Chapter 8
Resources

RESOURCES—human and economic—provide the means for the federal courts to carry out their mission. The near future will continue to be an era of austerity as far as federal budgets are concerned, and the judicial branch will have to do more with less. The plan contemplates that the federal courts will have to redouble previous efforts to cut red tape, streamline the budget process, add flexibility to personnel and procurement practices, decentralize decision making, and eliminate inefficient and unnecessary activities.

The plan also assumes that court personnel will be subject to growing demands, and that the federal judiciary will have to compete vigorously for the new talent necessary to maintain the standard of excellence that is the hallmark of the federal system. From judges' chambers to clerks' offices to probation and pretrial services operations, the federal courts must implement strong resource management practices.

Justice is expensive, and legislative additions to the federal courts' jurisdiction are not cheap. The federal courts must continue to seek the resources necessary to carry out the tasks assigned by Congress and the Constitution, and they will remind the nation and the political branches that maintaining the traditional standards of the federal courts will be worth the added cost. The extent of that cost will depend on which vision of justice the nation decides should be the next century's reality.

This chapter's recommendations assume that the federal courts will avoid the dramatic expansion of size and role discussed in Chapter 3. A greater magnitude of resources and far more resource management would be required by a federal court system with significantly greater workload and personnel. A system of such gargantuan proportions would, if it were to provide justice anything like that which we know today, generate costs that the nation will quite simply be unable to afford. The recommendations are also based on the belief that the nation cares about quality justice and will pay a fair price to obtain it. A few of the resource issues raised by the alternative future of the federal courts are discussed in Chapter 10.

Obtaining Adequate Resources

❒ RECOMMENDATION 54: **The federal courts should obtain resources adequate to ensure the proper discharge of their constitutional and statutory mandates.**

Any comparison to the state courts discloses that the federal courts have been well funded. During the past decade, Congress has provided the judicial branch with a rate of resources growth about equal to that of the Department of Justice, but well above that of executive branch agencies and, in recent years, that of the Congress itself. Congressional penury has not placed the

federal courts in their current circumstances. Rather, the current situation results from the increased workload of the federal courts and their honest adherence to empirical workload formulae as the basis for budget justification. Where workload has increased, the federal judiciary has argued that resources ought to increase as well. Where workload remains flat or decreases markedly, budget requests are correspondingly limited or reduced.

The regrettable reality is that while recent judicial budgets have shown sizeable increases, the increases have not kept pace with the volume and costs of additional tasks that the courts have assumed under new congressional mandates. Insufficient resources are ultimately a threat to judicial branch independence. Overload and delay become the first consequence. Some judicial responses to delay may reduce the quality of federal justice. On the other hand, failure to decide cases more quickly creates access barriers to litigants unable to bear the costs and consequences of delay.

Separation of powers principles require that no branch of government deprive another of either the powers or resources it needs to perform its core functions. Discharge of the judicial function as an independent branch requires resources sufficient for the judiciary to perform all its constitutional and statutory mandates. Unlike several state judiciaries, which have asserted an inherent right to compel funding beyond regular appropriations for judicial functions, federal courts depend on the Congress to provide them with sufficient resources. Chronic failure to provide adequate resources puts federal judges in the unfortunate position of supplicants, constantly begging the Congress for funds.

❒ RECOMMENDATION 55: **Congress, when enacting legislation affecting the federal courts, should be encouraged to appropriate sufficient funds to accommodate the cost to the courts of the impact of new legislation.**

The Administrative Office of the United States Courts currently prepares and makes available to Congress judicial impact statements on legislation potentially affecting the judiciary, on the principle that funding should be commensurate with responsibility. Congress should be encouraged to refrain from enacting new legislation that adds to the workload of the federal courts without also approving sufficient funds for the judiciary to meet its obligations under that legislation. Alternatively, in lieu of appropriating new funds to support the performance of new judicial responsibilities, Congress should be urged to reduce the judiciary's existing obligations sufficiently to offset the impact of any new legislation with a quantifiable judicial impact.[1]

❒ RECOMMENDATION 56: **Federal judges should receive adequate compensation as well as cost-of-living adjustments granted to all other federal employees.**

Implementation Strategies:

56a *Congress should be encouraged to refrain from the current practice of linking judicial and congressional pay raises.*

56b *Congress should be encouraged to repeal section 140 of Public Law No. 97-92.*

[1] See Chapter 4, Recommendation 13 *supra*.

The real compensation of Article III judges must not be diminished. The matter of adequate compensation, including routine cost-of-living adjustments, is at the heart of an independent judiciary. The erosion of the real compensation of judges amounts to a *de facto* diminution in the salary of the judicial office. While perhaps not violating the irreducible salary clause of Article III, any denial violates the spirit of the clause and undermines the independence of the judiciary from Congress. Current practice from time to time has forced federal judges to serve with inadequate compensation, to leave the bench, or to ask Congress for compensation while at the same time sitting in review of congressional enactments. It also threatens the ability of the judiciary to attract and retain judges.

The present mechanisms for setting judicial compensation have failed to protect federal judges from erosion in their real pay. This may be attributable, in part, to section 140 of Public Law No. 97-92, which requires affirmative congressional approval of a judiciary pay increase.[2] It is important to seek repeal of this statute, and to devise a system to protect against diminution in the salary of the judicial office. Formerly, the Quadrennial Commission played a useful though imperfect role in facilitating pay increases. A similar mechanism should be devised in place of the present non-viable structure.

