

2020—A Cybercourt Odyssey: A Look at the U.S. Courts in the 21st Century

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What follows is a letter that I wrote in response to the *1995 Long Range Plan for the Federal Courts*.¹ Although I recognize that a planning committee must spend many hours and put into any plan much painstaking work, I did not feel that this plan adequately reflected what a long-range plan should be—long-range in my view means after I am gone. Conventional thinking would call for a planner who is a pragmatist and has both feet planted firmly on the ground, but whose head is slightly in the clouds. I take a different perspective.

First, I view long-range plans much the same way as I do budgets—they are simply projections of where we want to be or believe we will be, and are written to provide some guidance for those in the pits who must prepare for the future but are not in on the policymaking that gets them there. Second, I believe that because the future, bound-up as it is in the progress of automation, thrusts planners and dreamers, as it must, into the realm of the theoretically-plausible and hopefully-possible, it requires that any long-range plan have an air or touch of science fiction about it. Hence, for me the ideal planner is a futurist—one whose head is planted firmly in the clouds and whose feet, while not on the ground, do nonetheless dangle fairly close to it.

This letter, revised and somewhat edited, was to reflect some of my thoughts on what and where judges and judging will be in the 21st century. It was written tongue-in-cheek to a beloved colleague, who is devoted to, and deeply involved in planning for the federal courts. But humor, after all, *is* a form of aggression. So, it was meant to be a critical message—but kindly and gently delivered.

Dear Friend and Colleague:

I have finished reading your *Long Range Plan for the Federal Courts*.² There is much in it to be praised, but I fear, a measure in it to be criticized as well. Concentrating first, as I prefer to do, on the positive, let me say that some of the alternatives you propose are truly prophetic. I know it represents a great deal of time and effort on your part, for which I thank you. Nonetheless, on a recent flight from California, bored as I always am on long flights, I came up

* Judge, U.S. Court of Appeals for the Third Circuit. I wish to thank John B. “Sean” Heasley and Roger Schwartz, (two truly weird individuals who have for several months been passing themselves off as law clerks), who have made many helpful suggestions.

¹See JUDICIAL CONFERENCE OF THE UNITED STATES, *LONG RANGE PLAN FOR THE FEDERAL COURTS* (1995).

² *See Id.*

with the following alternative to the futuristic scenarios which your committee describes regarding judging in the year 2020.³

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The year is 2020. Federal case loads, which grew rapidly until approximately the turn of the century, leveled off and have now diminished considerably. The federal budget remains in crisis. The seemingly “permanent” budget deficit exists notwithstanding the fact that Republicans, who gained control of Congress just before the turn of the century, and Democrats, who caved into public pressure for “smaller government,” have eliminated much federal spending and many programs that were not patently successful. Indeed, instead of engaging in a principled attempt to balance the federal budget, Congress continued to exhibit a lack of political will to balance pragmatism with need and to raise taxes sufficiently to cover even necessary services. Moreover, Congress, believing that large savings could be accomplished without high political costs, began to curtail spending for new courthouse space and judicial support staff. In response, the federal judiciary swiftly reasserted its role as a co-equal branch of the government and undertook an eminently successful and drastic systems overhaul under its own auspices. The central feature of the “reconstruction” of the judicial system involved the adoption of any and every computer and automation program that would assist it in reaching its end product—just decisions.

The linchpin of the reform of the federal judiciary was the Federal Judiciary Act of 2000 (“FJA-2000”). The FJA-2000 was the result of a long-range plan prepared by the courts. The Act eliminated the old and obsolete federal district court trial and circuitwide appellate system that had been in effect for more than 100 years. The FJA-2000 also removed all distinctions between federal district court and court of appeals judges. In place of the old system, the FJA-2000 created an unified federal court system called the United States Court. Under the new system, all federal judges of the “inferior courts” described in Article III of the Constitution sat on trial duty for approximately nine months out of the year; on review duty for one month; and received two months for training, sabbatical, catch-up, and vacation time. In addition, the total number of federal judges was capped at 1000 under the Act.

