Federal Court Governance

Why Congress Should— and Why Congress Should Not— Create a Full-Time Executive Judge, Abolish the Judicial Conference, and Remove Circuit Judges from District Court Governance

Russell R. Wheeler
Gordon Bermant

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We sent a draft of this paper in late December to several people for review and reaction, and are pleased to acknowledge the comments and assistance received from Judge Sarah Barker, Judge Edward Becker, Judge John Coughenour, William Eldridge, Judge Wilfred Feinberg, Judge Martin Feldman, Steven Flanders, Judge Ralph Guy, Denis Hauptly, Robb Jones, Judge James Lawrence King, Judith McKenna, Director L. Ralph Mecham and his colleagues at the Administrative Office of the U.S. Courts, Chief Judge Michael Mihm, Judge Virginia Morgan, Chief Judge Diana Murphy, Wendy Pachter, Judge Elizabeth Perris, Judge Otto Skopil, Sylvan Sobel, Chief Judge Michael Telesca, Thomas Willging, and Judge Harlington Wood. We also express our gratitude to the staffs of the Planning & Technology Division and the Information Services Office and the Editorial Office of the Center for their assistance in helping us throughout the preparation of several drafts of the manuscript.

In fairness to the reviewers named above, we note that some of them emphasized their disagreements with the proposals for change analyzed in this paper, or asserted their belief that no changes were needed, or, indeed, questioned the value of the paper in its entirety. Responsibility for all errors of fact and interpretation rests with the authors alone.

A Note About Method

This paper analyzes the current federal court governance arrangements and alternatives to those arrangements. In Part V we offer arguments supporting change and responses to those arguments. The alternative arrangements we offer for analysis include such ideas as creating a full-time executive judge for the federal courts, leading to a less active role for the Chief Justice; establishing a policy-making body different from the Judicial Conference; merging the Administrative Office of the U.S. Courts and the Federal Judicial Center; relieving appellate judges of district court governance responsibilities; and implementing a different way of selecting chief judges.

We are grateful to several reviewers of a preliminary draft who emphasized the importance of explaining our purpose. Lest our goal be misinterpreted, we want to spell out as clearly as we can what we are, and are not, trying to accomplish.

First, we are neither promoting the changes we discuss nor defending the status quo. We do not endorse the criticisms of the current arrangement or the responses to them, and we do not endorse the alternative arrangements or the responses to them. We have drawn these arguments, pro and con, from observations of current operations over the years and conversations with the participants. We think that some of the arguments, both pro and con, are much stronger than others. However, we think that at this point in its long-range planning process, the judiciary will be helped by a chance to assess many conflicting points of view, organized within a single coherent framework. Our hope is that the paper stimulates focused analysis and discussion.

Second, we chose the particular alternatives to analyze because they allow discussion of ideas currently under inquiry. Every aspect of federal court governance discussed here has already been put on the table for analysis by individuals or groups within the judiciary. One indication of the current interest is the list of questions included in the Judicial Conference Long Range Planning Committee's invitation to participants at its March 1994 retreat on governance; the invitation appears in Appendix A. To be sure, other al-

ternative arrangements have also been offered and are under discussion. We reference some of these alternatives in the body of the paper, and we list them and others in a coda at the end of the paper.

Third, at several points, we use the format of statutory amendments to describe alternative governance arrangements and how they differ from current operations. Those familiar with the legislative process will recognize that these presentations are not in any form that could be submitted as legislation, and they know that preliminary draft statutes often serve mainly to encourage debate and to accommodate revisions resulting from that debate. We hope the statutes we have drafted serve the same function. The statutory format has a second advantage: It forces readers to confront how in fact a new system might work. For example, it is easy enough to argue that circuit representation on the Judicial Conference favors smaller circuits over larger circuits and circuit judges over district judges. However, one's enthusiasm for changing those conditions may cool when one is forced to weigh the pros and cons of an organic statute drawn to eliminate the disproportionality.

Fourth, we do not suggest that the alternatives we analyze must be treated as a single package, to rise or fall as a unit. Although we present a hypothetical governance arrangement with systematically connected parts, readers are likely to conclude that some parts are attractive and others are not. More district judges, for example, will support the idea of restricting council membership to trial judges than will support the idea that a single national judicial official should select all the chief district judges. To repeat, our goal has been to lay the various ideas out on the table for analysis and discussion.