At present, federal judicial compensation has fallen to more than 20% below that received in 1969 as adjusted for inflation. Consequently, consistent with the spirit of the irreducible salary clause, federal judges should automatically receive salary increases when other federal employees receive them.

❒ RECOMMENDATION 57: **Congress should be encouraged to include appropriations for the constitutionally mandated functions of federal courts as part of the non-discretionary federal budget.**

Several of the current functions of the judicial branch are constitutionally mandated. As such, costs for these budgets are not discretionary with the judiciary or the Congress. Therefore, the political branches should be urged to treat these items of the judicial budgets as non-discretionary spending, and to afford appropriations automatically once these items are budgeted by the judiciary.

❒ RECOMMENDATION 58: **The federal courts, including the bankruptcy courts, should obtain funding primarily through general appropriations.**

Federal courts are an indispensable forum for the protection of individual constitutional rights; their costs are properly borne by all citizens. Unlike other governmental operations such as national parks, for which substantial funding through user fees may be appropriate, the mission of federal courts could not be performed if users were denied access because of an inability to pay reasonable user fees.

At least three reasons support continued reliance on general appropriations instead of user fees. First, given that the

[2] Pub. L. No. 97-92, § 140, 95 Stat. 1183, 1200 (1982). This provision, enacted in a continuing appropriations resolution 13 years ago, bars all automatic cost-of-living adjustments for federal judges except as specifically authorized by Congress. Although the sponsor of the provision originally intended that it apply only to a single year, it has been interpreted by the Comptroller General as permanent law. The Comptroller General recommended repeal of section 140 to the 99th Congress, but Congress instead has adopted a practice of suspending application of section 140 to particular cost-of-living raises.

frequency of federal court filings can vary substantially from year to year, economic uncertainty about the amount of revenue that can be raised annually through user fees makes user fees an unreliable and, therefore, undesirable source of funding. Second, with that uncertainty, constant fee adjustments might be necessary in order to sustain ongoing judicial programs. Finally, and most importantly, litigants should not be so burdened with fees as to effectively eliminate the access of some low and moderate income users to our federal forum. The reasonableness of fees and principles relating to revenues and fees are discussed in the next chapter at Recommendation 90.

The bankruptcy courts and bankruptcy cases should be treated similarly. Before the Bankruptcy Reform Act of 1978, the bankruptcy system had been financed through fees, with general revenue covering operating deficits in the system. The Commission on the Bankruptcy Laws of the United States recognized that the system could not be self-supporting without significantly raising financial burdens on debtors and creditors, and therefore recommended discontinuing court financing through fees. Legislative history of the 1978 Act reflects that the bankruptcy court, like other federal courts, should be financed through appropriations.[3]

Ensuring Lifetime Service on the Bench

❒ RECOMMENDATION 59: **Incentives should be created to allow the courts to attract and retain the best-qualified persons as judges and eliminate disincentives to long judicial service. Federal judges should be encouraged to stay on the bench for the lifetime tenure that the Constitution contemplates and guarantees.**

The primary resource of the federal courts is the men and women who serve as judges. Preserving the core value of excellence depends on the federal courts' ability to attract the highest caliber of lawyers and retain those persons for a lifetime of service. Constant turnover in the federal bench, through resignation or retirement, has undesirable consequences. Experienced judges who leave the bench take with them significant expertise, and, under current practice, those judges are seldom replaced for several years.

As long as their physical and mental capabilities allow them to, federal judges should continue to serve, first as active judges and then, when they reach senior status eligibility and wish to slow down, as senior judges. There should be an expectation of a lifetime commitment for federal judges from the time of appointment (despite the possible financial sacrifice). It should be made clear that "revolving door" judges—those who stay on only a few years—do not best serve the interests of the judicial branch and the nation. (This excludes those judges who choose to accept exceptional appointments to serve the public in high positions in the executive or legislative branch—as several FBI Directors, Attorneys and Solicitors General, a Senate Majority Leader, and a Counsel to the President have done.) Nor are those interests served by those few judges who, when appointed, already intend to remain only for the requisite years until eligible for retirement and then return to practice or go on to other careers.

Measures that encourage judges to leave the bench after serving for specified periods of time should be avoided. For ex-

[3] *See* 124 CONG. REC. S 17406 (Oct. 6, 1978) (statement by Senator DeConcini upon introducing the Senate amendment to the House amendment to H.R. 8200), reprinted in 1978 U.S.C.C.A.N. 6505, 6554.

ample, until fairly recently, a judge who left the bench entirely at age 65 would not continue to receive a full salary (as pension) for life. That was changed in 1984, so that now a judge eligible for senior status under the rule of 80 (age 65 and 15 years of service) can leave the bench entirely, practice law or teach or engage in any other private endeavor, and still receive full pay (as pension). Such measures should be avoided in the future. For instance, lowering eligibility under the rule of 80, to an age 60 and 20 years of service requirement (as is now being considered) or change to a rule of 75 should apply only to judges who take senior status *and* stay on the bench.[4]

❒ RECOMMENDATION 60: **Service-year credit toward benefits vesting for service already rendered as federal judicial officers should be awarded to bankruptcy and magistrate judges elevated to the Article III bench.**

Current law contains disincentives for sitting bankruptcy and magistrate judges to accept elevation to the Article III bench. Upon elevation, these judicial officers receive no service-year credit under the retirement and disability benefits plan for Article III judges for service rendered as a federal judicial officer. These disincentives are an unnecessary impediment to the judiciary's ability to attract the best qualified persons to the Article III bench, and illogically penalize those who have served and will continue to serve in the federal courts.