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Judge Leia Skywalker, a recently appointed federal judge, arrives at her computer station, a quiet, comfortable cubicle in a federal courthouse. Although judges are still entitled to modest chambers, she has opted for none, preferring the freedom of working from any place where she can plug into the “FedJurNet.” This morning Judge Skywalker plans to consult the latest United States Court decisions to determine the applicable law for a series of cases she

³ See *id.* at 18–20.

has been assigned during her one month annual assignment to the United States Court of Review.⁴ During this assignment, her panel will review appeals from decisions of the Court of Fact⁵ to determine if those decisions are consistent with the law and prior United States Court decisions, and that they comport with the fundamental considerations of fairness judges have more rigorously enforced since the adversary system of trial was modified to more closely exemplify a search for truth and to de-emphasize the concept of justice by trial combat.

She logs onto the FedJurNet through her Individualized Electronic Chambers System ("IECS"), which, with a handful of CD-ROMs, contains all the files and information she needs to address the issues and cases on review and to prepare for her upcoming trial duties. While she unconsciously runs through the coded security maze to gain access to the system, she reflects upon how the federal judiciary had changed since her days as a law student in the late 1990s.

Automation, which had begun in earnest just before the beginning of the 21st century, all but eliminated the need for actual physical chambers for the judges. Judges worked with what were originally called laptop computers, but are now known as IECSs. She would use her IECS to log onto the FedJurNet, a network reserved solely for the federal judiciary where all information, records, and files pertaining to the United States Court were electronically stored. Most judges worked at home or in their modest chambers, unless they were actually in trial. Skywalker preferred a cubicle provided at the federal courthouse, or one of the "quiet rooms" which most communities now provided for computer use, much in the same way as libraries had earlier provided reading rooms. These rooms were open, spacious and comfortable, and contained computer terminals at each chair or table. Indeed, most companies had such rooms for their office staff—replacing the old and outmoded notion of the individual office and appended secretarial station. Actually, judges could do most of their work any place they wished. Their IECSs transmitted to the FedJurNet from anywhere in the world and the messages were encrypted by the judge's voice. One no longer even needed access to a telephone line. Significantly, judges did not need to be physically present at a court facility unless actually involved in courtroom activity.

Automation, in an accelerated plan conceived by the judges to meet exigent needs, had become the rule of the day in every area of the system. All filings were now done electronically, and "paperwork" flowed through electronic waves rather than the mails. The filing clerks of twenty-five years ago had all but disappeared, replaced now by a professional staff of computer specialists

⁴ The new appellate level of the United States Court system.

⁵ The new trial level of the United States Court system.

who made sure that the Individual Case Program contained all the necessary information for a trial of the issue. The same Program tracked the cause after trial through any appeals and indeed through to execution of the court's mandate.

The court system still had libraries, but the individual judges did not: They all had access to a central library which was updated continuously and/or used CD-ROMs when necessary. Indeed, it was so difficult for hard copy publishers to keep up with law changes and cases, and so few judges depended upon books for research, that most reporter systems and technical and research publishers had simply converted to computer technology. Books were mostly for archival purposes. Then too, what used to be called "opinions" were different now and treated differently as well. They were succinct, rather dry, technical and formulaic reports on the court's decision. But more on that later.

Most trials, Judge Skywalker mused thankfully, were still done personally, although after the O.J. Simpson trials in Los Angeles, and as a result of the tremendous time, money, and case pressures on both litigants and the bar, and, more importantly, as a result of constitutional amendments, significant changes were made to the right of trial by jury and the jury system itself. Now most cases were tried without a jury. Indeed, just the evening before, she and her husband had rented the movie *Twelve Angry Men* from the video chip rental store. She had watched that classic movie dozens of times and could not get over how times had changed. "Angry men," she mused, "perhaps that had been part of the problem."

Although she was authorized one secretary, Judge Skywalker no longer used one. All filings and aspects of case management were now centralized and handled by Computer Programming Clerks, who staffed the central office for the United States Court. Moreover, since most mail and case correspondence was filed and stored electronically on the FedJurNet, she, like most other judges, simply had no need for clerical help.

