Approaching the Future

Remarks of Senior Circuit Judge Frank M. Coffin, presented to the Committee on the Judicial Branch, Santa Fe, New Mexico, June 8, 1992

I. A Futurist Attitude.

First let me say how pleased I am to be included in this inspired concept of Judge Tacha -- participating with you, with representatives of both the Administrative Office and the Federal Judicial Center, and with my Governance Institute colleagues, Bob Katzmann and former Congressman Kastenmeier in a day devoted to the future of the federal courts. This Committee on the Judicial Branch is an ideal vehicle for such a ventilation of ideas. Its charter is broad. Its major mission is "to address problems affecting the judiciary as an institution and affecting the status of federal judicial officers". Together with the Executive Committee of the Judicial Conference, and the Long Range Planning Committee itself, you are vested with the overview of the judiciary. But you are somewhat more free than either, not being burdened with the day-to-day management and oversight functions of the Executive Committee, and not being involved with the problems of guiding all parts of the judicial establishment in technique and process that face the Long Range Planning Committee. And, unlike both, you have representation from all circuits.

I am therefore honored to attempt some opening remarks to a meeting that I know has already been the object of considerable careful thought. I do so with an abundance of humility. As I look back on almost three decades of judging, I am in awe of the changes in quantity and quality of caseload and in the social matrix that time has wrought. The future looks even more open-ended. Alvin Toffler has put a name to the turbulence I feel. He refers to "a new and powerfully upsetting psychological disease" which he calls "future shock. . . a dizzying disorientation brought on by the premature arrival of the future."[1]

This is the perspective he gives us. He asks us to think of the past 50,000 years of man's existence as the sum of 800 lifetimes of 62 years each. 650 of these lifetimes were spent in caves. Only during the last 6 lifetimes have masses of people seen a printed word. And virtually all of the material goods we use today have been developed within this present 800th lifetime.[2] Now we are gathered to contemplate what might happen within the 801st lifetime. Do you wonder that I approach this task with humility?

But although we have, as Churchill once is supposed to have said of Attlee, "much to be humble about," we should not be paralyzed. Earlier this year, at a conference in Illinois about the future of its courts, an invited futurist, Professor James Dator of the University of Hawaii, in urging a creative rather than a passive mode, said his law of the future is that "any useful statement about the future should appear to be ridiculous."

We can test this thesis. Suppose we go back a couple of centuries and put ourselves in the position of delegates to the 1787 Convention in Philadelphia, called for the purpose of "revising the Articles of Confederation." Being neophyte futurologists, what would we have thought about having a system of federal courts? If we had acted as our Founding Fathers did, most of us would have thought very little. A few of us, if we were lawyers and had represented British

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[1] Alvin Toffler, Future Shock (N.Y.: Bantam Books, 20th printing, 1972), p.4.

[2] Id. at 14.

creditors with dire results in state courts or had had difficulties in representing out-of-state citizens, would see the need for a national forum. A few more would respond to the logic of separation of state and nation. As leading Supreme Court scholar Julius Goebel observed, "[I]t is difficult to divest oneself of the impression that, to some delegates, provision for a national judiciary was a matter of theoretical compulsion rather than of practical necessity."[3]

There was very little debate, but what little there was looked like a roller coaster. First, a resolution by John Rutledge of South Carolina to expunge the Virginia Plan's provision that "a national judiciary be established" passed by a 5 to 4 vote. State courts were felt to be entirely adequate for the new nation. In what must surely be one of the outstanding examples of fast legislative footwork, Wilson and Madison quickly moved that "the national legislature be empowered to appoint inferior Tribunals." Apparently, the Founders were happy with "appoint," as opposed to "establish," because the former was thought to allow Congress the option of appointing state courts as the chosen vehicle to do national work.[4] If anyone had argued, flat out, for a system of national courts paralleling the state systems, he would have been laughed out of the Convention.