[4] See also Recommendation 58 regarding judicial compensation. For over 25 years, the Judicial Conference has supported expansion of the rule of 80 to allow earlier eligibility for *senior status*, not for *complete retirement from the bench*. *See*, *e.g.*, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 54 (Oct.-Nov. 1969); *id*. at 77 (Oct. 1970); *id*. at 11-12 (Mar. 1978).

❒ RECOMMENDATION 61: **Adequate security protection should be provided for judges and court personnel at all court facilities and when they are away from the courthouse.**

Implementation Strategies:

61a *Where necessary, home security systems and portable emergency communications devices should be provided.*

61b *New judges and their families should receive security briefings.*

61c *Training for judges in security should be made available.*

61d *Judges and probation officers should receive information whenever prisoners are released. The notification should include an assessment of the violent nature of the prisoner and the potential risk he or she poses to judicial branch personnel.*

The judiciary should be directly involved in the development of security policy, the establishment of security priorities, the implementation of a comprehensive security program, and the monitoring of the use of judicial security resources.[5]

The Judicial Conference Security, Space and Facilities Committee has noted the need to bring all federal judicial court buildings under judicial branch direction in order to comply more effectively with security standards. In addition, that committee has proposed changing courthouse design, where possible, to allow only one public entrance and to have at least one maximum security courtroom, as well as to avoid housing judicial facilities in multi-use

[5] See Chapter 7, Implementation Strategy 51a *supra*.

facilities. Current federal property regulations should be modified to permit needed new courthouses to be placed in areas representing new and projected population centers. Moreover, security briefings should be offered to judges and court personnel at least annually.

All judicial officers should be provided with an appropriate level of security protection at all times when they are away from the courthouse. The level of off-site security provided should be determined based upon an assessment utilizing risk management principles. Previously, the Judicial Conference has called for legislation to enable judicial officers to carry firearms, for ensuring the safety of judicial officers while they are away from the courthouse, and for establishment of court security as the primary duty of the United States Marshals.[6]

The Judicial Conference should assume responsibility for overseeing the assignment of court security personnel in accordance with recently developed standards for deploying court security officers for all districts. This deployment should be accomplished with sufficient flexibility to address the particular needs of a specific district, taking into consideration the district's size, location, number of judges, past history of violence, and future projections.

Making Most Effective Use of Judicial Resources

To ensure continued access to quality federal justice, the structure and processes for judicial resource allocation should be made more efficient and flexible. All judges—including senior judges, magistrate judges, and bankruptcy judges—should be used effectively, efficiently, and fully. Only in so doing will the goal of carefully controlled growth of the federal judiciary be attained.

❒ RECOMMENDATION 62: **Standards and procedures for the assignment of circuit, district, magistrate, and bankruptcy judges to perform judicial duties in other jurisdictions should be flexible.**

Workloads frequently shift among judicial districts, often with little relation to the number of judges serving in them. Intermittent increases in filings cannot be addressed effectively through creation of additional judgeships or realignment of boundaries. What is needed is greater flexibility and efficiency in the use of existing judicial resources.

Consolidation of districts can assist in equalizing workloads and thus ameliorate some of the worst workload/resource imbalances. But there is a growing need for visiting circuit, district, magistrate, and bankruptcy judges to provide temporary assistance. For many years inter-circuit and intra-circuit assignments have been used to direct judge power from courts with less burdensome dockets to those where additional help is needed. Although critical to the judiciary's success in meeting workload demands to date, these procedures are often cumbersome, potentially frustrating prompt relief of overburdened courts even where sufficient judicial resources exist within the system at large.[7]

[6] REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 69 (Sept. 1990); *id*., at 12-13 (Mar. 1989).

[7] An example of this potential can be seen where a judge cannot travel short distances to assist a court in another district without the approval of the chief circuit judge or circuit judicial council (located two or three states distant in some cases) or, if the other district lies within another circuit, the Chief Justice of the United States. Large metropolitan areas such as Kansas City, New York City, St. Louis, and Washington, D.C., are each divided among two

The present alignment of judicial districts calls for rethinking the rigid allocation of judges to individual courts. New standards and procedures are needed for the temporary assignments of judges to overburdened courts, and to ensure adequate space, staff, and other resources when they get there. In an October 1992 survey, just over 71 percent of the respondents (approximately 75 percent of active judges responding) supported easier movement of judges for purposes of holding court in districts requiring temporary assistance.[8]

To assist in the development of this long range plan, the Judicial Conference Committee on Intercircuit Assignments examined the current process for assigning judges to temporary duty on other courts and generally reviewed the impact of district and/or circuit boundaries on efficient deployment of judicial resources.[9] Although the idea of requiring judges to accept temporary assignments to courts in serious need of assistance was rejected as potentially divisive and disruptive of courts' and individual judges' efforts to manage their time and caseload,[10] the committee recognized the importance of making the system "simpler and more flexible."[11]

In the event that the federal judicial system is unable to address future judge power needs in a prompt and efficient manner, the judiciary should consider structural changes to streamline temporary assignment authority. One approach might be to authorize district judges to hold court in any district located within a certain distance or travel time of their permanent duty stations upon designation by the chief judges of the respective courts.

