What Is the Role of the Judge in Our Litigious Society

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TWo aspects of this lecture are daunting, causing me to question my qualifications for the task. First is the fact that it is part of the Donald A. Giannella Memorial Lecture Series. Professor Giannella was a brilliant man and I quake now standing before you to deliver a talk in his name almost as much as I quaked as his finger (actually his whole arm) darted from student to student in search of the right answer in his labor law class. And he knew who would have the answer—when his finger rested pointing at someone not known for immediate insightful responses, the finger would pause for a nanosecond while the realization of his error reached Giannella's brain... then the finger would move abruptly to point to a more reliable victim. I should note that my knees were also shaking at another event when Professor and Mrs. Giannella were in attendance: they were at our wedding nearly twenty-five years ago.

Professor Giannella's brilliance was equalled only by his remarkable caring for his students and his ability to inspire them. Both Ed and I valued the Giennellas as friends, and Ed particularly valued Professor Giannella as a mentor.¹ I am honored to have been invited to participate in this commemorative lecture series.

The other daunting aspect of this lecture is my topic. How dare the rookie be so presumptuous as to voice her views on what a seasoned player does (or should do)—especially when the audience includes several of those currently "on the bench" (pun intended)? I caution, therefore, that my chosen subject caused me not to draw on my years of experience, but rather to explore the

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¹ Mr. Edward Rendell is Judge Rendell's spouse and is currently serving his second term in office as Mayor of the City of Philadelphia.
ever-changing role of a judge by way of research and reflection. If I am didactic at times, it is only the former lawyer in me creeping back, longing for the proselytizing way of life when to convince (whether client or judge) was the goal. I certainly don’t claim to be an authority on my chosen subject at this early stage of my judicial career.

The inquiry which is the subject of this discussion, namely, “What Is the Role of the Judge in Our Litigious Society?,” can be interpreted in as many ways as there are listeners. To one, it may be perceived as asking whether Judge Ito did a good job; to another it may be viewed as inquiring about judicial activism or “legislation” by judges; yet to others, it may echo the cry for help of a harried, overworked benchsitter—not unlike the question, and I quote: “What’s a mother to do?” These differing interpretations of the question illuminate the immense difficulty of divining an answer.

The role of the judge as one who presides over trials and assists the jury in understanding legal issues is of course the most popular and usual depiction. While sometimes donning a wig (as in the British courts) or a southern accent (as in My Cousin Vinnie), but always donning the robe, the universal view of judge as trial overseer is as a character larger than life, above the fray, exuding dignity and dispensing justice for all.

The statue of Justice—regal, impartial, literally blind to any outside influence on her measured judgment—is a familiar symbol of judicial demeanor. Professor Judith Resnik has described how this personification of Justice represents the traditional view of the neutral judiciary:

> The goddess herself—aloof and stoic—represents the physical and psychological distance between the judge and the litigants . . . . Justice is unapproachable and incorruptible. The scales reflect evenhandedness and absolutism. The sword is a symbol of power, and like the scales, executes decisions without sympathy or compromise. Finally, the blindfold protects Justice from distractions and from information that could bias or corrupt her. Masked, Justice is immune from sights that could evoke sympathy in an ordinary spectator.

Federal judges, seen in the light of this image of justice, have traditionally been presumed to play their most important role at

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The judge is overseer and umpire. However, the traditional role of the federal judge was never limited to that of a mere umpire. Instead, the judge has always been “the governor of the trial for assuring its proper conduct.” In the exercise of this power, the trial judge has the prerogative and, at times, the duty of eliciting facts necessary to the clear presentation of issues. To this end, she may examine witnesses who testify, as long as she preserves an attitude of impartiality and guards against giving the jury the impression that the court believes that one side or the other should prevail. The blindfold on the statue of Justice symbolizes this impartiality, a necessary element in an adversarial system. The integrity and independence of the judiciary is mandated and assured, its separateness from the executive and legislative branches a hallmark of our system. This was thought important by the framers of the Constitution as a safeguard against government tyranny over people, their rights, and their property. Justice’s blindfold represents not only an attitude of impartiality in the case at hand, but also an institutionalized blindness to outside influences from other branches and other sectors.