I guess the lesson from all this is that we should have our heads in the clouds and look beyond the stars, but keep our feet firmly planted on the ground. What I propose to do in the next few minutes is to sketch the face of the fairly predictable future, ask you to think about what kind of a judiciary we want to see in that future, present the beginnings of a menu of things that might be worked at, and set the stage for thinking about what process you might follow in carrying out this new task.

II. What is predictable?

According to Professor Dator, there are trends of such major significance that they merit the name, "tsunamis of change," analogous to the great ocean wave movements created by underwater earthquakes. As an amateur, I would pick out two groups which are likely to exert profound influences on the federal judiciary. In the first group are: at least for the immediate future, further increase in population; continuing demand for limited space; eventual exhaustion or at least serious diminution of reliable oil reserves and resort to costly alternatives, together with Draconian efforts to conserve energy; increasing concern about land, forests, air, and water; the continuing march of technology, from the inner spaces of genetics to the outer spaces of galaxies; increasing international interdependence and competition; the rising demands to restructure our educational system to make access more real and results more effective, to rebuild inner cities, to develop a more adequate health care system . . . all of this while somehow managing to achieve effective budgetary, expenditure, and deficit controls.

In the second group of "tsunamis" are the more imponderable trends in social and moral values. Here may be listed continuing fragmentation of the family, influence of the visual media, consumerism, focus on individual tastes, pursuits, and autonomy, special interest politics, drug-related crime, and pervasive distrust of our major institutions of government.

The thrust of the first group of trends, so far as they concern our work and role, will be to create a tension between scarce resources of space, goods, services, and income on the one hand and increasing insistence on recognition of individual rights and fairness in the administration of

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[3] Julius Goebel, Jr., Antecedents and Beginnings to 1801, Vol. I - The Oliver Wendell Holmes Devise History of the Supreme Court of the United States, (N.Y.: The Macmillan Company, 1971), p. 206.

[4] Id. at 211.

statutes and regulations on the other. These liberty and equality pressures would assure our workload for the foreseeable future even without new spawning grounds for litigation. But biotechnology, mass tort actions, outer space and ocean floor, international treaties and organizations all offer their own agenda.

To complicate matters, we face these workloads in a time of institutional distrust, an era of lost innocence and newly discovered cynicism, which may well threaten judicial independence and the quality of judicial work and life. That is, while the march of our society promises to thrust new workloads of high complexity on courts, particularly federal courts, we are likely to find that the dikes of respect, restraint, and sensitivity to judicial independence which used to protect us from rash encroachments have been breached at critical points. One example of such encroachments is the temptation to federalize any offense that can claim wide occurrence.

So, unlike the futurists of old who, like Thomas More, could contemplate a "Utopia," we look ahead to a future of pressures and threats. What this view underscores is the necessity of identifying workable goals, workable in the sense that we are in a position to do something useful in advancing their fulfillment, and of pursuing those goals in an activist way.

III. What kind of a judiciary?

Before identifying future possible trends about which something useful can be done, the threshold task is to develop a profile of the kind of judiciary that can best serve the nation in the foreseeable future. I say this because of the clear and present danger of responding to perceived pressures and threats in such a way as to wind up with a fully automated, technically supported, state-of-the art judiciary, with layers of para-judicial personnel employing superefficient assembly line methods. In the process we would have sacrificed the essence of an independent and reflective judiciary.

For starters, I suggest the following basic framework for thinking about to shape the future of the federal judiciary:

A. Role.
   1. No inappropriate cases.
   2. No unnecessary trials.
   3. No unnecessary appeals.

B. Operations.
   1. Optimum use of technological methods and equipment.
   2. Improved systems for processing cases and appeals.
   3. Improved use of personnel.

C. Structure.
   1. No unnecessary layering of tiers.
   2. No unnecessary expansion of judicial personnel.
   3. A system of internal governance suited to individual and systemic needs.