Another innovative approach, already employed in some districts and circuits, employs a standing agreement for a set period, *e.g.*, one year, among several contiguous districts, and approved by the councils of the concerned circuits, to permit immediate cross-assignment of judicial personnel upon request and agreement between the two courts involved. Although sound reasons may exist to retain oversight and control of judicial movements in general, there is little to recommend in a process that frustrates access by overburdened courts to nearby, underutilized judicial resources.

Further steps may be taken to cope with disparate workloads:

- Corporate venue and transfer statutes should be amended to remove all obstacles to the interdistrict transfer of cases for judicial economy.
- Obstacles, such as funding restraints, to the interdistrict and intercircuit assign-

or more districts, sometimes falling into different circuits. Unnecessary expenditures of judicial time on travel result in places where circuit and district boundaries are combined with substantial distances between places of holding court. An example of this can be found at New Albany (located in the Southern District of Indiana, Seventh Circuit), which is adjacent to Louisville (principal place of holding court in the Western District of Kentucky, Sixth Circuit), but must be served by judges travelling more than 100 miles from Indianapolis thrice annually.

[8] PLANNING FOR THE FUTURE: RESULTS OF A 1992 FEDERAL JUDICIAL CENTER SURVEY OF UNITED STATES JUDGES 12, 34, 56, 78, & 100 (Federal Judicial Center 1994).

[9] Report of the Judicial Conference Committee on Intercircuit Assignments to the Judicial Conference Committee on Long Range Planning (Jan. 31, 1994).

[10] *See id.* at 12. The committee agreed, however, to seek a statutory amendment allowing delegation of the power to authorize intercircuit assignments if the Chief Justice finds that responsibility to be "cumbersome." *Id.* at 10.

[11] To that end, the committee agreed to undertake the following measures: (1) recommend to the Chief Justice appropriate amendments to the Guidelines on Intercircuit Assignments; (2) publicize more widely the availability of temporary assignments as a case management tool; (3) identify courts that may benefit from the services of visiting judges; (4) survey active judges to determine who may be underutilized and willing to assist courts in other circuits; (5) recommend long-term (*i.e.*, up to one year) open assignments of senior judges on an experimental basis; and (6) evaluate, through voluntary, post-assignment reports, the overall effectiveness and impact of visiting judges on court caseloads, staff and facilities. The committee believes that "major improvements will result" from these actions, enabling it "to meet current and future requirements." Report, *supra* note 9, at 10-12.

ment of judges to districts in need should be removed.

- Rules and procedures should be promulgated to make clear a judge's authority to conduct proceedings in a case in another district from the judge's home district.

- "Judicial emergency teams" comprised, in one instance, of an available district judge and an accompanying magistrate judge, should be an alternative for dispatch to districts seriously understaffed or overburdened by caseload.[12]

❒ RECOMMENDATION 63: **The courts should use senior and recalled judges—a significant portion of federal judge power—as much as needed to achieve the goal of carefully controlled growth.**

Senior judges carry a significant portion of the caseload of the federal judiciary, accounting (in the statistical year ended June 30, 1995) for 17,532 appellate participations and conducting 3,723 trials. This amounted, respectively, to about 17% of all appeals and about 19% of all trials. In many districts and circuits, the work of senior judges has been indispensable to the effective performance of the work of the federal courts. Senior judges also take up the slack caused by vacancies in courts across the nation and contribute significantly to the administration of the federal judicial system.

Without their efforts, the federal judiciary would need substantially more judges to handle its caseload. In 1995, senior judges provided service equivalent to 100 active district judges. According to an estimate made in 1989, the nation would need an additional 80 judges, at an annual cost of approximately $45 million, to compensate for the loss of senior judges. With the number of senior judges much higher now than it was in 1989, this estimate is probably much too low.

When a judge takes senior status, it creates an immediate vacancy on the court even though the judge continues to work. This means that a younger full-time judge will be appointed to fill that spot. When a senior judge continues to work, the court has both a new judge and the assistance of an experienced senior judge often working half-time. As a result, the court enjoys in that judgeship a 50 percent increase in judge power.

New legislation allows recall of bankruptcy judges and magistrate judges to render judicial services as needed. This enables the courts to benefit further from the experience these judges bring to the courts they serve.

❒ RECOMMENDATION 64: **The value of senior judge status should be recognized, and policies and procedures that affect senior judges should be periodically reviewed, in order to insure that senior judge status is an attractive alternative.**

In recent decades, there has been a new and alarming trend for federal judges to leave the bench entirely when they reach retirement eligibility, rather than take senior status. From the early days of the federal judiciary, few judges voluntarily left the bench before the age of 70. In the last 25 years, however, 81 have left, only 16 of

[12] Such a judicial emergency team has been formed in the Southern District of Iowa. *See* Statement of Chief Judge Charles R. Wolle to Committee on Long Range Planning, *in* Transcript of Public Hearing on the Proposed Long Range Plan for the Federal Courts, Dec. 16, 1994, at 151, 161*ff*.

whom were age 70 or over. The reasons for the recent trend are many, but it can be safely assumed that in most cases economic, workload, and status-related factors played a decisive role.

Senior judges should suffer no discrimination upon assuming that status. To the contrary, they should be treated with the consideration that their years of service justify. Fearing the impact of prejudicial policies, some active judges may decide to remain in full-time active status, when, because of advancing years, they should change their status to senior. Other active judges may decide to forego senior status when eligible and simply leave the bench altogether. A fair, responsive policy for utilizing this invaluable resource will deter the use of either of these alternatives.