The perception of the judge as isolated and removed has historically carried over into the reality of what a judge does, day to day, in connection with the matters before her. Traditionally, judges have remained above and removed from the more unseemly aspects of litigation—the filing of papers, trial preparation and discovery, settlement negotiations, and other attempts to resolve cases amicably or short of a full-blown trial by jury. The traditional judge was aloof and isolated, holding the scales at arm’s length. Due to the adversarial nature of our system, the parties controlled the pace and shape of litigation. They defined the case or controversy; the judge merely acted as listener, observer and occasional inquisitor. The macro aspects of the system—the number of cases filed or the progress of cases before them—were not the judge’s concern. It was in most chambers anathema to urge a resolution of disputes other than by a constitutionally-guaranteed trial by a jury of one’s peers.

4. Gordon v. United States, 438 F.2d 858, 864-65 (5th Cir. 1971) (citing United States v. Tyminski, 418 F.2d 1060, 1062 (2d Cir. 1969)).
5. Resnik, supra note 2, at 448.
All that has changed. To say that the discrete role of judges in 1995 is to preside over trials is like saying that the role of women in the 1990s is to care for the home. Surely, we do that, but we do so much more. Analogies can easily be made between the expansion of the roles of judges and of women, especially those with children, in these fast-moving, no-holds-barred times. The complexity of society, the awakening of individuals to ever-increasing needs, rights, and desires, the advent of technological advances, to say nothing of the countervailing pressures of time and money, make the role of a judge, and that of a parent today, challenging indeed. The teenager was content to wear sneakers until someone called them Nikes, said you had to have them and slapped a $130 price tag on them. Counsel were content to correspond and informally exchange information in preparation for trial with little or no judicial involvement until someone enacted the Federal Rules of Civil Procedure and discovered you could charge fees not only for trial but for hours spent in pretrial discovery. Judges and parents must moderate these influences. I belittle neither of these callings by the foregoing remarks, just note the reality of life in our times.

With the advent of the Federal Rules of Civil Procedure, the judge joined the fray. Justice no longer merely holds the sword as a symbol of power, but wields it actively through involvement at every turn. She monitors not only the trial, but all aspects of litigation—especially the discovery phase and pretrial proceedings.

At the same time as the procedures have been expanded, the basic rights of individuals for which there are remedies, and citizens' awareness of these rights and readiness to seek recourse in the courts, have increased greatly. The number of civil cases has doubled in the last twenty years, with 239,000 civil cases filed in 1995. This reflects an increase of 15% in the last four years alone. Criminal cases in the federal courts have increased as well—filings in 1994 were 58% higher than in 1980. The average district court judge's caseload in 1994 consisted of 396 civil and 58 criminal cases.

The pressures that have resulted from this burgeoning litigation are most readily translatable into concerns over time and money. The time it takes to prepare for trial, try the matter, and

9. Id. at 1582.
appeal, can in itself be a disincentive to litigants—justice delayed is justice denied. Time and enhanced procedures that take even more time translate into greater cost. Litigants must question whether they can afford to vindicate their rights.

Public outcry against the time and expense of litigating caused Congress to preempt the debate by enacting the Civil Justice Reform Act of 1990 (CJRA). As Senator Biden, the primary proponent of the CJRA, indicated, the CJRA “was intended to reverse a recent trend in which one’s bank balance, rather than the merits of the case, controlled a decision to file suit.” According to Congress, the problems of cost and delay, coupled with limitations on judicial resources, were threatening the “just, speedy and inexpensive resolution of civil disputes in our nation’s federal courts.”

Congress’s broad goal in enacting the CJRA was to instigate changes in district court procedures to make the litigation process more efficient. Each district was required to develop a plan to reduce cost and delay, incorporating many specific legislatively defined procedures. The legislation prescribed differentiated case management, a discovery-case management conference in each case within a few months of a responsive pleading, early setting of trial dates, tracking specific discovery procedures and a provision for alternative dispute resolution. Our own district plan calls for early, firm trial dates—within twelve months of filing in standard cases and eighteen months for complex cases—pre-trial conferences, settlement conferences, self-executing discovery, and court-annexed mediation and arbitration. Additional refinement of pre-trial conferencing and discovery procedures occurred with amendments to Rules 16 and 26 in 1993, grafting even more judicial oversight onto the pretrial phase. Thus, the judge’s roles now include lion tamer, shepherd, timekeeper and director. She is not only in charge of quality control, but also must monitor and insure the progress of the product as it moves along the assembly line.