Fifth, some reviewers suggested that any useful analysis of alternative arrangements must be preceded by a detailed assessment of how well the current system is operating. Why, some reviewers asked, did we not specify clear-cut criteria of successful federal court governance and then use those criteria to analyze the actual operations of the current system and assess the quality of leadership, communications, personnel and resource management, and other attributes? We did not do that for several reasons, only one of which is the difficulty any judicial branch employee would have in

performing the task in a politic manner, at least without extensive negotiations and agreements with the many constituent elements of the current governance system. We also believe there is some danger of a long-range planning process becoming overinvolved in examining present-day issues and losing sight of the system's capacity to respond to conditions that may be on the horizon. At this point in the planning process, the need is to paint with a somewhat broader brush, to set out a range of criticisms and defenses in an organized analysis that, we hope, many judges, staff members, and outside observers of the courts will read and weigh in light of their own experiences. If the paper serves only to confirm that current governance arrangements are up to the task and should be defended against charges to the contrary, it will have made a contribution to the courts' long-range planning process.

We hope this paper will stimulate others to respond in various ways, including, for example, writing separate monographs on specific topics, arising perhaps from the work of individual study groups.

Introduction

This paper analyzes the structure and practice of federal court governance. It first describes the current governance arrangement. It then articulates the implicit assumptions on which the current arrangement appears to rest. Next, it offers arguments for and against a detailed set of alternatives, as a way of assessing the strengths and weaknesses of the current system. The final part returns to the underlying assumptions of the current governance arrangement, reassessing those assumptions in light of the analysis of alternative arrangements. The paper does not review all of the important questions about federal court governance. For example, it does not raise explicitly the question of the balance of authority and power between the Judicial Conference, the circuit councils, and the district courts, though some of the arguments presented implicate these relationships. (The final part includes a coda with suggestions for modest adjustments in the current governance arrangement—suggestions that emerged during our analysis of more far-reaching changes but do not rise to the level of long-range planning.)

The paper does not assume that there is a crisis or emergency in the current governance arrangement that must now be addressed. Contrary to the otherwise sound advice that unbroken things should not be fixed, the paper serves the purpose of long-range planning by looking beneath and beyond the apparent current effectiveness of federal court governance to assess its vitality and its capacity to meet new challenges during the next several decades.

This paper is one of six in a series analyzing important planning topics facing the federal judiciary.[1] We repeat here the disclaimer that is standard in every paper of the series: The paper does not present an official Federal Judicial Center position on the argu-

1. The first two papers in the series are Gordon Bermant et al., Imposing a Moratorium on the Number of Federal Judges (1993) and William W Schwarzer & Russell R. Wheeler, On the Federalization of the Administration of Civil and Criminal Justice (1994). Subsequent papers will address alternative dispute resolution, criminal adjudication and sanctions, and the impact of demographic diversity on the federal courts.

ments it contains. The paper responds to the Center's mandate to "conduct research and study of the operation of the courts of the United States, . . . to stimulate and coordinate such research and study on the part of other[s], [and] to provide staff, research, and planning assistance to the Judicial Conference of the United States and its committees."[2]

2. 28 U.S.C. § 620(b)(1)(4).

Part I: Why Examine Federal Court Governance Now?

There are several reasons why the federal judiciary is reviewing whether its current governance structures and procedures will be adequate in the future. Some judges and commentators believe that the present governance structure, conceived in an earlier era, cannot provide the active, sophisticated management the courts require. The judicial branch today dwarfs the judicial branch in 1939, when, in one statute, most of the major elements of the current governance structure were created. Then, a budget of $18.66 million supported a judicial system of fewer than 250 judges and about 2,000 staff.[3] Today, the courts are a $2.75 billion annual operation employing more than 27,000 persons.[4] As of October 1, 1993, there were 837 life-tenured judgeships,[5] approximately 315 senior judges who perform some judicial service,[6] 326 bankruptcy judgeships, approximately 374 full-time magistrate judges, and 16 judgeships on the Court of Federal Claims. Of the 25,540 nonjudges working in the federal judicial system in September 1992, 24,315 worked in the courts themselves, and 1,225 worked in the Washington, D.C., support agencies (the Administrative Office of the U.S. Courts, the Federal Judicial Center, the U.S. Sentencing Commission, and the Judicial Panel on Multi-District Litigation).[7]

Other judges and commentators believe that present arrangements are satisfactory for today but may be unable to respond effec-

3. Dept. of Justice Appropriations Act, 53 Stat. 903–07, 1223–24 (1939). *See also infra* text accompanying note 59.

4. The judicial appropriation for fiscal 1994, including all accounts, is $2.754 billion. *President Signs FY94 Appropriation Bill for Judiciary,* The Third Branch, Nov. 1993, table at 2. The total number of personnel in the judicial branch on September 30, 1992, the most recent date for which we have data, was 27,431. *See* Administrative Office of the U.S. Courts, Annual Report of the Director, 1992, at 98 [hereinafter AO Annual Report, with year and page].

