

Fall 1996

# Federal Court Long Range Planning: Fine Lines and Tightropes

Sarah Evans Barker

*U.S. District Court, Southern District of Indiana*

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>



Part of the [Courts Commons](#), and the [Judges Commons](#)

## Recommended Citation

Barker, Sarah Evans (1996) "Federal Court Long Range Planning: Fine Lines and Tightropes," *Indiana Law Journal*: Vol. 71 : Iss. 4 , Article 2.

Available at: <http://www.repository.law.indiana.edu/ilj/vol71/iss4/2>

This Symposium is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact [wattn@indiana.edu](mailto:wattn@indiana.edu).



**JEROME HALL LAW LIBRARY**

INDIANA UNIVERSITY  
Maurer School of Law  
Bloomington

# Federal Court Long Range Planning: Fine Lines and Tightropes

SARAH EVANS BARKER\*

## INTRODUCTION

With her usual grace and insight, Dean Lauren Robel has illuminated some key issues at the heart of the federal courts' long range plan. As one of the nine members of the committee appointed by the Chief Justice to formulate the Plan,<sup>1</sup> I am grateful the Dean finds some commendable features in it. I am also grateful that she has engaged seriously with what she regards as defects in our work.

I can assure you that neither our committee nor the Judicial Conference set out with the intention of drafting a controversial plan simply for controversy's sake. Our goal was to speak as clearly as we could through the Plan about emerging trends, particularly trends that, from our perspective, threaten to affect adversely the work of the courts. When sufficient consensus emerged in our committee to warrant recommending solutions to problems, we did not hesitate to express ourselves, hoping that the published Plan would at least stimulate a vigorous conversation about the status and preferred future of the courts. The *Indiana Law Journal's* initiative in providing a forum to address these issues as well as the wide array of other symposia, articles, and editorials responding to the Plan, fulfill this hope.<sup>2</sup>

Dean Robel's critique has focused primarily on the Plan's discussions of judicial federalism. In a nutshell, it seems to me, there are two problems with her criticisms: first, her critique of the adequacy of the analysis and some of its conclusions;<sup>3</sup> second, her questioning of the wisdom of the judiciary's having spoken publicly about these matters at all. Dean Robel indicates that she cannot find a reason to conclude that the views of

---

\* Chief Judge, U.S. District Court, Southern District of Indiana. Member, Long Range Planning Committee of the Judicial Conference of the United States 1991-96; Member, Executive Committee of the Judicial Conference of the United States 1988-91; Seventh Circuit District Judge Representative to the Judicial Conference 1988-91. I wish to acknowledge and express my deep appreciation for the substantial assistance of Gordon Bermant, Director of the Planning and Technology Division, Federal Judicial Center; A.B., University of California at Los Angeles; M.A. and Ph.D., Harvard University; J.D., George Mason University, in the preparation of this Article. Dr. Bermant's counsel to the Long Range Planning Committee throughout the course of its deliberations and the preparation of the Plan was essential to its success, and his contributions to this particular Article evidence the value of his continuing investment in the planning process and the attendant debates. No one works with Gordon without coming away from the experience enriched by the interchange and inspired by the gifts of intellect and friendship which he brings to such encounters. I am such a grateful beneficiary.

1. The Committee consists of Otto R. Skopil, Jr., U.S. Court of Appeals, Ninth Circuit (Chairman); Sarah Evans Barker, U.S. District Court, Southern District of Indiana; Edward R. Becker, U.S. Court of Appeals, Third Circuit; Wilfred Feinberg, U.S. Court of Appeals, Second Circuit; Elmo B. Hunter, U.S. District Court, Western District of Missouri; James Lawrence King, U.S. District Court, Southern District of Florida; Virginia M. Morgan, U.S. Magistrate Judge, Eastern District of Michigan; A. Thomas Small, U.S. Bankruptcy Judge, Eastern District of North Carolina; and Harlington Wood, Jr., U.S. Court of Appeals, Seventh Circuit.