D. Quality of Judicial Life.
   1. Adequate space, equipment, and personnel support.
   2. Compensation and benefits appropriate to the office and sufficient to attract and retain top quality judicial personnel.
   3. Development of optimum methods to cope with the caseload, without sacrificing quality.

E. External relations.

1. Development of sustained close relationships with state courts and their institutions to address common problems.

2. A positive working relationship with Congress and the executive branch.

3. A comprehensive educational outreach program to enhance understanding of and respect for courts.

4. Development of ways and means to work with citizens and citizens' groups to preserve and strengthen the federal and state court systems.

IV. Suggestions for the Menu.

At this point I am going to leap directly into a catalogue of things to think about. I group them under the five subjects I have listed in what I have called the framework. What you should do, however, before constructing your own agenda, is to develop and apply your own criteria to enable you to be selective and to focus on the most promising subjects. What I am about to say probably contains my own hidden and unconscious criteria.

I add two other disclaimers. I make no claim that all of these ideas are original or equally promising. I also recognize that some items may not be appropriate for this committee, but list them for completeness' sake. As time goes on, you will be deciding on the diet you prefer and the meals you want to serve. Here is my a la carte menu.

A. Role.

The appropriate role of federal courts is a logical place to begin because any success in limiting cases to those most appropriate for federal courts will bear significantly on judges' ability to cope, on avoiding excessive expansion of numbers of judges and of unnecessary tiers of courts. Without attempting to prioritize, I list the following possibilities:

1. Getting serious about abolishing most diversity jurisdiction, recognizing the need for federal funding to cushion the impact of shifting this burden to the states.

2. Developing the most informed judicial input into drug decriminalization. Are there steps that can safely be taken, such as treatment option for first offenders, that can stem the remorseless increase in criminal caseloads and prison populations? Although any legislative decision is that of the Congress, the experience and judgment of the judges who have had to live with this problem ought to be of value.

3. Alternative dispute resolution. This is obviously a "hot" field to monitor. Many offshoots, such as "rent-a-judge," have sprung up. Whatever the ultimate course of events, the judiciary should develop its own expertise and make its own input, rather than simply have ADR in its various forms thrust upon our justice system. At some point there may be an occasion for developing guidelines.

4. Encourage the creation of a truly independent corps of administrative law judges. This could pave the way to identifying some areas of law where

review by Article III judges could be eliminated or made discretionary.

5. A useful study might be made of the criteria which should inform any legislative decision as to discretionary appeals. Up to now, this issue has been considered only in connection with specific kinds of cases. Since the issue of discretionary appeals is bound to arise increasingly, thought ought to be given to developing a reasoned approach. Another way of looking at this question is to think about developing subsystems which have matured enough, in terms of the integrity of their fact-finding and adjudicative processes, to warrant only discretionary rather than mandatory appeal.

B. Operations.

In addition to ongoing consideration of case management plans, complex litigation procedures, and other procedural reforms, I suggest the following as worth of study and experiment:

1. How best to use law clerks. This might seem an absurd subject, since there are probably as many kinds of utilization as there are judges. Standardization would be unthinkable. Nevertheless, we all know of cases at both trial and appellate levels where a judge's production is slowed by an obvious misuse or nonuse of a law clerk. Most writing about law clerks is at a high level of generality. Concrete sharing of experience by and with respected judges might yield impressive results.

2. Career (or long term) law clerks. With today's district and circuit judges being allowed two or three, sometimes four, law clerks, it is possible to consider the advantages to having one of such clerks being a career clerk. The traditional debate has been "either-or", and the concept of choosing the bright young law school graduate over the tired time-server has won. But today there are many of the best and brightest who, male or female, prefer to stay on for a substantial time. To the extent that this option is open, a judge vastly benefits by having a source of institutional memory, continuity, indoctrination, orientation, mature judgment, familiarity with his or her idiosyncrasies, . . . and accelerated productivity.