Responses to a recently conducted survey of senior judges and active judges eligible or soon to be eligible for senior status indicate that the treatment of senior judges often ignores their important contributions. Examples of disincentives to taking senior status and remaining on the bench, ranging from major to petty, abound. For example, the 1989 legislation concerning salaries of federal judges limits the potential pay increases for certain senior judges.[13] This distinction should be eliminated when practicable. In some circuits, senior judges are not considered to be "judges of the court" for purposes of comprising panels under 28 U.S.C. § 46(b). Also, some but not all circuits treat senior judges unwisely with respect to a variety of matters, including chambers assignment, provision of court reporters, sitting preferences, participation and voting in court meetings unless otherwise provided by statute, the placing of a senior judge on the bench in panels of three and in court ceremonies, and dissemination of information and inclusion of senior judges "in the loop."

In all these situations, senior judges should be treated, if practicable, as though they were active judges with the same seniority. Each court of appeals and district court should review their practices and policies (including those dealing with annual recertification of senior judges) to ensure that senior judges are accorded full court participation and treated with the respect and dignity which is their due. Among other things, they should be referred to, if so desired, as "judge" rather than "senior judge." In addition, current statutory provisions limiting the powers and rights of senior judges should be reexamined as appropriate. Consistent with this aim, the Judicial Conference at its September 1995 session adopted a resolution "recogniz[ing] that senior judges provide an invaluable resource to the Federal courts . . . [and] should be provided the same level of respect and deference as their active colleagues, and . . . suffer no diminution in status because of their retirement from active service."[14]

❒ RECOMMENDATION 65: **Magistrate judges should perform judicial duties to the extent constitutionally permissible and consistent with sound judi-cial policy. Individual districts should retain flexibility, consistent with the national goal of effective utilization of all magistrate judge resources, to have magistrate judges perform judicial services most needed in light of local conditions and changing caseloads.**

As adjunct judicial officers of the Article III district courts, magistrate judges

[13] 28 U.S.C. § 371(b)(2), (f) (Supp. V 1993).

[14] REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES __ (Sept. 1995) (forthcoming).

are indispensable resources who are readily available to supplement the work of life-tenured district judges in meeting workload demands. Maintaining an appropriate division of labor between district judges and magistrate judges will pose a continuing challenge to the courts. Maximum flexibility should be retained in the district courts to promote the most effective use of magistrate judges in each district in light of local conditions and changing caseload needs. Although each district court exercises discretion in its use of magistrate judges, the effort to encourage effective utilization of magistrate judges must be national in approach and effect.

The need to conserve the increasingly scarce time of district judges will make effective and extensive use of magistrate judges (including those retired judges available for recall service) a practical necessity in virtually all courts. Expanding the role of the magistrate judge in the area of felony criminal trials should be examined, taking into account constitutional considerations and sound judicial policy. The district courts should expand the use of magistrate judges to conduct civil proceedings with the parties' consent as currently authorized by 28 U.S.C. § 636(c). Use of magistrate judges for this purpose may necessitate reassessment of how they perform other functions. It has been suggested, for example, that where only an issue of law must be resolved, use of the report and recommendation procedure is inefficient because it is a duplicative use of resources.

District courts should adopt comprehensive plans for using magistrate judges in accordance with Judicial Conference guidelines. This process could lead to development of minimum standards to ensure that existing magistrate judge resources are used effectively before additional positions are authorized. Magistrate judges should be provided adequate staff, clerical, research, and other support services to enhance their ability to perform the functions specified above.

❒ RECOMMENDATION 66: **Magistrate judges should be vested with a limited contempt power to punish summarily for misbehavior committed in their presence, and to punish for disobedience or resistance to their lawful orders in civil cases referred to them for disposition with the consent of the parties.**

To be recognized and utilized as fully effective judicial officers in the district court, magistrate judges must possess the requisite legal authority and status, including an ability to enforce their own orders. Although 28 U.S.C. § 636(e) provides that certain acts or conduct in proceedings assigned to a magistrate judge constitute a contempt of the district court, the authority of the magistrate judge in such instances is limited to certifying the operative facts to a district judge and serving a show cause order on the alleged contemner. The power to punish litigants directly for contempt is essential in all cases of misbehavior in a magistrate judge's presence, and in cases of disobedience or resistance to a lawful order issued in civil matters referred to a magistrate judge for disposition with the consent of the parties. Indeed, the present lack of contempt power for magistrate judges can be a major detriment to their performance of judicial functions.

Diminishing the Problem of Judicial Vacancies

❒ RECOMMENDATION 67: **Attention should be given to the problem of fre-**

quent, prolonged judicial vacancies in the federal courts. The executive branch and the Senate should be encouraged to fill vacancies promptly, and the judicial branch should utilize procedures and policies to mitigate the impact of vacancies on the capacity of the courts to conduct judicial business.

Research aimed at eliminating obstacles to efficiency in the federal courts shows two disturbing trends: (1) an increasing percentage of vacant judgeships; and (2) a lengthening average time from the occurrence of a vacancy to the confirmation of a successor judge. Unfortunately, while the judicial vacancy rate is among the more serious problems facing the federal courts, the solution to the problem lies primarily outside the judicial branch.