2. See, e.g., Richard B. Hoffman & William T. Lucianovic, *Long Range Planning: A Reality in the Judicial Branch*, 44 AM. U. L. REV. 1599 (1995); Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 KAN. L. REV. 503 (1995); Charles W. Nihan, *A Study in Contrasts: The Ability of the Federal Judiciary to Change Its Adjudicative and Administrative Structures*, 44 AM. U. L. REV. 1693 (1995); *Symposium on Judicial Administration*, 14 MISS. C. L. REV. 193 (1994); Editorial, *A New Approach to Long-Range Planning for the Federal Courts*, 79 JUDICATURE 4 (1995); Robb M. Jones, *The Future of the Federal Courts*, JUDGES' J., Fall 1995, at 16.

3. I say this even though Dean Robel has said that her point "is not to take a position on the wisdom of the jurisdictional allocations advocated by the Plan" because, it seems to me, she has done that at several places in her paper. See Lauren Robel, *Impermeable Federalism, Pragmatic Silence, and the Long Range Plan for the Federal Courts*, 71 IND. L.J. 841, 849 (1996).

federal judges on how federal judicial resources should be deployed are “more important or informed than any other citizen’s.”<sup>4</sup> She fears that by speaking out on such matters the Judicial Conference will undermine public confidence in the impartiality of the federal courts.<sup>5</sup>

I suspect that Dean Robel does not expect me to duck a discussion of these important issues, and I won’t. But before I turn to them, I must offer some disclaimers. First, the positions I take in these remarks are purely my own. I am not here as a representative of anyone else. Second, these views emanate from the trenches, that is, from the position I occupy as a federal trial court judge. Every day my District Court judicial colleagues and I try, or attempt to settle before trial, all the civil and criminal disputes that arrive on our calendars. Obviously, our common venue is the courthouse, and we would admit that courthouses are not uniquely privileged locations for arriving at policy conclusions about the proper role and future course of federal justice. Moreover, when we don our robes to do our work, we must become instruments of the Constitution, relevant statutes, precedents in our case law, and procedural rules that control our conduct.

Yet when we occupy this instrumental role, we do not lose our individual values, critical capacities, or abilities to envision better ways for our institution to accomplish its important mission. As judges, we must not bring more of these individual qualities to our judicial role than is properly intended for the role of judicial discretion.<sup>6</sup> On the other hand, we must bring a certain amount of individuality to our work, for the job demands it; and indeed the job cannot be done if we fail to do it. Each of us accepts the responsibility that we have been granted under the Constitution to fulfill the duties of the office in the context of this complete, personal commitment.

Neither Dean Robel nor any other reasonable, thoughtful person would want me or any other federal judge to come to the bench without making that commitment. It is my obligation to make it, and the public has the right to expect it. Inevitably, this means that I will sometimes decide cases and sometimes speak out in ways that displease some or all of the audience. It is not uncommon for this to occur when I decide cases. Whether this displeasure is inevitable or should always be avoided when my colleagues and I go public in our roles as participants in federal judicial governance is one of the issues that Dean Robel has raised, and one which I will address at the conclusion of these comments. But when I do, and in fact in the course of all these remarks, you must keep in mind that I am speaking only as Sarah Barker, and only for myself.

---

4. *Id.* at 856.

5. “I suggest that concern about this impartiality should counsel pragmatic silence on issues of policy as contentious as federal jurisdiction.” *Id.* at 857.

6. See AHARON BARAK, *JUDICIAL DISCRETION* 7 (1989) (defining judicial discretion); DONALD S. VOORHEES, *MANUAL ON RECURRING PROBLEMS IN CRIMINAL TRIALS* 136 (3d ed. 1990) (describing and citing cases ruling on the conduct of judges at trial); Gordon Bermant & Russell W. Wheeler, *Federal Judges and the Judicial Branch: Their Independence and Accountability*, 46 *MERCER L. REV.* 835 (1995) (distinguishing between judicial commentary in administrative and adjudicative roles). I am not using the term “discretion” here in its more technical sense as creating a lenient standard of judicial review. See generally Henry J. Friendly, *Indiscretion About Discretion*, 31 *EMORY L.J.* 747 (1982), cited in *Wilton v. Seven Falls Co.*, 115 S. Ct. 2137, 2143 (1995) (using abuse of discretion as standard of review for reversing declaratory judgments).

