth, various procedural innovations have been adopted, including the use of screening programs, summary dispositions, increased complement of staff attorneys, and the elimination of oral argument in many cases.

Table 1

Authorized Magistrate Judges and Civil and Criminal Workload 1975 - 1995

(12 months ending June 30)

	Full-time	Part-time	Combination	Civil and Criminal Matters Disposed Of
1975	143	322	17	255,061
1980	210	263	22	280,151
1985	277	179	11	426,440
1990	329	146	8	450,565
1995	416	79	3	511,039

Workload Changes in Criminal Cases

- In 1972, drug offenses accounted for only 18 percent of the criminal dockets, with selective service and auto theft accounting for an additional 13 percent. By 1994, both auto theft and selective service cases had all but disappeared while drug offenses accounted for 40 percent of the criminal filings.

- The number of multi-defendant cases has grown by 47 percent since 1980. The number of multi-defendant drug cases has increased by nearly 30 percent between 1990 and 1994. The average judge time required per defendant in multi-defendant cases is 5.8 hours compared to 3.0 hours per defendant in single defendant cases.

- The number of jury trials with 4 or more defendants has increased more than 35 percent between 1990 and 1994 while criminal case filings have increased only 11 percent.

- The conviction rate in 1972 was approximately 75 percent. Since that time the rate has grown gradually to its present 85 percent. This translates into additional defendants requiring sentencing.

- 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.

- There were only 20 districts in 1972 where criminal cases represented more than 50 percent of the trial dockets; in 1992, 38 districts devoted more than 50 percent of their trial dockets to criminal cases.

- Since 1970, the average length of a criminal jury trial has increased from 2.5 days to 4.4 days.

- Criminal jury trials in the 6-20 day range have increased 118 percent since 1973.

- The number of prosecutors has increased 125 percent since 1980 while the number of judges has increased only 18 percent.

Table 2

Authorized Bankruptcy Judges (or Referees) and Filings

1950 - 1995

(12 months ending June 30)

	Full-time Positions	Part-time Positions	Total Bankruptcies Filed
1950	54	110	33,392
1960	107	67	110,034
1970	184	34	194,399
1980	235		360,957
1990	291		725,484
1995	326		858,104
	(Total bankruptcies in 1980 represent 67,517 cases filed in U.S. District Court plus 210,364 cases and 83,076 joint petitions filed after October 1, 1979, pursuant to the Bankruptcy Reform Act)		

Conserving Core Values

The system has coped, but many judges believe that in doing so the core values have been stretched too far. As Chief Justice Rehnquist said in a recent annual report, the federal courts are now at a crossroads. The next few years will require the nation to confront, and decide, critical questions about the federal courts and their role in our system of government. From the perspective of the federal courts, the choice is clear.

The vision of the federal courts set out in this plan has been driven fundamentally by the need to conserve the core values. No change in the jurisdiction, structure, function, governance, or role of the courts should diminish the perception or reality of the federal courts as uniquely competent national courts of limited jurisdiction serving as the embodiment of the core values discussed above.

While affirming the immutability of the core values, the plan also recognizes that specific elements of jurisdiction, structure, governance and function are not sacrosanct. The ability to adapt to changed conditions is the sign of a healthy institution, "for an institution without the means of some change is without the means of its own conservation."[4] Accordingly, the plan makes many recommendations for change. Most of them could be characterized as incremental. The plan also builds in many opportunities for experimentation and pilot programs, many of which will be critical for the more wholesale changes that will be called for if the alternative future discussed in Chapter 3 comes about.

[4] EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 33 (1973), *quoted in* M.A. GLENDON, A NATION UNDER LAWYERS 107 (1994).

The late Chief Justice Warren Burger once referred to the need for "systematic anticipation."[5] Although this plan presents what is to the federal courts a preferred vision of the future, it also recognizes that the most important aspect of planning is creating structures and methods for dealing with the unanticipated. Thus, while the federal courts' mission statement embodies the core values identified above, it has built in flexibility for encouraging the spirit of experimentation and innovation that has long existed in the federal courts.

Has the Crisis Arrived?

Some believe the mission of the federal courts has already been compromised. They feel that the system to which lawyers, litigants and the American people have become accustomed has irretrievably vanished. Others believe the courts have preserved their essential nature despite the changes. Yet they too worry about the future. Certainly many warning calls have been voiced throughout the years by well-respected leaders in the federal courts community. Sixty-seven years ago, during one other period when federal courts strained under an expanded criminal jurisdiction, then Professor Felix Frankfurter expressed dismay that "[s]igns are not wanting that an enlargement of the federal judiciary [which then numbered slightly more than 170] does not make for the maintenance of its great traditions."

Twenty-five years later, Justice Frankfurter restated his message in *Lumbermen's Mutual Casualty Co. v. Elbert*,[6] that the federal courts' growing diversity docket was fundamentally altering the legitimate business of the federal courts, and that solving the jurisdictional problem by increasing the size of the judiciary was "bound to depreciate the quality of the federal judiciary and thereby adversely affect the whole system."