3. Judicial self-help. Building on the specific example in paragraph 1, the committee might well encourage systematic resort to the device of exploiting judges with a track record for excelling in some function of trial or appellate judging by organizing workshops, conversations, and seminars. (I was privileged to suggest to the Ohio State Law Journal that it institute as series of articles by "Judges on Judging." My initial article was entitled, "Grace Under Pressure: A Call for Judicial Self-Help."[5] Judge Tacha has made one of the more recent contributions, with her thoughtful article, "Judges and Legislators; Renewing the Relationship."[6])

[5] 50 Ohio St. Law Journal 399 (1989).
[6] 52 Ohio St. Law Journal 279 (1991).

An example of this kind of judge-to-judge help was the "Chambers to Chambers" newsletter once published by the Federal Judicial Center. For a while the Center found individual judges who would write, in an anecdotal manner, about their experiences. In a fast track, high tech age this seems like small potatoes, but it may prove to be an idea whose time is yet to come.

4. Correcting error vs. making law. A great deal of discussion has taken place on the implications of distinguishing between error correcting and law making. If we could, as a practicable matter, divide appealed cases into these two enclaves, we could put the former into a fast track of abbreviated, unpublished opinions, reserving the latter for more deliberate and articulated opinions. Were we able to do this, we could immeasurably increase the productivity of appellate courts. So – is it possible to gather experience, analyze, and come up with a useful way to identify the two types? In the case of an opinion which starts out to be merely error correcting, then finds that there is one issue as to which something legally significant is being written, can a simple procedure be concocted to limit the publication to the single legally significant issue?

C. Structure.

I have placed this subject third, following after role and operations, because the need for different structures in the federal court system will become apparent only after role has been identified and systemic reforms made.

1. Minimizing conflicts among the circuits is another area for study. The Federal Judicial Center has embarked on its important project of analyzing the quantity and seriousness of conflicts. Perhaps one of the byproducts of this project could be some guidelines for circuits, suggesting what kinds of conflicts present the most serious claim for Supreme Court resolution. As to these, courts of appeal may consider special procedures to ensure the most careful consideration before creating such a conflict.

2. Minimizing the judge time involved in en banc proceedings. Could a study shed any light on ways and means to save judge time without cheapening the process? When are conferences useful and when not? When are oral arguments useful and when not? When would closed circuit TV arguments and conferences be practicable?

3. Governance. The federal judiciary is historically a hierarchical system. Judges are appointed to various levels of courts at various times. Seniority of rank and level of court have been and remain the determinants. But there is also the equally venerable tradition of judicial independence and the fairly modern instinct and desire for participation in policy making. To construct forms of governance that reflect both forces is a challenge for future thought. Our system has grown like Topsy and has served us remarkably well. But this is not to say that improvements cannot be made. The area of governance is worth the most thoughtful and innovative consideration.

D. Quality of judicial life.

1. Research. Virtually all research in the field of judicial administration has been quantitative. In my view the time has come to do serious research about the necessary preconditions to the kind of judging that you determine is essential if the Third Branch is to continue to fulfill its historic role. The research, involving judges, administrators, and behavioral scientists, would ask such questions as: how many hours should a judge spend in an average day? what does he need in equipment, space, and personnel support? how much time in self improvement? how much of a caseload can he comfortably carry? how much time in administrative duties is tolerable? Until we have some idea of the profile of a contemporary, bright, motivated judge working at her top potential and enjoying it, we risk taking measures that will destroy that which we are trying to preserve.[7]

2. Space, equipment, personnel. These are not concerns of this Committee, but are necessary prerequisites of an adequately functioning judiciary. Planning for these is important, not merely to assure optimum efficiency, but to provide judges with the minimal conditions for a quality judicial life.