Nor did she or any of her colleagues have use for individual law clerks any longer. All new decisions were automatically and instantaneously entered on the FedJurNet and checked for jurisprudential consistency with prior United States Court case law. If a judge needed help with legal research, one could use the FedJurNet to interface with a legal research specialist employed by the United States Court or affiliated with a law school or legal center. But this contract research was now becoming commensurately more rare as the technical skills of the judges improved. In addition, if a judge wished to discuss the nuances and intricacies of a particular legal issue, the judge could access one of the chat rooms on the FedJurNet and engage in an interactive conversation with other judges from across the country. In general, however, although HAL was nowhere to be found, the need for judges to seek outside help with their legal

research and reasoning was growing more seldom as the technical skills of the judges improved and as the FedJurNet itself assimilated, processed, and sorted more data from the various decisions around the globe, making research by the judges themselves quick and easy. The elbow law clerks were now long gone and "judging" had come full-circle, back to the days when all work was done by the judges themselves.

As she sat pondering the caseload for the upcoming argument session, Judge Skywalker saw with some excitement that the panel would be considering an appeal from a diversity suit. Jurisdiction based upon diversity of state citizenship had all but disappeared after the Federal Judiciary Act of 2015 ("FJA-2015"). The FJA-2015 had declared corporations to be citizens of any state in which they did business. In addition, because insurance companies were defined to be parties in interest under the Act, very few cases whose jurisdiction was based upon diversity of state citizenship found their way into the federal court system, because few were truly diverse. She thought also about the other systemic and substantive changes in the federal judiciary and the types of cases heard that had occurred over the last twenty years:

1. Most countries had ratified commercial law and criminal law treaties, and the International Courts of Justice ("ICJ") of the United Nations now had jurisdiction over crimes that had a "significant impact" on international commercial law (tracking, of course, American jurisprudence with respect to the manner in which the U.S. Supreme Court had expanded federal jurisdiction under the Commerce Clause of the U.S. Constitution⁶). The ICJ also had international diversity jurisdiction over civil disputes in which the parties' national citizenship was diverse, or which involved commerce among citizens of different subscribing countries. Its jurisdiction also extended both to the international airways and to the reaches of outer space. Because most commercial goods fell within these parameters, the federal courts heard few commercial cases. The ICJ's Criminal Division and international criminal jurisdiction also covered most drug cases, because they involved international traffic and any other crime that transcended national boundaries. Like the United States Court of Review, the ICJ had no permanently assigned judges; judges from all the subscribing countries sat from time-to-time on panels of the ICJ.

2. There were other reasons why the federal judiciary seldom heard a criminal case now. As a result of research shortly after the turn of the century, medical and behavioral scientists had uncovered causes, and were developing cures for almost all compulsive disorders and chemical addictions. Discoveries in behavioral genetic data had also helped make it possible to identify persons who were predisposed to antisocial behavior that would lead to crime and

⁶ U.S. CONST. art. 1, § 8.

violence. In addition, progress was finally a reality in what had once been labeled a “war” against drugs, when the U.S. government embarked on a comprehensive program to control both the supply and demand sides of the drug problem. On the supply side, the government used its influence to implement an international economic boycott whereby aid and trade were withheld from those countries that refused to commit to serious action against the drug trade in their own countries. Also, imported goods now received more than a wink and a nod for a drug inspection. On the demand side, the government embarked upon an unprecedented campaign to eradicate the nation’s desire for drugs by committing extensive resources for treatment and educational purposes. As a result of this two-pronged attack, the drug crisis was stemmed and consequently, drug crimes were substantially reduced.

3. Education was now heavily into ethics and morality, which had become as fundamental as the “three Rs” once had been. Indeed, America, shortly after the turn of the century, concluded that police simply could not be law enforcement officers, and had determined that the real culprit was a deteriorating base morality. All states launched massive ethics and morality programs built around the common core values that underlie all social rules and criminal laws. In addition, since Welfare Reform Acts had eliminated virtually everything of the old system, except for a “safety net” which was usually temporary, governments now routinely guaranteed full employment.

4. Violence had become almost a thing of the past, after the criminal justice delivery system (as it was now called) discovered and accepted the fact that more than morals were implicated in behavioral misdeeds, and began to treat offenders holistically with massive no-nonsense punishment, counseling, and therapy, all designed to prepare them for the civic responsibility required of all citizens. Indeed, the entire criminal justice system had been overhauled and now followed Cicero’s formula, *salus populi suprema lex esto* (the safety of the public shall be the first law). Now all offenders were sentenced to a program which gave them the necessary plan and tools to correct their deviant behavior. Those who would not cooperate or were incorrigible were securely and humanely contained.