The judge’s early involvement in pretrial discussions and discovery, through conferencing, must be effective. The judge cannot merely dabble in the case, but must immerse herself in the substance of what is going on in order to be assessing the relevance—

13. Id.
or lack thereof—of discovery requests. The Federal Rules not only bring about more occasions for judicial involvement and control, but more need for judicial understanding, early on, of all aspects of the case as it progresses, as well as an understanding and perception of the parties' strategic and substantive needs. Quality time must be given to this task—parenting and psychiatric skills are of value.

While shepherding the cases along, careful that none stray from the fold, the judge must make room for the determination of motions in her copious free time. The roles of speed reader and juggler are thus added, as well as that of interpreter of foreign tongues. Summary judgment is now in favor, and summary judgment motions of six inches or more in thickness predominate. The court's ruling on an issue rarely depends upon a clear legal principle, but rather upon whether defendant's mound of evidence will meet plaintiff's mound of evidence, and raise it one. In fact, I find it curious that summary judgment motions are thought to be an economical way of avoiding trial when they, in and of themselves, are costly undertakings indeed: costly to litigants in terms of attorney hours devoted to their preparation, and costly in terms of the expenditure of judicial time and effort. Once the motion, the answer, the reply and the surreply have been filed, the judge then examines the four corners of the 1500 pages of deposition testimony and determines whether there are genuine issues of material fact—any one of which would thwart the entire motion—and whether movant is entitled to judgment as a matter of law. You might scoff at this and suggest that this is law clerk's work (and sometimes it is, but usually because of the press of other matters, not because the judge prefers it this way). Pennsylvania Superior Court Judge Spaeth commented on his *modus operandi* in addressing appellate cases before him:

I have four clerks. That is too many to permit proper supervision. I ask each clerk to draft at least six opinions a month. That asks more than is wise; only the ablest and most diligent clerk can meet such a norm and still do good work. I rarely read the entire record of the trial testimony and documents, usually reading only those parts that seem from the briefs or my clerk's draft opinion likely to be critical. In reviewing a draft opinion, I often accept the clerk's exposition, so that my revisions are mostly stylistic. Sometimes I do not read the record at all. In deciding whether to join the opinion of another judge, I often ac-
cept the judge’s statement of the record, on my clerk’s as-
surance that the statement is accurate. In ruling on
motions, I usually rely on summaries and recommenda-
tions prepared by the staff attorneys and my clerks. . . . I
assent to every criticism that may be made of this
breakneck way of doing things. I am sure that I should
have decided some cases differently had I proceeded in a
more deliberate and thorough way. But what else can I, or
any judge like me, do? The cases keep piling up. They
must be decided.14

It would be ideal for a judge to have the time to address each
summary judgment motion from start to finish—but it just isn’t
possible. Judge Spaeth’s comments express the frustration of not
having the time to do so.

The advantage of the judge’s involvement in so much pretrial
prodding and prognosticating is that the judge’s opportunity to ex-
plore settlement possibilities increases. Although a judge’s involve-
ment in settlement discussions can present ethical problems
(specifically, where the matter is non-jury, or where a summary
judgment motion is pending or anticipated), in reality many civil
cases do settle, and it is better for all parties that the judge broaches
this issue early and often. A judge who is informed and takes an
active role is more likely to succeed in promoting settlement. As
one commentator has suggested:

[T]he judge who is likely to contribute most to the settle-
ment dynamic is active rather than passive, analytical
rather than emotional or coercive, learns the facts and law
involved in the dispute instead of relying on superficial
formulas or simplistic compromises, and, after listening
and learning with an open mind, offers explicit assess-
ments of parties’ positions and specific suggestions for
ways to reach solutions . . . . [T]he judiciary’s status and
unique perspective converge to create a special potential
for assisting in this sensitive business, but . . . this potential
can be realized only by judges who, first, do their home-
work, then muster the courage to express their views and

14. A. Leo Levin & Michael E. Kunz, Thinking About Judgeships, 44 Am. U. L.
Rev. 1627, 1640-41 (quoting Edmund B. Spaeth, Jr., Achieving a Just Legal System:
The Role of State Intermediate Appellate Courts, in 462 THE ANNALS OF THE AMERICAN
ACADEMY OF POLITICAL AND SOCIAL SCIENCES 48, 55 (A. Leo Levin & Russell R.
Wheeler eds., 1982)).
the self-control to do so tactfully. 15

Settlement is an aspect of litigation that must be shepherded by a judge with full knowledge and understanding of the case. A judicial foray into settlement discussions without full knowledge will not only cause the parties to lose faith in the judge’s ability to help them devise a settlement, it could also be interpreted as a lack of impartiality if, for instance, the judge is more aware of the facts or law favoring one side of the argument than the other.