In the same year, Harvard professor and federal courts scholar Henry Hart declared, "The time has been long overdue for a full-dress reexamination by Congress of the use to which these [federal] courts are being put." More recently, Judge Henry Friendly (when the Article III bench numbered just under 500), Judge Richard Posner in 1985 (when it numbered a little more than 600), and the Federal Courts Study Committee in 1990 (when the Article III judiciary totaled about 750) have articulated a thesis of impending crisis. In 1992, the Chief Justice raised the following concerns:

> Unless actions are taken to reverse current trends, or slow them considerably, the federal courts of the future will be dramatically changed. Few will welcome those changes. . . .
>
> Some will say that we merely need to create more federal judgeships, which in turn would require more courthouses and supporting staff. . . . [T]he long term implications of expanding the federal judiciary should give everyone pause.[7]

Concerns about trends in the growth of the federal courts' caseload led the Judicial Conference of the United States in 1993 to endorse a policy of carefully controlled growth for the federal courts. At the same

[5] Warren E. Burger, Agenda for 2000 A.D.—Need for Systematic Anticipation, Address to the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7, 1976) *in* DELIVERY OF JUSTICE 101, 102 (1990) (quoting PERLOFF, THE FUTURE OF THE UNITED STATES GOVERNMENT (1971)).

[6] 348 U.S. 48, 59 (1954) (Frankfurter, J., concurring).

[7] William H. Rehnquist, Remarks before the House of Delegates at the American Bar Association's Mid-Year Meeting 8-10 (Feb. 4, 1992).

time, the Conference reaffirmed an earlier position supporting a "relatively small" federal judiciary while rejecting the notion of an artificial upper limit on the number of federal judges

Should the Congress and the nation not heed these concerns about the implications of uncontrolled growth, one of two unfortunate consequences will inevitably follow: (1) an enormous, unwieldy federal court system that has lost its special nature; or (2) a larger system incapable, because of budgetary constraints, workload and shortage of resources, of dispensing justice swiftly, inexpensively and fairly. Either consequence would result in an alternative future for the federal courts, one that is far different from the preferred vision articulated earlier in this chapter.

The projections in Tables 3 through 6 are based on historical data published by the Administrative Office of the United States Courts. (See Appendix A for additional projections and an explanation of the methodology.)

Table 3

Historical and Projected Cases Commenced in the U.S. District Courts, 1940 - 2020

(12 months ending June 30)

	Total Cases Commenced	Criminal Cases Commenced	Civil Cases Commenced	U.S. Civil Cases	Federal Question Cases	Diversity Cases	Admiralty and Local Jurisdiction
1940	68,135	33,401	34,734	13,644	6,177	7,254	7,659
1950	91,005	36,383	54,622	22,429	6,775	13,124	12,294
1960	87,421	28,137	59,284	20,840	9,207	17,024	12,213
1970	125,423	38,102	87,321	24,965	34,846	22,854	4,656
1980	196,757	27968	168,789	63,628	64,928	39,315	918
1990	264,409	46,530	217,879	56,300	103,938	57,183	458
1995	283,197	44,184	239,013	44,531	144,540	49,693	249
2000	364,800	47,800	317,000	41,400	213,600	62,000	
2010	610,800	62,000	548,800	54,600	381,000	113,200	
2020	1,060,400	83,900	976,500	67,000	695,000	214,500	

Table 4

Historical and Projected Appeals Filed in U.S. Courts of Appeals

1940 - 2020

(12 months ending June 30)

	Total Appeals	Criminal Appeals	Prisoner Petitions	Other Appeals
1940	3,505	260	65	3,180
1950	2,830	308	286	2,236
1960	3,899	623	290	2,986
1970	11,662	2,660	2,440	6,562
1980	23,200	4,405	3,675	15,120
1990	40,898	9,493	9,941	21,464
1995	49,671	10,023	14,488	25,160
2000	85,700	15,000	34,500	36,200
2010	174,700	26,000	77,400	71,300
2020	334,800	43,000	149,600	142,200

Table 5

Total Historical and Projected Appeals Filed by Circuit
1940 - 2020
(12 months ending June 30)

Circuit	1940	1995	2020
D.C.	325	1,585	1,690
First	111	1,335	10,900
Second	572	3,948	30,200
Third	322	3,555	22,500
Fourth	159	4,928	27,800
Fifth†	398	6,465	45,000
Sixth	340	4,600	28,500
Seventh	377	3,103	22,700
Eighth	289	3,203	19,400
Ninth	335	8,274	65,100
Tenth	218	2,729	21,300
Eleventh		5,946	39,900

† The Fifth Circuit was split to form the Eleventh Circuit in 1982.

Table 6

Historical and Projected Judgeships
1940 - 2020

	Appellate Judgeships	District Judgeships
1940	57	191
1950	65	224
1960	68	245
1970	97	401
1980	132	516
1990	156	575
1995	167	649
2000	440	890
2010	870	1,430
2020	1,660	2,410