## I. SAUSAGE, LEGISLATION, AND PLANNING

Let me begin by giving you a little behind-the-scenes appreciation of how the Plan came to be.<sup>7</sup> Dean Robel noted that the Federal Courts Study Committee recommended in 1990 that the judiciary create a “permanent capacity to determine long-term goals and develop strategic plans by which they can reach those goals.”<sup>8</sup> So when Chief Justice William Rehnquist appointed the members of the Committee on Long Range Planning in March, 1991, we had a sense that we were responding to a need that had already been identified within the Judicial Branch and its community of commentators.<sup>9</sup> We also had a sense that long-range or strategic planning was an activity that had developed its own methods and status as an intellectual discipline, with a specialized vocabulary and models of procedure.<sup>10</sup> One of our first tasks was to learn more about the structured activity of planning. Supported by staff and consultants from the Administrative Office, the Federal Judicial Center, academia, and other organizations, we set out to educate ourselves.

The official charge to the committee included, among other things, the following two provisions: We were to “[c]oordinate—in consultation with and participation by other committees, members of the judiciary, and other interested parties—the identification of emerging trends, the definition of broad issues confronting the judiciary, and the development of strategies and plans for addressing them.”<sup>11</sup> And of course, we were to prepare and to submit to the Conference the Long Range Plan itself, after consultation with Conference committees and others.<sup>12</sup>

It would have been difficult to draft tasks for a committee more far-reaching and overarching than these. And I believe it is accurate to say, speaking for the committee as a whole, and certainly for myself, that more than once during the course of our work, we were humbled by the size of the task and the complexities of obeying its requirements. I can assure you that every one of the committee members is a judge who has made the total personal commitment that I mentioned earlier. Among other things, this meant that, as an entire committee meeting together in person over a five-year period of time, we debated the structure and contents of our proposed plan thoroughly—sometimes, exhaustingly—until we reached positions that we could live with as a group. There was no holding back and no rush to judgment on the points we considered to be central to the Plan’s message. This meant that every one of us had to compromise from time to time, while not giving up on our bedrock principles. We engaged with each other strenuously,

---

7. See JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE ON LONG RANGE PLANNING, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS app. B (1995) [hereinafter MARCH PLAN] (setting forth an outline of the committee’s progress).

8. THE FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 147 (1990); Robel, *supra* note 3, at (n.10).

9. Planning is an attempt at rational administration. Planning in the courts is part of the attempt to create a rationalization of judicial administration that is often, if somewhat inaccurately, traced to work of Roscoe Pound and others during the Progressive era at the beginning of this century. See RUSSELL W. WHEELER & HOWARD R. WHITCOMB, JUDICIAL ADMINISTRATION: TEXT AND READINGS 25-96 (1977).

10. See, e.g., ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, PLANNING HANDBOOK FOR FEDERAL COURTS (1994); PETER SCHWARTZ, THE ART OF THE LONG VIEW (1991).

11. MARCH PLAN, *supra* note 7, at 151.

12. *Id.* at 152.

would have its own way with it after we had submitted it.<sup>13</sup> On this point, let me note that there are not many judges, or others, who could have chaired this committee with the skill, tact, and goodwill that Judge Otto Skopil of the Ninth Circuit brought to the job. The judiciary and the public owe Judge Skopil a great debt for his leadership in bringing this very difficult job to conclusion.

You have heard it said that law and sausage are two things you do not want to see being made.<sup>14</sup> I would not go quite that far in describing the work of our committee, but I will tell you that it was a very *human* exercise, in which nine federal judges, assisted by staff and consultants devoted to the work, brought a great deal of energy and time to fulfill the broad mandate assigned to them by the Judicial Conference. We gathered facts and information from various interested parties. Most important, we had extensive correspondence, telephone conferences, and personal meetings with representatives from the other committees of the Judicial Conference whose business overlapped our own. These committees developed their own planning subcommittees and committee meeting agendas. We held three conferences, which we called retreats, for judges, lawyers, and academics representing different courts, practice areas, scholarly achievement, and geographical regions. We conducted three national mail surveys, two of federal judges and one of state court judges, on the broad range of issues that must figure in any long range plan for the courts.<sup>15</sup> And when we had completed a draft plan, we distributed thousands of copies to lawyers and many others, and held hearings in three locations around the country, soliciting comment from any and all before finally, in March of 1995, submitting our proposed draft to the Judicial Conference.<sup>16</sup>