Another time-intensive aspect of being a judge is the complex task of sorting out the state of the law. As the years go by and the law library shelves—or disks—become overloaded, the task becomes more and more challenging. My rudest awakening on taking the bench was the realization that upon reading the briefs submitted, I did not experience an immediate epiphany as to the applicable law or the right result. Rather, the briefs are the proverbial tip of the iceberg and the judge had better have a very sharp pick—or law clerk—to succeed in discovering the truth. Rarely is the key salient fact or case laid bare by the parties; it must be unearthed by the judge, with the help of the law clerk’s research. Deciding a case, often thought of by the uninformed as somewhat like umpiring a game, is more like an archaeological dig—certainly not a superficial judgment call.

Practices and procedures adopted to deal with the increasing case load and time-intensive nature of the judge’s workload have been successful in sharing some of the judge’s roles with others. Particularly significant have been the experiments in alternative dispute resolution, where arbitration and mediation techniques have effectively diverted certain cases from the court’s docket. The judge may also use magistrate judges and masters to handle certain aspects of the litigation process: magistrates may handle discovery matters, settlement conferences, or actual trials; masters can be referees, examiners, and assessors under the Federal Rules. 16 These resources can help the judge to move cases along without sacrificing the quality of justice.

While the role of the judge has evolved greatly over the last several decades, with a premium being put on management ability

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16. For a discussion of judicial approaches to dealing with an increasing caseload, see generally A Taxonomy of Judicial ADR, 9 ALTERNATIVES TO THE HIGH COST OF LITIGATION 97 (July 1991).
and early in-depth involvement in cases, the challenges of the present and the future for each judge, and the system as a whole, will be in reacting to continuing change. Changes over the last several years reflect a trend in the types of cases coming to our courts that will tax the system, and individual judges, even more. The proliferation of complex cases in recent years proves this point. While the number of antitrust and securities cases of past decades has remained constant, or even decreased, the growing complex case of today is the civil rights case. Civil rights cases now account for 15% of our civil case load as compared to 8% in 1980. In the last four years, more statutory cases were filed than contract, real property, and tort cases combined, and civil rights cases as a part of that grew from 19,000 civil rights cases of 118,000 statutory cases filed in 1990 to 35,500 of 155,000 statutory cases filed in 1994. While the numbers themselves are not overwhelming, the time-intensive nature of the cases makes them significant. Civil rights cases differ from traditional federal court cases. They are imbued with a very personal, human element. At the heart of a civil rights case is the plaintiff’s belief that a basic right has been denied—a family has been terrorized in an allegedly improper police search; a woman has been discriminated against because of her gender; a man complains of termination from his job due to his disability. The claims are tied up with the dignity of the individual; thus, they are sometimes difficult to resolve on an amicable basis. Discovery in these cases is necessarily intense, requiring a broad scope of relevant evidence to be explored. Summary judgment motions are inevitable, with each defendant arguing that the mountain of facts adduced still does not meet the legal standards which, in areas such as immunity and discrimination, are in and of themselves a judicial minefield. It is interesting to note that our federal courts—traditionally courts of first resort for recognition of individual rights and liberties under the Constitution, but which for a time were perceived as the repository of corporate and securities law litigation—are now once again the people’s court, where the downtrodden can and do seek redress. With the passage of legislation such as the ADA and last year’s crime bill, more Americans will be approaching our federal courts to redress their basic individual rights. Vindication of individual rights in past decades was sometimes a conceptual


dilemma—an individual’s right to wear his hair a certain length, the propriety of the search of one’s school locker. Today, the determination of civil rights is a heavily fact-driven and system-taxing arena. And Congress continues to add causes of action to federal court jurisdiction, responding to constituent demand for more and easier access to courts.