By constitutional design, the very nature of judicial appointments is political. Any potential solution that seeks to remove politics from, and to shorten, the appointments process would also dramatically change the nature of the appointment process and may require a constitutional amendment.[15] This plan does not endorse such drastic remedies. Nonetheless, several ideas for addressing the problem are outlined here as a means of emphasizing how serious the problem is and why it requires prompt attention and appropriate action.[16]

At present, nominees for court of appeals, district court, Court of International Trade, and Court of Federal Claims judgeships are selected through a variety of methods that depend on the type and geographic location of the positions to be filled, the decision making styles of persons involved in the process, and the prevailing political realities. Predictably, the results vary. It is not the province of the judiciary to instruct the executive and legislative branches on *how* they should discharge their responsibilities. Nevertheless, the other branches might consider measures aimed at speedier, perhaps surer decisions. For example, they might wish to undertake periodic review and enhancement of the procedures used to identify and screen judicial candidates, as well as devote additional financial and personnel resources to the selection process.

Ultimately it may be more worthwhile to address the *effect* of the vacancy problem rather than its various *causes.* The impact of prolonged vacancies is invariably the same: courts are required to manage caseloads without adequate judicial resources. Although it may be possible to expedite the appointment process, vacancies undoubtedly will continue to occur more rapidly than the system can fill them. The courts, in order to continue to meet their mandates, must maintain the ability to function well at less than full strength.

Implementation Strategies:

67a *Delays in filling judicial vacancies should be reduced by encouraging retiring judges and those taking senior status to provide substantial (*i.e.*, six-month or one-year) advance notice of that action.*

The lengthiest delays in filling judgeships arise in the process of identifying and evaluating the suitability of potential nominees. If that process can be routinely commenced *before* a vacancy arises, the period of time in which a court is required to operate at less than full strength can be substantially reduced if not eliminated. Advance notice can be used to achieve this

[15] See Chapter 10, notes 11-17 and accompanying text *infra*.

[16] Chapter 10 also discusses the judicial vacancies problem, suggesting more far-reaching solutions in the event of an alternative, much less favorable, future.

result in two ways: (1) directly apprising executive and legislative branch officials of the impending need for a judicial appointment; and (2) allowing local bar and civic organizations to use their resources to encourage the President and the Senate to act speedily in appointing a new judge.

Timely selection of successor judges depends, of course, on prompt notice of retirement decisions as they are made. Because this entails voluntary cooperation from individuals who, for various reasons, may not otherwise choose to make their retirement plans known in advance, it will be necessary to remind judges periodically of the Judicial Conference policy, adopted in March 1988, urging advance notification of impending retirements from active service or the bench.[17]

67b *Statistics should be maintained concerning the number, length, and impact of judicial vacancies (including data which relates to judicial emergencies) in each court, and benchmarks or timelines should be created for the nomination and confirmation of all judges. The judicial branch should publicize all vacancies extending beyond these limits, and all data on judicial emergencies, to Congress and the President by means of semi-annual reports.*

It is essential that judicial appointments be viewed as an important task that will be performed expeditiously. The stark impact of vacancies on each court's ability to function should be documented through the statistical presentations of judicial workload. In addition, reasonable time frames should exist for completing the appointment process. A useful approach would be the voluntary acceptance of "benchmarks" or "timelines" for nominations and confirmations. If generally recognized in the legal and political communities—*e.g.*, with support from bar organizations, scholars, and the press—an expectation would be created that vacancies will be filled promptly. Periodic reports to Congress and the President would reinforce the point by reminding the other two branches, and the public at large, of any vacancies extending beyond the suggested time frames. In addition, the policy of declaring "judicial emergencies" in courts with vacancies of 18-months or longer duration should be continued.[18]

67c *Procedures for the temporary assignment of judges should emphasize the importance of providing assistance to courts with vacant judgeships.*

As described earlier in this chapter,[19] a flexible, efficient system of bringing judicial resources temporarily to the aid of overworked courts will be needed to an ever-increasing extent. In particular, courts operating at less than full strength should be encouraged to seek assistance of senior judges and other volunteer judges from courts able to spare them. One useful approach might be to dispatch "judicial emergency teams" of available district judges, magistrate judges, and support staff to aid understaffed districts with overwhelming dockets.[20]

67d *Procedures and policies governing the transaction of court business should seek to address special circumstances arising as a result of prolonged judicial vacancies. Among other things, rules governing the number of visiting*

[17] REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 31-32 (Mar. 1988).

[18] *Id.*

[19] See Recommendation 62 *supra*.

[20] See note 12 *supra* and accompanying text.

or senior judges serving on panels in the courts of appeals should be held in abeyance during the existence of vacancies on a court constituting a judicial emergency.

The individual courts should be active in devising means of coping with long-standing vacancies. Although various measures can (and should) be taken at the national or circuit levels, each court should take responsibility for developing emergency procedures (including exceptions to normal methods of operation, where permissible) to expedite the handling of judicial business when required to operate at less than full judge strength.

For example, applicable law requires that a majority of judges on any court of appeals panel "be judges of that court." But the same law allows for exceptions if "such judges cannot sit because recused or disqualified," or when "the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness."[21] Although the circuits differ—in local rules, decisional law, or practice—on whether senior judges are "judges of th[e] court" for purposes of panel composition, the statute clearly empowers a court to deviate from the requirement, however defined, if an emergency arises. The courts of appeals should therefore be encouraged to take advantage of all available judicial resources, including senior and visiting judges, when vacancies seriously threaten their ability to function effectively. Of course, these "emergency" panels should be utilized sparingly given the possible impact on the coherence and consistency of circuit law.

[21] 28 U.S.C. § 46(b) (1988).