I list these activities to convey a sense of the totality of effort that went into the construction of the Plan. Of course, that effort by itself transfers no credit to the substance of the Plan—the substance must stand or fall on its own merits. But the effort does, I think, authenticate the Plan as a document prepared with all the care and skill that we knew how to bring to it. In that sense, I believe, it represents an authentic voice of the federal judiciary on matters that are of great concern to the judiciary and to everyone who is affected by what federal judges do. Moreover, it is a voice that, having been heard, now recedes. We spoke out to announce how we saw our present and how we are worrying about our future. We did not speak as judges from the bench, but as judicial administrators charged with stewardship for the health of the third branch. I do not believe that a public statement of our views on critical matters either harms the judiciary or runs a large risk of tearing the fabric of public life. The burden of reprimanding the judiciary for speaking out at all on these selected issues is heavier, therefore, than the burden of showing that our substantive positions on any topic are wrong or even wrong-headed.

---

13. The March Plan contained 101 recommendations and 77 associated implementation strategies. MARCH PLAN, *supra* note 7. The final plan approved by the Judicial Conference in September, 1995 contained 93 recommendations and 76 associated implementation strategies. JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE ON LONG RANGE PLANNING, LONG RANGE PLAN FOR THE FEDERAL COURTS (1995) [hereinafter SEPTEMBER PLAN]. One hundred and twenty-four of the 169 recommendations and strategies in the final plan were accepted without change from the March committee proposed plan.

14. "Laws are like sausages. You should never watch them being made." POLITICAL QUOTATIONS 96 (Michael C. Thomsett & Jean Freestone Thomsett eds., 1994).

15. FEDERAL JUDICIAL CENTER, PLANNING FOR THE FUTURE: RESULTS OF A 1992 FEDERAL JUDICIAL CENTER SURVEY OF UNITED STATES JUDGES (1994) (publishing results of the survey).

16. Copies of our draft were circulated via the same mailing list that the Administrative Office of the United States Courts uses to distribute proposed amendments to the federal rules of procedure. We held public hearings on the draft in Phoenix, Chicago, and Washington, D.C., in December, 1994.

## II. THE FORM AND SUBSTANCE OF THE PLAN: IS THE PLAN POLITICAL?

It will be useful at this point to review quickly the form and substance of the Plan as approved by the Judicial Conference. As to its form, it should not be surprising to learn that, like lawyers everywhere, the planning committee and the Conference distinguished between levels of language within the Plan. We were influenced by the now familiar distinction between legislative language and accessory commentary, for example between the black letter and commentary of the American Law Institute's restatements.

So at the top level of the Plan, we set out our recommendations: in the version approved by the Judicial Conference in September, there are ninety-three such recommendations,<sup>17</sup> down from the 101 we had submitted in March 1995 in our proposed plan.<sup>18</sup> Within the committee, we referred to the recommendations as "black-letter language." I invite you to think of it that way, too, as you review it.

Second, we developed what we called "implementation strategies." For the most part, these are statements that put more detail into the subject addressed generally by the "black-letter" recommendation. Consider our treatment of the bankruptcy courts as an example. Recommendation 27 states, "Each district court should continue to include a bankruptcy court consisting of fixed-term judges with expertise in the field of bankruptcy law."<sup>19</sup> Two implementation strategies associated with this recommendation follow. The first one directs, "The bankruptcy court should exercise the original jurisdiction of the district court in bankruptcy matters to the extent constitutionally and statutorily permissible."<sup>20</sup> The second provides that

Congress should be encouraged to clarify the authority of the bankruptcy courts. For example, legislation should be enacted that expressly recognizes the civil contempt power of bankruptcy judges and also affords them limited jurisdiction to hold litigants or counsel criminally liable for misbehavior, disobedience, or resistance to a lawful order.<sup>21</sup>

At the third level of the Plan there is commentary in which we attempted to flesh out some of the context in which we had proposed the recommendations and implementation strategies. I have already told you that the committee as a whole reviewed every word, at every level, of the proposed Plan as it went to the Conference. I repeat, sometimes our discussions about the details of the commentary were lengthy and intense. Nevertheless, we were most concerned, and properly so, with our black-letter and strategic language. Moreover, it was to that language that the Judicial Conference addressed the bulk of its attention. This was, after all, a *plan*—not a treatise or academic article—that we wished to promulgate.