3. Support, compensation, and benefits. These are traditional concerns of the committee. They remain of top importance. Level of basic pay, cost-of-living increases, insurance, survivors' annuities, travel . . . all of these deserve painstaking support. I mention here the additional item of sabbatical leaves, a subject that ought to come into its own in the last half of this decade. A sensible sabbatical policy will not only prolong the creativity and energy of judges and avoid "burnout," but will be a strong attraction for the ablest of new applicants.

4. Administrative overburden. One of the problems of a system approaching maturity is the tendency to proliferate meetings, committees, reports, conferences, and subsequent recommittal to committees, subcommittees, new studies, reports, and proposals. Judges now spend from one fourth to one third of their time on committees of their courts, councils, conferences, and the Judicial Conference. Somehow, as the future is approached, with all of its pressures and threats, as well as opportunities, care must be taken to diminish rather than increase the nonjudicial activities of judges. Are there ways to distinguish jobs which should be done by judges and those which may as well be done by others?

E. External relations.

1. Relations with state courts.

I list this as a first priority in external relations, being convinced that the judiciary and courts of this country, state and federal, share the same function, problems, and fate. I see nothing but loss in the concept that we have two separate systems, a first class one and a second class one. To the extent that the state courts

[7] See Frank M. Coffin, "Research for Efficiency and Quality: Review of Managing Appeals in Federal Courts." 138 U. Pa. L. Rev, 1857, 1864-70 (June 1990).

handle their caseloads satisfactorily, to the same extent are the federal courts relieved of their "last resort" burden. To the extent that they are well regarded by the citizenry, we shall enjoy the benefit to the same extent. As all of you know, we have much to give each other.

2. Relations with Congress.

This, of course, is one of your most explicit missions. You have available to you the experience and expertise of the Congressional Liaison Office of AO. Building on its experience in the interest of, as Judge Tacha entitled her Ohio State Law Journal Article, "Renewing the Relationship," is an essential function of this Committee.

a. Your present assignment, to review the projected experiment in "statutory housekeeping", whereby courts of appeal forward opinions identifying gaps or inconsistencies in statutes to Congress for consideration by committee staffs for possible correction, should be pursued. The recent endorsement of this project by bipartisan leadership of the House of Representatives gives this undertaking added impetus.

b. Following this, a similar initiative would explore ways and means to clarify the meaning of legislative history and improve the technical drafting of statutes. This, in turn, might well lead to a more or less permanent group of judicial and Congressional personnel working on technical problems of common interest and gradually building toward a genuine community of interest. As Judge Tacha wrote in her Ohio State article, "Systematic discussion between the two branches would inform the debate on congressional intent, reduce misunderstandings, change some judges' philosophical stances toward legislative history, and enhance the clarity of statutory language."[8]

c. Clarification of what is proscribed by "lobbying" and what is permitted. This long standing objective can be attained over time by pursuing the activities mentioned in paragraph a.

d. State of the Judiciary Address. This is a familiar idea, but I am suggesting that it be made much more of an educational vehicle. As I suggested to the 1989 conference of appellate judges, "As the President draws upon the judgment of Cabinet officers for the State of the Union address, so analogously would the Chief Justice draw on the Judicial Conference and its committees in order to present an institutional perspective."[9] If we approached the exercise in this manner, a yearly message of great immediate and long range value could be conveyed to the Congress and to the people.

e. Relations with staff. As Judge Tacha has already recognized, close

[8] Note 6, at 280.

[9] Cynthia Harrison and Russell R. Wheeler, eds., The Federal Appellate Judiciary in the 21st Century (Federal Judicial Center, 1989), p.209.

and constant work with Congressional staff are of top importance. Such staff is of two kinds: there are the key aides who endure, and most of the staff which is subject to dramatic turnover. We therefore are well advised to establish and maintain good working relations with permanent staff and to devise programs of constant education and reeducation for others. Workshops, seminars, videotapes, visits to courts and chambers are some of the ways in which these channels may be established. One proposal worth studying advocates a program of staff cross-fertilization, in which staffers of one branch would spend time serving the other two branches.

f. Judicial impact statements. The new device of the judicial impact statement, pioneered by the Administrative Office, has now been in effect for some time. Do we have any feedback? Are they as effective as we had hoped? What do Congressmen and staffs think? Should the coverage be widened? Perhaps a reappraisal would be timely and helpful. An American Bar Association study, currently under way, should be monitored.