In addition, while I firmly believe that the quality of justice varies not one iota depending upon the nature of the party before the court, it cannot be denied that the impact of the system on different kinds of parties does vary. Individual plaintiffs who believe that defendants have violated their civil rights identify keenly with their litigation and with the success or failure of their cases. They must understand the limits of what the system can do, and while they hope that the system will make things right, failure can be devastating. Judges assigned such individual civil rights cases may take on the additional role of educators, informing those before them that the courts cannot always right every perceived wrong, but are limited to judging facts and circumstances based upon established precedent together with developing legal standards.

Another recent change is the proliferation of drug cases. The sheer number of drug cases has reached crisis proportion in some jurisdictions. When criminal cases abound, civil cases suffer. Many of these criminal cases are conspiracy cases involving multiple defendants, proof dependent upon wiretaps and informants, and novel legal issues, not only at trial but in the pretrial and sentencing phases as well.

Between 1969 and 1994, while the number of criminal cases rose slightly, the proportion of drug cases increased fourfold, and now represents nearly one-third of all criminal cases, and 40% of all defendants.19 Drug possession cases have declined substantially, while distribution cases are on the rise. The distribution cases have a high defendant-to-case ratio, which increases the time for disposition of charges and demands more judicial time. The same number of drug cases that would have required 713 hours of judicial time in 1973 required 953 hours in 1994, due to changes in the mix of cases and the number of defendants per case.20 Sentencing in these cases is complicated by the Sentencing Guidelines,21 which involve more of a judge’s time than discretionary sentencing did in

19. Cook et al., supra note 8, at 1586.
20. Id. at 1588.
the past. Also, there are more criminal trials than ever before, with the number of trials rising more than 12% between 1987 and 1994.22 The Speedy Trial Act23 requires these cases to move rapidly to trial, and the number of civil trials has fallen by 21% as the courts must devote more time to their criminal docket.24

In addition, public law cases continue to challenge the courts. Public outcry that courts should not legislate is all well and good, but cases and controversies will continue to be brought in our federal courts seeking a mandate, and a remedy, to carry out the purpose and intent of the Constitution and our federal statutes. The changes sought are not accomplished by a simple court order. The more reluctant parties are to agree to fashion a constitutional remedy on their own, the greater the demand on the court to fashion one. And the more reluctant public institutions are to expend funds to assure compliance with the court-ordered maintenance and protection of individual rights, the more judicial oversight will be required, and the more embattled this area will become. Whether for better or for worse, these cases will increase in number, causing judges to devote their key judicial resource—time—to resolving these demanding cases.

None of the cases just described are appropriate for wholesale diversion to an arbitration system or referral to a magistrate. Nor can they be resolved simply by being “moved along.” The complaining parties in these cases—aggrieved plaintiffs and criminal defendants—generally resist efforts to move their cases along because of the nature of the preparation required and the extent of the rights involved. Also, the attorneys typically involved in these types of cases are usually understaffed and overcommitted. The CJRA requirements, while effective in facilitating procedures in “typical” disputes, are not always readily adaptable to atypical or complex cases. As one commentator has noted, “The reforms assume and facilitate a procedural system hospitable to litigants with disputes involving well-settled legal principles. Efficiency reforms make expendable those raising difficult and often tenuous claims that demand the re-ordering of established political, economic and social arrangements, that is, those at the system’s and society’s margins.”25

22. Cook et al., supra note 8, at 1590.
The CJRA plans put cases into nice little boxes to be moved along at a fixed rate of speed. There is little consideration of quality control, as such, but the judge, wearing two hats—quality control and assembly line monitor—knows that both aspects of the case are her concern. Moving the case along without concern for the substance of what is happening is not only a useless act, but it just doesn’t work. Images of *I Love Lucy* with Lucy on the assembly line in the candy factory come to mind.

The challenge that faces us as judges today is complex. We have left the serene valley of merely judging cases and preserving and protecting the body of law, and have been told to take an uphill path—as plotted by the CJRA—to become more efficient and manage our caseload. We are making progress up the mountain, but an avalanche may be headed our way. The fact that a path of rules and procedures is concealed beneath the snow is not really going to help. We have recognized the need and have begun to look at ways to handle the avalanche, gathering ideas through judicial study committees as to the most effective approach. With the passage of the CJRA, the imposition of guideline sentencing, and the federalization of many crimes, we have come to realize that the future path of our courts, if not addressed by us now, will be plotted by others who may have less understanding and perspective of the needs of the system and the litigants.