I emphasize the distinction between the levels of language in the Plan—the black-letter recommendation, followed by the implementation strategies, followed by the commentaries—for this reason: one could find in the commentary explanations or

---

17. See SEPTEMBER PLAN, *supra* note 13.

18. See MARCH PLAN, *supra* note 7.

19. SEPTEMBER PLAN, *supra* note 13, at 9.

20. *Id.*

21. *Id.* This language survived unchanged from Recommendation 28, and Implementation Strategies 28a and 28b, of the March Plan. For the associated commentary, see MARCH PLAN, *supra* note 7, at 50.

arguments that put the judiciary on record as holding or rejecting some position that is, perhaps, properly called *political*. Even so, note that the recommendations and implementation strategies are sufficiently general that people may agree with them for more than one reason, or indeed disagree with them, even if they accept the accuracy of the rationale provided in the commentary. But it is ultimately the language of the recommendations and implementation strategies that will guide the judiciary in the future and, we hope, also inform, if not actually guide, the lawmakers and executive branch officials whom the Plan addresses.

So much for the format of the Plan; allow me a brief review of the substantive areas for which the Plan makes recommendations and provides implementation strategies. In the process, consider with me whether there are recommendations throughout the Plan that, like some of the commentary, deserve the label *political*. What becomes obvious is that, depending on what one cares deeply about in the administration of federal justice, controversial recommendations exist almost everywhere you look. Many, if not most, of the important recommendations throughout the Plan, in order to become general public policy, will require either positive legislation or forbearance from legislation that already has been or soon could be offered as a bill in Congress.

Right up front in the September Plan, accounting for the first fifteen recommendations and eleven strategies of the Conference's September version, is judicial federalism. Let me defer discussion of these temporarily, for they are at the heart of Dean Robel's concerns.

The second major set of recommendations and strategies concerns the structure of the courts; the analysis is divided between appellate and trial functions. The recommendations on appellate structure take unequivocal positions on matters that have been the subject of repeated, widespread debate in and outside the judiciary over many years. For example, the language of Recommendation 19, that "The United States Supreme Court should continue to be the sole arbiter of conflicting precedents among the courts of appeals,"<sup>22</sup> implicitly rejects the establishment of a nationwide court of appeals to sit between the regional appellate courts and the Supreme Court.<sup>23</sup> The recommendation reflects the acceptance of the position, by the planning committee and the Conference, that intercircuit conflicts are not sufficiently frequent or serious to warrant structural change in the courts of appeals in order to reduce the number of conflicts before they come to the Supreme Court in motions for certiorari.<sup>24</sup>

Taken together, the black-letter and strategic language of the Plan regarding court structure seem quite far reaching and, perhaps to some eyes, even political. They are certainly recommendations that will require legislation, or the defeat of proposed legislation, and in that sense they necessarily become part of the political process that is the essence of the legislative function. Should the judges withdraw from the debate on the structure of the judicial branch for this reason? I don't think so.

---

22. SEPTEMBER PLAN, *supra* note 13, at 7.

23. In 1975, a federal commission usually identified by the name of its chair, Senator Roman Hruska of Nebraska, recommended that "Congress establish a National Court of Appeals, consisting of seven Article III judges appointed by the President with the advice and consent of the Senate." COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE vii (1975). In 1990, the Federal Courts Study Committee recommended a detailed study of various structural alternatives for federal appellate courts, and in the same year the Congress requested the Federal Judicial Center to conduct and report the results of such a study. See JUDITH A. MCKENNA, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS (1993) (publishing results of study).