Managing Judicial Branch Resources

The governance structure of the federal courts reserves considerable local autonomy to individual courts and their judges. Recently, the decentralization of management authority has increased. With this trend has come increased accountability and responsiveness to centralized leadership. The trend is consistent with modern management theory, which emphasizes the efficiency benefits of empowering those small units closest to an enterprise's core mission.

Budget decentralization and expanded local roles in personnel and procurement have made judges and court administrators increasingly responsible for the direction and operations of their units. Planning—both near- and long-term—has become even more crucial.[22] In an environment of inadequate resources, priorities will constantly need to be set and reset. Thus while budget decentralization deals with the limited spending authority over these insufficient resources allocated to individual courts, the larger problem of resource allocation among the various levels of the judicial branch remains. Development and implementation of administrative policies, as noted in Chapter 7, might affect the decentralized governance of resource management.

Budget Decentralization

❒ RECOMMENDATION 68: **To match responsibility with authority, the budget execution function should be further decentralized so that each court may**

[22] *See, e.g.*, Henry Mintzberg, *The Fall and Rise of Strategic Planning*, 72 HARV. BUS. REV. (No. 3) 107, 112*ff.* (1994).

control spending of appropriated funds to meet its needs.

Budget decentralization has its roots in the collegiality and local autonomy of the federal courts. In this period of fiscal austerity, the workability of the model will surely be tested.

Budget decentralization should be gradual. It should promote institutional cohesiveness and equity through implementation of a central audit function. That function should include spending oversight and responsibility for the submission of a single budget for the courts. To date, each step in budget decentralization has been mirrored by an increasing sophistication in the audit trail. This process must continue while at the same time preserving sufficient local flexibility to allow productive differences in local court cultures.

A proposal meriting further consideration is to employ a fixed formula in the budget process used to allot a specific number of dollars to a court per case or judgeship so as to produce a more predictable form of funding. Judges and staff would be accordingly stimulated to plan more effectively, although courts would still be permitted to establish special funding needs over and above the formula.

Technology and Facilities

Technology will bring vast change in how people meet, interact, conduct business, and resolve their disputes. Growth in communications abilities will change where people work, as well as how they work. While face-to-face meetings may remain the norm in some situations, increasing reliance will be placed on electronic media. The courthouse of the future may not always be a finite physical space. Critical issues about technology, including data security and due process rights, must be resolved, however, before these changes take effect.

❒ RECOMMENDATION 69: **Use of court-related technology should be expanded to improve the ability of the federal courts to provide efficient, fair, and comprehensible service to the public.**

The federal courts' experience with technological innovation is explored in depth in the *Long Range Plan for Automation in the Federal Judiciary*, a document generated and reviewed by umbrella and user groups of judges, Administrative Office officials, court administrators, and support staff. It is a well-conceived plan for testing and bringing the best technological innovations to the courts.

In the future, technology must continue to facilitate the work of the courts. To do so, the approach to its adoption must be integrated. A true federal courts information management and national communications network is emerging. For the courts to successfully embrace the technological future, however, everyone involved in court operations—not only technically expert staff—must be capable of identifying how and where new technological tools will improve performance.

❒ RECOMMENDATION 70: **The courts must remain current with emerging technologies and how they can be employed to improve the administration of justice generally.**

The concept of the "electronic" or "virtual" courthouse—a system that networks computers to permit parties to litigation and the court to exchange materi-

als on-line, and to conduct meetings and hearings over the network (including use of simultaneous video conferencing) in lieu of the participants assembling at the same location—should be assessed to determine its suitability to meet the needs of court users and the judiciary. When courts are able to receive documents electronically from parties already equipped to submit their cases in this manner, the concept of the "virtual courthouse" envisions a court able to schedule proceedings through visual telecommunication, with participants at different locations, lessening the need for a "physical courthouse."

❒ RECOMMENDATION 71: **The judicial branch should maintain a comprehensive space and facilities program, giving careful attention to economy in a time of austerity.**

Almost all the federal district and circuit courts have completed long range plans for facilities and space requirements. Working through the Judicial Conference, the courts should continue to participate actively in needs assessments, and in the design, construction and management of space and facilities for judicial officers and court employees. At a time of extreme budgetary austerity, it is essential that the courts exercise prudence and economy in the design of new facilities.

Using Conference-approved planning and space standards, a long range facility planning program should be periodically updated. That plan should be the basis for funding requests to Congress for new court and court unit facilities. It should address increasingly the need for and the likely impact of new technology. The Conference should adopt a real property capital budget and pursue alternatives to financing new construction through annual appropriations.[23]

❒ RECOMMENDATION 72: **To achieve economies of scale, eliminate unnecessary duplication, and otherwise improve administrative efficiency and effectiveness, the courts should study alternative methods of organizing and allocating judicial support functions.**

Efficiency and cost savings are possible through voluntary sharing of such personnel as administrators, clerks, and probation officers, among districts. To expedite feasible, common sense solutions to resource needs, unnecessary procedural barriers should be eliminated. Given the courts' commitment to decentralized court administration and budgeting, local courts should have the ability freely to allocate their personnel resources. A number of districts or circuits should be selected to test more flexible methods of organizing judicial support activities. Such experiments will surely suggest more far-reaching structural changes and innovations at the district court level.[24]

❒ RECOMMENDATION 73: **To refine both operations and policy, the federal courts should define, structure and, as appropriate, expand their data-collection and information-gathering capacity.**

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[23] See Chapter 7, Implementation Strategy 51a *supra*.