5. A cashless economy had all but eliminated bank robbery, embezzlement, and many of the other economic acts that once were federal crimes. The vast recording system, now made possible by computer automation, had virtually eliminated the temptation for any form of fraud. Economic flow analysis was so easily accomplished that the profits from, and economic incentive to commit, crime, were greatly diminished.

6. Guns were now seldom used to facilitate crimes. First, the federal government and most states had passed laws setting firearm registration and licencing fees sufficient to cover the social cost of gun ownership and use. This

action had made handguns, automatic, assault-style weapons, and indeed, most nonsporting firearms simply too expensive to own. Second, federal and most state laws forbade carrying any concealed weapon. And third, rigid and tightly controlled licensing of firearms dealers made the casual sale of firearms impractical and the purchase of firearms difficult. Hence, firearms had become very hard to find for those who once would have used them to facilitate their crimes.

7. When sentencing was completely restructured in the year 2005, all guidelines and mandatory minimum sentences were eliminated and the federal courts returned to a humanitarian version of the old discretionary, indeterminate sentencing system, wherein the judge and a team of experts developed an Individual Action Plan ("IAP") for each person who was convicted of a crime. The team, or panel of experts, which usually included ethicists, psychologists, psychiatrists, geneticists, educators, and Rabbis and Ministers, all worked together with the offender to determine an IAP. The IAP was actually a contract, complete with consequences if any party failed to perform as agreed, between the government, the offender, and often the victim and the families of both the victim and offender. The same team then provided general oversight for the correctional process and the individual's progress, and accounted to the criminal justice delivery system, the other panels, the general public, the victim (if any), and the offender himself. The full accountability virtually assured eventual success.

8. Judge Skywalker thought wistfully back to the days of criminal trials. Most people who committed a crime now merely opted for a plea and an IAP. Appeals were almost nonexistent and recidivism rates were down to nearly zero under the IAP contract-sentencing system. Indeed, only the truly innocent or pathologically criminal went through a trial these days. Consequently, most trials resulted in outright acquittals or old-fashioned commitment to prison. Prisons were now, in fact, reserved for the pathologically antisocial and incorrigible criminals. Treatment of offenders in prison was, however, humane and supervised by the criminal's IAP panel. As a consequence, prisoner suits had virtually dried up. Judge Skywalker had never actually seen a prisoner suit, although she had heard of them. "How strange," she thought, "that we were once so ignorant as to punish everyone who erred, no matter the etiology of the crime."

9. She also never saw agency review cases anymore. A series of cases following *Chevron v. National Resources Defense Council*⁷ had "deferred away" any meaningful court review of them anyway. So, no one had much motivation to come to court for relief from adverse agency rulings.

⁷ 467 U.S. 837 (1984).

10. Lawsuits were simply not as numerous as twenty-five years ago. Legislatures, responding to a public outcry over attorney arrogance and the high costs of litigation, amended many laws and created alternate levels of dispute resolution that had simply obviated the need for many lawyers.

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Judge Skywalker's thoughts returned quickly to the present when her two colleagues logged onto the FedJurNet with her to create an "Appeal Report." Only the U.S. Supreme Court issued actual opinions now. Courts in the United States Court system merely issued official "Reports," which were entered and filed on the FedJurNet. The Reports were all per curiam,⁸ standardized in form, and announced the court's decisions on each issue with a brief explanation giving reasons for each ruling or interpretation of the law.

Judge Skywalker knew that the decision they would make today was of great interest to attorneys, and that the argument would be watched by many (all arguments were now publicly accessible to anyone with a computer), so she quickly checked to make sure nothing personal or private was visible on her screen. The argument went quickly and when it concluded, she and her colleagues, all working simultaneously on the same Appeals Report, quickly reached a consensus on each issue and created their concise report reversing the Court of Fact.

For several reasons, reversals were now rare. First, there no longer existed a "them" and "us" mentality between trial and appellate courts. Second, without separate circuits, circuit splits became a relic of the past. Unity was also promoted because different editions of "Reporters" for trial and courts of appeal no longer even existed. Further, the temptations for fact finding by the Courts of Review, and other forms of fudging the standards of review that were once employed by frustrated trial judges who sat upon courts of appeal, were gone because all judges were equal in judicial authority and stature. And, for a host of other reasons, not the least of which was a tremendous *esprit de corps* among the 1000 federal judges, all of whom now considered themselves the legal elite, the goals of the courts had become far less divided or divisive among the judges.