24. See MARCH PLAN, *supra* note 7, at 43-44.

The third set of recommendations relates to adjudicative matters. Included here are the Plan's positions on criminal sentencing, the jury system, and the costs of litigation. Consider, for example, Implementation Strategy 30a, which states that "Congress should be encouraged not to prescribe mandatory minimum sentences."<sup>25</sup> It is widely known that there are strong differences of opinion among elected officials, as there are among other commentators, about whether these more severe and inflexible penalties are desirable.<sup>26</sup> I am quite willing to allow better political scientists than I to determine, if they can, whether the disagreements align along partisan political lines. There is more than one reason one can oppose mandatory minimum sentences, of course. One objection frequently advanced is based on the technical inconsistency that arises when mandatory minimums become part of the system developed under the elaborate set of sentencing guidelines; this technical objection is, in fact, one of several contained in the Plan's commentary.<sup>27</sup> The point remains that the Conference has spoken out on an issue that has been the subject of intense debate and disagreement in our public life: the implementation of the goals of criminal justice. Should the judicial branch stay on the sidelines, biting its tongue, because the issue is controversial or political? I don't think so.

The fourth major area of concern in the Plan is governance, covering questions of management and accountability in the third branch. As you would expect, most of the recommendations made here address matters of internal concern without apparent political significance on the national stage. But closer examination reveals that even here some positions generate strenuous debate and disagreement. Consider, for example, Recommendation 51 and Implementation Strategy 51a. The recommendation states that "[a]dministration of federal court facilities, programs, or operations should be the sole province of the judicial branch."<sup>28</sup> The implementation strategy provides, "Executive branch responsibility for the following programs should be transferred to the institutions of judicial governance or agencies operating under their supervision: judicial space and facilities program; court and judicial security program; and bankruptcy estate administration (*i.e.*, the U.S. trustee system)."<sup>29</sup>

This recommendation and its implementation call for a re-balancing of administrative powers between the judicial and executive branches. To some, it may appear to be a government housekeeping alteration which is justified, or not, on grounds of efficiency. To others, it may appear to be an effort to move authority even further away from elected officials toward the nonelected, life-tenured, nonmajoritarian third branch. In respect to the location of control of bankruptcy estate administration, it revives all of the old issues that were debated at length during the 1970's and 1980's, when the current bankruptcy system was legislated and re-legislated as a result of constitutional decisions by the Supreme Court.<sup>30</sup> Within our federal system, questions about separation of powers among the branches are undeniably very hot political potatoes. Should the judiciary stand mute as a matter of principle as this debate over issues of governance rages all around? I don't think so.

---

25. SEPTEMBER PLAN, *supra* note 13, at 10.

26. See generally MICHAEL TONRY, SENTENCING MATTERS (1995); *Symposium on Federal Sentencing*, 66 S. CAL. L. REV. 99 (1992).

27. See MARCH PLAN, *supra* note 7, at 56-57.

28. SEPTEMBER PLAN, *supra* note 13, at 16.

29. *Id.* at 16-17.

30. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *The United States Trustee Act of 1985: Hearings on H.R. 2660 and H.R. 3664 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 99th Cong., 1st & 2d Sess. (1985-1986).



The Plan next turns to the topic of resources. There are thirty-six recommendations and implementation strategies in this section, making it the largest in the Plan, with over twenty-one percent of the total number of recommendations.<sup>31</sup> Here, perhaps, one does not find any political language. The messages of this section are that courts need enough resources to fulfill their constitutional duty, that Congress should calculate the impact on federal litigation that arises from new legislation,<sup>32</sup> that Article III commissions should be accepted by the judicial officers on whom they are bestowed as careers for a lifetime, that we should fully recognize and utilize the extraordinary efforts of our senior judges, that judicial vacancies should be filled promptly, and so on. Even Dean Robel welcomes these proposals for review as well as expansion of data collection and analysis for the courts.<sup>33</sup> I must say, however, that it would not have taken all the extra time, care, and effort of the long range planning process if we were only to develop recommendations on resource issues. In major respects, these matters are already being taken well in hand by internal, sometimes perhaps parochial, standing committees of the Judicial Conference. Placing these issues in the Plan affords them added significance as an articulated portion of the judiciary's vision of its future. Should we have left them for development and debate only by the standing committees of the Judicial Conference? I don't think so.