3. Relations with the Executive Branch.

In the past, this has not been a specific objective for the judiciary, but recent discussions have suggested the wisdom of establishing a permanent working relationship with the Department of Justice. It is a resource for such projects as analysis of possible legislation and impact statements, among other things. For one period in the 1970s this function was assigned to a special Office of Improvements in the Administration of Justice.

4. Educational Outreach.

A broad, comprehensive educational outreach program would begin with the public school system, and include colleges, universities, and law schools. The objective would be to inculcate some understanding and appreciation of our system of courts and law. Detailed consideration of such a program is beyond my immediate focus, but this is not to say that it should not be a subject for study. What I do feel compelled to suggest is a start in this direction of educational outreach: the creation of a speakers' bureau, drawn from all levels of our judicial establishment.

If all judicial personnel who wished could be assigned to talk about their work and the work of their courts to youth groups, schools, service clubs, and other organizations, over time the judiciary would have done much to change its image to a more communicative and concerned body of dedicated public servants. The work of such a speakers' bureau would be a positive contribution.

5. Citizen Support.

As the judiciary has felt the burden of legislation enacted with all too little attention given to the impact on courts, as it has been subjected to increasing restrictions, requirements, and sanctions, encroachment on judicial independence

becomes a real possibility. The demands on the Congress are so varied and intense that the judiciary on occasion finds itself possessed of the weakest voice. It seems therefore appropriate to consider the need for and ways and means of encouraging citizen support groups dedicated to the preservation of an independent judiciary.

State judiciaries face the same problem and the same need. Our goals are not adverse. Exploring the structure and role of such a citizen surrogate for the courts in dealing with their legislatures might well be pursued in tandem and with full cooperation, if not jointly. While bar associations would be expected to play an important role, their own agendas are crowded and their purposes multiple. The problems courts are likely to face in the closing years of this millennium, and the importance of courts to states and nation are so important that a citizen coalition of broad scope and wide influence ought to be the ultimate objective.

V. Developing a Process

What I have presented is a smorgasbord. The hard work lies ahead -- selecting, prioritizing, and deciding how best to carry on this brand new function of long range planning. Since I, too, am a rank beginner, I cannot give you any pearls of wisdom. I make only a few comments.

First, not everything can be done at once. Indeed, some things need never be done. And not everything need be done by you. I think it would be helpful if, in refining your ideas of what should be done, you try to separate proposals into those that should be tackled immediately, those which are middle distance concerns, and those which are long range concerns.

Second, as time passes, things change and the future looks different. There are limits to what you can do, stringent limits as to what you can do in a single year. Of course, you have the assistance of the Federal Judicial Center and the guidance of the Long Range Planning Committee. And the various committees of the Conference have their own piece of the action. But as to this committee, with its broad charter and perspective, in addition to having working groups or subcommittees and annual reports on status and progress, it might be well to consider something like a triennial review seminar or colloquium to review the bidding, the progress, the problems, the prognoses, and to see where the emphasis should be placed.

Eight years ago I addressed the Bar of my own state of Maine. The subject of my talk was "Reflections on the Future as a Tool." I closed with remarks that are pertinent now:

> Law and society no longer move like stately glaciers. Although our capacity to manage change is always limited, if I had to navigate a white water river, I'd rather do so with skilled canoeists, though equipped only with pole and paddle, than be on a raft. Let us then try to see what lies ahead, what we want, what we don't want, and what we can do about it. Let us learn to use the future as a tool.