The Appeal Report just created by Judge Skywalker and her colleagues established new standards under which the Court of First Instance (occupied by judges who were once called Magistrate-Judges) could issue Certificates of Probable Cause to Sue ("CPCS"). Accordingly, they wanted to fine-tune the wording of their Appeal Report with great care. Under the new United States Court system, the American rule of fee-shifting had been modified so that an

⁸ This tradition began following the suggestion in an essay contained in the 1994-95 edition of *The Scribes Journal of Legal Writing*. See Richard Lowell Nygaard, 5 THE SCRIBES JOURNAL OF LEGAL WRITING 41, 51 (1994-95).

attorney and/or party who filed a cause of action without first petitioning for, and receiving, a CPCS indicating whether a triable cause of action existed, faced the prospect of paying both the defendant's attorney's fees and the costs incurred by the United States Court system if that party did not prevail at trial.

This Appeal Report was tagged as "precedential" because it decided a novel issue. Few reports were thus tagged, but when so denominated they became law until a later panel challenged the precedent. In that event, the possible conflict of opinion was noted on the FedJurNet and a group of seven other judges was randomly selected and automatically impaneled to review and report on the issue anew. The decision of this "Review Panel" then became law unless reversed by the Supreme Court. Reversal by the Supreme Court, however, was rare since about all the Court reviewed now were constitutional issues. Indeed, the Supreme Court was known among the profession as simply a "Constitutional Court of Review." Members of the Court, however, were still affectionately referred to as "The Nine Old Women."

The Appeal Report now reflected the thoughts of all three judges, so Judge Skywalker punched in her encrypted "signature," which was actually a voice command, a series of digits, and placed her hand on the scanning pad in order to verify her identity. Completion of these security measures signaled Judge Skywalker's permission for the report to be entered and filed on the FedJurNet. The automated system then asked the judges a few questions in order to set the issue in standardized form. That completed, each judge on the panel again completed the security measures and signaled approval. The computer then asked a few more linguistic questions as it translated the opinion into *Interlingua*, the vocabulary for international business, government, and law, and prepared the report for international dissemination. With the questions answered and the Appeal Report filed, Judge Skywalker signed off from her panel meeting.

It was nearly time for the other reports of the day to be published, so she logged onto the Report Bulletin Board to see what had been decided in the past twenty-four hours by both the United States Courts and the ICJ.

After reviewing the reports, she next logged onto the Direct Response Bulletin Board, an interactive area of the FedJurNet where public citizens could discuss with participating judges their responses to particular reports or decisions reached by the United States Courts or the ICJ. Indeed, since the public could now watch oral arguments and had unlimited access to certain "read only" areas of the FedJurNet, including immediate access to filed reports, Judge Skywalker was able to gauge first-hand the impact on the public of certain issues decided by the federal courts. Although at first she had reservations about judges discussing legal principles and issues with the public, as Judge Skywalker had become more secure in her position, she had come to

believe that interactive dialogue provided great benefits for the law, both conceptually and practically. Indeed, now that citizens were afforded the opportunity to participate in legal debates, their opinions about the law and the role of judges in interpreting and applying the law had begun to change. The public no longer considered the law to be a mysterious and foreign entity, fully divorced from the realities of their own lives. Rather, they began to develop a greater respect and appreciation for the necessary role of the courts and the importance of the rule of law in society.

So too had public opinions about judges shifted. Through interaction with judges over the FedJurNet, citizens had come to better understand that judges were human beings who brought particular values, beliefs, and life experiences with them to the bench. As such, people were generally less quick to criticize judges and seemed to recognize that judges were often asked to make very difficult decisions concerning fundamental moral and ethical questions. The importance of these shifts in public opinion, Judge Skywalker noted, was that public confidence in the judicial system had never been higher. This marked a significant difference from the way the nation felt about the judicial system during the last decade of the 20th century when it had become the object of scorn for some legislators and executives who knew better, and a general public that did not.

She then logged off her computer; and, because I have rattled on far too long, so will I.