The final set of recommendations and strategies in the Plan expresses the judiciary's sense of the third branch in the larger social context.<sup>34</sup> They address a wide range of concerns about cultural and linguistic diversity, criminal defense, and concerns for indigent and pro se civil parties, simplified procedures for receiving complaints about improper treatment within the courthouse, and so on. While others may disagree, I believe that they are sound, appropriate, compassionate, and noncontroversial recommendations. Do our expressions of commitment to fairness, accessibility, and cultural sensitivity amount to a thumb on the scales of justice, putting us at risk of being partisans in legal disputes where the lack of those things is what brought litigants to our courts in the first place? I don't think so.

So I have now come to the end of this substantive inventory, and it should be obvious that questions of considerable controversy, enough to be labeled political in an important sense, are addressed in virtually every section, not just the section on judicial federalism. It seems to me that if the judiciary is well advised to engage in a planning process and the plan is to be more than a series of empty, hollow phrases created at public expense, it cannot avoid being controversial in some of its recommendations. Now, to the Part specifically on federalism and Dean Robel's critique of it.

### III. JUDICIAL FEDERALISM IN THE PLAN

What is it about judicial federalism, in particular, that leads Dean Robel to advise us simply to stay mum about it? It does not appear to be merely that changes in the balance between state and federal judicial jurisdictions are largely products of statutory change. It ought to be clear to everyone that virtually all important aspects of federal court

---

31. SEPTEMBER PLAN, *supra* note 13, at 17.

32. See, e.g., Charles G. Geyh, *Overcoming the Competence/Credibility Paradox in Judicial Impact Assessment: The Need for an Independent Office of Interbranch Relations*, in CONFERENCE ON ASSESSING THE EFFECTS OF LEGISLATION ON THE WORKLOAD OF THE COURTS 79 (A. Fletcher Mangum ed., 1995).

33. See Robel, *supra* note 3, at 845 n.24.

34. See SEPTEMBER PLAN, *supra* note 13, at 22.

operations are dependent on statutes, whether or not they have implications for federalism. The Constitution leaves little doubt that the inferior federal courts are creatures of the legislature.<sup>35</sup> I do not hear Dean Robel counseling the courts to refrain from planning in any area in which congressional cooperation must be sought.<sup>36</sup> Her position is, rather, that questions of federalism require “substantive policy choices about some of the most important and controversial issues in our nation,”<sup>37</sup> that these issues are “inextricably political,”<sup>38</sup> and therefore that “[w]hen the federal judiciary takes public positions on the legitimacy of particular grants of jurisdiction, or outlines bright-line tests for the allocation of jurisdiction, it risks compromising the very protections [under Article III] that ensure its stature and excellence.”<sup>39</sup>

In the face of these criticisms, I have considered again the fifteen recommendations and eleven implementation strategies gathered under the heading of judicial federalism in the Plan. I have looked for the language of those proposals that risks causing a constitutional crisis for the judiciary. I do not find it. What I find instead are principled positions on critically important matters that attempt to balance all the relevant interests within the federal forum. I also find in the commentary explicit statements of deference to the power of the legislature to dictate the scope of judicial jurisdiction within constitutional limits.<sup>40</sup> In short, I find precisely what our committee set out to construct: a coherent approach and framework for thinking through the vexing problems of allocating work among the nation’s federal and state judicial systems. When we undertook to write this Plan, we were obliged to derive fundamental positions on all the factors that influence the work of the federal courts. Dean Robel cautions us to be neutral, but I believe we must distinguish between being neutral and being inert. If, as judges generally believe, we are obliged to bring all our intellectual resources to bear in service to the third branch, and having done that, we arrive at certain conclusions with which those in public life disagree, we do not become neutral by remaining silent in order to avoid controversy—in my view, we become irresponsible.

Dean Robel correctly notes a link between the Plan’s positions on jurisdiction and its position on the desirability of maintaining a slow growth rate of the federal bench. She joins Professor Judith Resnik, among others, in emphasizing the increasing significance of non-life-tenured judges in the work of the federal courts.<sup>41</sup> Without benefit of a more

---

35. “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1. See also the Constitution’s jurisdictional grant. U.S. CONST. art. III, § 2.

36. In this, the Dean differs from the editors of *Judicature*, who concluded that “[t]he plan’s undue concentration on legislative matters is unfortunate.” Editorial, *supra* note 2, at 4. The positions of the journal’s editors and Dean Robel are otherwise quite congruent.

37. Robel, *supra* note 3, at 849.

38. *Id.* at 842.