What reforms will address current and future needs, and who should determine the reforms to be implemented? It is important to recall that the requirements of the CJRA were imposed by Congress without consulting the judiciary, and caused great outcry in the judicial community. The idea of Congress legislating how judges should do their jobs was probably as popular as such unsolicited interference would be to any professionals who valued their individual and informed practices and procedures—witness physicians’ responses to proposed health care reform legislation. This was not the first sign of Congress’ muscle-flexing by legislating how judges do what they do, as evidenced by the Sentencing Reform Act of 1984—enacted to make judicial sentencing “certain” and “fair.” But the passage of the CJRA was perhaps a call to arms. When last year’s Crime Bill was proposed, the judiciary was actively involved in the dialogue, informing Congress of the impact


the bill's provisions would have on the judiciary, litigants and the court system as a whole.

The last several years have seen increased initiative from within the judiciary to assess the impact of legislation on the judiciary and to talk with Congress about proposed legislation. Commenting on the need for these planning efforts, Chief Justice Rehnquist said:

Some may well note the irony that at a time when all of us are challenged more than ever just to get through our daily workload, we have chosen to develop a strategic vision and think about what we'll have to do in the future. My response is that we cannot escape the future technological, societal, economic and demographic changes that may challenge conventional assumptions about how the federal courts system does its business. If we don't look over the horizon, and at least have the discipline and the structures in place to meet anticipated changes, we will simply be swept along in the currents of change.  

The first step in the planning effort came in 1988, when Congress established the Federal Courts Study Committee (FCSC) to identify problem areas and recommend improvements. The Judicial Conference of the United States adopted the FCSC recommendation that a specific planning committee be formed. The Judicial Conference established a long range planning committee which met twice as frequently as other committees. Soon after, a long range planning office was created in the Administrative Office of United States Courts. As commentators have noted about recent planning efforts: "If any fundamental change in outlook occurred in the federal courts, it might be characterized as recognition that remaining a purely reactive institution meant forfeiting its ability to influence the plans that others make for it." Failure to plan allows uncontrolled external forces as well as unfocused internal forces to become the major causes of change. The combination of external and internal forces is likely to bring about significant strategic change in the federal courts.

Federal judges today are starting to view their roles not only as

31. Id. at 1607.
the guardians of our body of law, but also of the system itself. This view, however, is not shared by everyone. The Mercer Law Review’s recent federal judicial independence symposium issue includes an article by Senator Orrin Hatch, focusing on threats to judicial independence.\textsuperscript{32} Senator Hatch hastens to reassure the reader that Congress has no desire to lower judges’ compensation—a matter near and dear to our hearts—and that Congress has no intention of becoming involved in the adjudication of specific cases. But Senator Hatch states a strong belief that “Congress has full authority to prescribe procedural as well as substantive rules for the federal courts,”\textsuperscript{33} stating that “so long as the procedural rules are not designed to control or interfere with a particular case, decisional independence would appear not to be at stake.”\textsuperscript{34} It is clear that all but direct involvement in a case is viewed as fair game for legislation.

As this view continues to prevail, judges are becoming involved in yet another fray—heightening their own level of accountability and trying to improve communication with Washington. The need for constructive communication is demonstrated by recent legislation reflecting frustration and mistrust of the judiciary on the part of Congress. As an example, Senator Grassley has recently introduced legislation that would drastically cut back on the funding for circuit conferences and would place limits on location, in reaction to a Ninth Circuit conference held in Maui, Hawaii (which does happen to be in the Ninth Circuit).\textsuperscript{35} Clearly, some members of Congress believe that too much money is spent on these conferences—more money than they are worth. We are challenged to prove the worth of activities such as judicial conferences as worthwhile educational tools. Perhaps we need to use these conferences as a marketing tool for the judiciary as well—not only by experimenting with new ways of conferencing at lower cost, but also by focusing in these conferences on areas that are of concern to Congress as well as the judiciary, such as how to improve judicial performance and the effectiveness of the system.