[24] This kind of resource sharing is already permitted in the defender services program under the Criminal Justice Act. *See* 18 U.S.C. § 3006A(g)(1) (1994) (two adjacent districts or parts of districts are authorized to establish a defender organization to serve both areas).

Implementation Strategies:

73a *To obtain better data for reporting, policy-making, and planning purposes, the Judicial Conference should establish a steering group to coordinate and define the process. Members of the group should include representatives from all primary data sources, judicial branch users, and outside researchers.*

73b *This steering group should:*

(1) Conduct a data needs assessment that includes but is not limited to: courts of appeals, district courts, and bankruptcy courts; magistrate judge reporting; Administrative Office program reporting; research; budgetary impact analysis; and long range planning.

(2) Inventory and catalog data collection efforts. Utilize recent surveys conducted by Conference committees and other organizations.

(3) Evaluate the ability of current statistical data holdings to support planning and policy.

(4) Determine how best to collect and maintain such data. Determine how best to organize and manage such efforts. Determine training requirements.

(5) Design the most appropriate single or coordinated network of data bases.

In determining the judiciary's need for statistical data and other information, the federal courts should seek input from interested persons outside the system, including scholars and researchers who study the courts. Judicial data collection should include the statistical data and other information needed for planning purposes, *e.g.*, data on historical trends and their impact on the judiciary, and on the demographics of court users. However, expansion of judicial data collection should be preceded by careful research to determine what precisely is needed in order to run the courts fairly and efficiently.

Clearly, a broad-based inquiry into what data and statistics should be regularly collected and how they are used must be made a high, immediate priority. Personnel from all levels and units of the federal court system, and others, should participate in specifying the contours of these data and statistics. The Judicial Conference should support and promote information resources management to meet the information needs of the courts, the public, the bar, and litigants.

The Federal Courts' Workforce of the Future

The workforce of the federal courts of the future will be shaped by trends similar to those that have created the workforce of today. The current workforce is larger than ever, reflecting significant workload growth. It rose in size by more than 90% since 1982, from 14,400 to nearly 28,000 in 1994. Most of the growth has been in supporting personnel: the number of judicial officers has grown only about 17%. Because the business before the courts reflects conditions in society generally, staffing in probation and pre-trial services, bankruptcy and public defender offices has almost tripled in size in the past decade.

The federal courts' workforce today is far more diverse than in the past. Since

the early 1980's the number of women in professional positions has increased over 170%. Women now hold a majority, about 53%, of the judiciary's professional positions (legal, administrative and technical), compared to 1982 when the judiciary's professional workforce was about 36% female. The entire judiciary workforce—including both professional and clerical personnel—has grown from 63% female in 1982 to 69% female in 1991. The federal courts have also made substantial gains in minority employment. African-Americans, Latinos, Asians and Native Americans have more than doubled in number; their percentage in both the total workforce and its professional component has increased. Latinos represent the greatest number of new minority employees; their representation in the courts' professional workforce has grown by 213% since 1982.

What does this hold for the future? At the very least, the proportion of women and minorities in the federal courts will continue to increase, particularly in professional and technically skilled positions. These jobs now constitute 60% of the federal courts' non-judicial positions.

❒ RECOMMENDATION 74: **The courts should maintain and foster high-quality judicial support services.**

The effective operation of court units requires highly qualified, well-trained managers. The courts and national judicial administration agencies should recruit and retain the best possible professional and support staff, and develop their skills assiduously.

Increasingly, the federal courts will be competing with other employers for educated, professional, competent workers. To demonstrate that the system supports and rewards exceptional talent and strong performance:

- judicial branch employees must be recognized and compensated appropriately
- court personnel at all levels should be used extensively to assist the courts in administration and policy development, and
- continuing education must be integrated into both the schedule of the courts and each employee's work.

❒ RECOMMENDATION 75: **The courts should improve working conditions and arrangements for all court support personnel.**

The courts must be adequately staffed to perform all needed functions. Working conditions for court support personnel should be progressive and make provision for: family leave, flexible work arrangements, and ombudsmen to consider concerns and complaints.

❒ RECOMMENDATION 76: **High-quality continuing education for judges should focus on the law, case management, (including use of appropriate dispute-resolution processes), and cultural diversity.**

Education and training are as important for maintaining and expanding the skills of the experienced judge as for orienting the new judge. "Judicial education should not, however, end with orientation or yearly circuit conferences but should be a life-long process and pursuit."[25] Social, technological,

[25] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 170 (1990).

and demographic changes will require a higher level of judicial competence.

In the future, large dockets will test the management abilities of even the best judges. Intensive case management training will be essential. Appropriate dispute resolution must be the reality; it will demand judges who are expert and creative in "fitting the forum to the fuss."

To limit inconvenience and downtime for judges, the Federal Judicial Center should wherever possible educate judges via interactive video, computer-generated courtroom simulation, teleconferences, and other innovations. The federal courts' strong tradition of quality judicial education should be continued.

❒ RECOMMENDATION 77: **All federal court staff should be trained to ensure outstanding service to the public through adopting a "customer service" approach to justice. They should be educated regularly in the use of court technology.**

An emphasis on customer service and appropriate dispute resolution will create new opportunities for court system employees. Technology will free support personnel from the crush of paper record keeping for new, important jobs in the courts. New labor-saving systems will free staff for work that cannot be performed mechanically.

Nonjudicial court personnel should continue to be trained as service providers and facilitators. Their primary responsibility should continue to be the provision of timely, accurate, and efficient service to all persons having business with the courts, and assisting litigants in reaching the next step in resolving their disputes.