39. *Id.*

40. The commentary states:

The starting point in articulating a sound judicial system is identifying the essentials of federal court jurisdiction. In the following sections, the plan recommends prudential guidelines for limiting federal jurisdiction and implementing a sound judicial federalism. Any such proposals, like the ones discussed here or others, would favor certain interests over others, and may therefore be seen by some to constitute an initiative beyond the province of a non-majoritarian apolitical institution. However, sensible planning presupposes a sound allocation of jurisdiction, consistent with the overarching constitutional scheme, and what ensues is a principled effort to recommend a proper balance. The Congress, needless to say, will have the final word.

MARCH PLAN, *supra* note 7, at 23.

41. Robel, *supra* note 3, at 852-53. See generally Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909 (1990).

fully developed argument, however, I cannot accept her conclusion that the large and increasingly important roles of bankruptcy judges and magistrate judges represent a flaw in the Plan's preference for limiting the growth rate of numbers of judges with Article III protections.

Finally, I recognize in some of Dean Robel's comments a concern that the implications of the Plan's positions on federalism will work against federal legislation in substantive areas that she apparently believes should be federalized (*e.g.*, gender-based violence)<sup>42</sup> and will work in favor of rolling back federal legislation of which she approves (*e.g.*, certain environmental legislation).<sup>43</sup> She is, of course, quite right to raise these substantive concerns, loudly and clearly, here and elsewhere. Whenever and wherever responsible commentators read the Plan's language as having perverse consequences for their own substantive or political positions, they should enter the public arena to speak out. Their voices will be heard by legislators, executives, and other citizens, as well as by judges. The Plan's positions on federalism, and other important issues as well, are based on a vision for the courts that was as close to a consensus position of all the federal judges as our combined skill and effort could manage. Obviously, this doesn't mean that all of its positions are accepted as the best policy positions for the branch by every federal judge.<sup>44</sup> More importantly, it absolutely does not mean that judges will confuse their positions as members of an institutional governance body, developing policy, with their instrumental roles wherein, as instruments of the law, they are interpreting and applying statutes and precedents. This is the most important promise that judges make to their constituents—that is to say, to the public. It is, as Dean Robel correctly notes, the reason the Constitution has granted us the extraordinary protections of Article III. The distinction between judging the merits of individual cases and thinking through good policy positions for our branch of government does indeed sometimes require us to walk a fine line between our legal judgments and our policy positions in the trenches that we occupy. Speaking for myself, I assure you that I try everyday to deserve the trust that has been placed in me to carefully step along the tightrope we must walk. The other members of the planning committee were also well aware of how carefully we had to proceed in preparing and publishing the Plan. I think on this matter I can safely speak for them, and all other federal judges, when I say that we are fully committed to the exercise of due caution as we continue the debate over the Plan's recommendations and strategies and move on, hopefully, toward implementation. The federal judiciary will continue to expect and welcome the scrutiny and candor of wise and helpful commentators such as Dean Robel, particularly when she and they believe we are at risk of straying.

---

42. Robel, *supra* note 3, at 851.

43. *Id.*

44. See, *e.g.*, WILLIAM W. SCHWARZER & RUSSELL W. WHEELER, FEDERAL JUDICIAL CENTER, ON THE FEDERALIZATION OF ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE (1994) (arguing that substantive consensus on federal courts' role is elusive and emphasis should be on more practical considerations); G. Thomas Eisele, *Differing Visions—Differing Values: A Comment on Judge Parker's Reformation Model for Federal District Courts*, 46 S.M.U. L. REV. 1935 (1993) (arguing against the use of court-annexed alternative dispute resolution methods in federal courts); Robert M. Parker & Leslie J. Hagin, *Federal Courts at the Crossroads: Adapt or Lose!*, 14 MISS. C. L. REV. 211, 216 (1994) (approving a proposal for "a federal court structure consisting of ten circuits, each containing one court of appeals and one district court, with each court of appeals being comprised of twelve judges"); Stephen Reinhardt, *Too Few Judges, Too Many Cases*, A.B.A. J., Jan. 1993, at 52 (1993) (arguing that federal courts should grow much larger if caseload requires it). These positions are not those expressed in the Plan.