A difficulty we face as judges in effecting change is that the federal courts are governed in large part by agreement, consensus and pride, with no hierarchical structure akin to those found in

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  \item \textsuperscript{33} \textit{Id.} at 662.
  \item \textsuperscript{34} \textit{Id.} at 662 n.3.
\end{itemize}
executive branch agencies or private sector organizations to mandate plan formulation and manage implementation. Planning for the future implies change; as commentators have noted: "[M]anaging change is a different endeavor for the federal judiciary than for many other organizations. The unique organizational and collegial decision-making structure that characterizes the courts presents challenges to designing and implementing a planning process that other institutions with more hierarchical lines of authority do not face."\(^\text{36}\)

The Judicial Conference, the committees of the Judicial Conference, the Director of the Administrative Office—all these representatives are, in fact, engaged in this effort. As the Judicial Conference communicates the interests and concerns of the judiciary to Congress, however, one obstacle it faces is the difficulty of "speaking with one voice."\(^\text{37}\) Every proposal has its detractors. For example, views on appropriate alternative dispute resolution techniques abound.\(^\text{38}\) And the detractors are not shy, with dissenters working as vigorously and vocally as the voices of reform. Faced with divergent lobbying efforts, Congress may become frustrated and impose the brand of reform it thinks its constituents will applaud. The importance of developing an institutional voice is clear, and support for that voice, rather than for the occasional dissent, should be the norm.

The judiciary, on its own and with the approval of Congress, is working to come up with new ideas for effective and efficient handling of the increasing case load and of new types of cases—which could be the topic of a lecture in and of itself. We have the duty to build consensus among our ranks, to inform Congress of our needs, and to work to implement reforms to maintain the quality of the system. Incentives to the circulation and support of new ideas would assist this process. Judges should be encouraged to do more than just follow what was done yesterday—which is our task vis-à-vis interpretation of the law—or go along with whatever everyone else does today—which is what is appropriate under the Federal Rules. Judges should be urged to develop new ideas for the future.

The disincentive to instituting novel techniques on an individ-

\(^{36}\) Hoffman & Lucianovic, supra note 28, at 1624 (quoting NATIONAL ACAD. OF PUB. ADMIN., LONG RANGE PLANNING IN THE FEDERAL JUDICIARY 7 (1992)).


\(^{38}\) See, e.g., G. Thomas Eisele, The Case Against Mandatory Court-Annexed ADR Programs, 75 JUDICATURE 34 (1991) (criticizing court-annexed mandatory ADR programs as costly and unfairly coercive).
ualized basis comes from our concern for the authority that we have, or wish to exercise, to vary from standard rules of procedure, as well as a concern for the quality of justice. There is an understand-able tension between creativity and continuity, which may be unavoidable given a system built on the predictability of laws and procedures. While it may have been desirable to require trials of standard matters to occur within one year (and more complex matters in eighteen months) as provided in our local Civil Justice Reform Act Plan, imagine the reaction if one of my colleagues had imposed this as an individual rule in his or her court. Certainly, the justice handed out in that court would have been perceived as different from others, and challenges or criticism might have been leveled against this arbitrary imposition of a novel rule. Today’s judicial atmosphere does not promote innovation, but innovative programs and ideas should be encouraged as part of the planning process if the federal courts are to succeed in preserving and promoting the quality of justice.

In order to accomplish this goal, we must take on a role that has been difficult and uncomfortable in the past, that of communicating with Congress and making legislators aware of the judiciary’s views and needs. While such communication has been viewed as unseemly or inappropriate due to the historical separation of powers, the benefits to be reaped through communication and understanding, and the underlying theme of improvement of the judicial system, makes it a necessity. Add these new roles—innovator, planner and communicator—to the roles already discussed, and the role of the federal judge today is varied indeed.

I have made a few references to parenting—specifically motherhood—along the way, and perhaps it is not that absurd an analogy. Judges are, like parents, overseers of the day-to-day activities—the case crises, as well as the progress—but at the same time, stewards of the environment, charged with preserving it for the sake of future generations. Judges enjoy the role not only of ensuring that effective, quality justice is meted out in their courtrooms today, but that the system remains capable of providing a superior quality of justice in the years to come.

In closing, I want to caution that these observations are offered as food for thought. The challenges that face us are great—challenges that require us to re-think our roles. There is no one answer or direction, but we all must find our way through our own judicial

day, and judicial career. And no matter how challenging, it is an honor to serve, and a privilege to explore, these many roles. I must also note that for a year and nine months I have been privileged to serve on the bench with a remarkable group of colleagues. I am in awe of how many roles they fill ably, with integrity, intelligence, diligence and caring, and I am discovering each day how much more I have to learn about the role of a judge in today's society.