5. This number comprises 179 circuit judgeships (28 U.S.C. § 44), 649 district judgeships, including temporary judgeships, and 9 judgeships on the Court of International Trade; *see* 28 U.S.C. §§ 133(a), 251(a).

6. This number is subject to frequent change.

7. AO Annual Report, 1992, at 98.

tively to future demands that the courts do more work with fewer resources. In June 1993, Judge William W Schwarzer, director of the Federal Judicial Center, suggested that "the dominant long-range planning issue before the judicial branch . . . will be how to develop a long-range strategy for resource management and an institutional structure to effectively implement it."[8] More recently, Chief Justice William H. Rehnquist noted that the past forty years' trend of caseload increases will probably continue and that "for the foreseeable future . . . a regime of fiscal austerity will predominate . . . . [The challenge is] to use even more efficiently the resources available today and those few which may be added in the future to process a growing number of cases." The Chief Justice went on to say that additional rules and regulations for those involved in providing federal justice are virtually inevitable.[9]

Who will make those rules and regulations, and who will enforce them? What impact will they have on judicial independence? The relationship between judicial governance and judicial independence is crucial, and it will become more problematic as resources shrink. As Judge Schwarzer pointed out, it is not easy to "define and administer a bright line" between "decisional independence, which is essential, and operational autonomy, which is not." For example, decisions about space, facilities, and staffing—governance decisions about resource allocations—"influence [a judge's] job satisfaction and morale, and therefore . . . have a potential impact on decision making." But "this line of reasoning can be carried too far. It is doubtful that the spirit animating Article III includes the satisfaction of judges' personal comfort. Making this the touchstone of resource management is likely to frustrate its effectiveness."[10] What governance arrangement will best protect independence while providing rules adequate to manage a large entity operating on an increasingly tight budget?

8. Judge William W Schwarzer, Looking Ahead, Remarks at the District of Columbia Circuit Judicial Conference 1 (June 1993) (unpublished manuscript, on file with the Federal Judicial Center).

9. Chief Justice William H. Rehnquist, Address Before the American Bar Association 15, 16–17 (October 21, 1993). *See also* William W Schwarzer, *Challenges in Developing a Long-Range Plan for the Judicial Council of the Ninth Circuit, in* Long-Range Planning for Circuit Councils 21 (Federal Judicial Center 1992).

10. Schwarzer, *supra* note 8, at 4.

In the same vein, it is also important to remember that judicial independence, while essential, is itself merely instrumental. Courts do not exist to provide judges with independence. The Constitution protects judges' independence so that they can provide justice. Today, most would add that they should not only provide justice but, as best they can, provide it economically and expeditiously. What impact will governance arrangements have on the federal courts' ability to serve litigants and the public?

The future will undoubtedly include even greater congressional interest in and oversight of the judicial branch. Some fear that current governance arrangements are inadequate to assert the judiciary's interests in its dealings with the other two branches of government. Four statutes enacted during the past twenty years exemplify the legislative branch's inclination to control judicial conduct and administration: the Speedy Trial Act of 1974,[11] the Judicial Conduct and Disability Act of 1980,[12] the Sentencing Reform Act of 1984,[13] and the Civil Justice Reform Act of 1990.[14] Each statute was intended to speed or regularize judicial conduct that the judicial branch claimed it was capable of regulating on its own but that Congress decided it was not. As each was being debated, the Judicial Conference of the United States officially opposed the legislation or strove to alter it (usually with partial success).[15] Revisions in governance arrangements coupled with planning to anticipate new problems might enhance the judiciary's ability to satisfy Congress about the efficient administration and delivery of federal justice, and communicate the fact of that ability to legislators and to executive branch officials, whose decisions also affect the judiciary.

Finally, the future of governance must accommodate the tensions between the centralized authority located in the Judicial Conference and the Administrative Office (and, in a more limited sense, the Federal Judicial Center), and the decentralized authority

11. 18 U.S.C. §§ 3161–3174 (1988).

12. 28 U.S.C. § 372(c).

13. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1988 (codified as amended in titles 18 and 28 U.S.C.).

14. 28 U.S.C. §§ 1, 471 (1991).

15. Report[s] of the Proceedings of the Judicial Conference of the United States, Sept. 1973, at 76; Sept. 1978, at 49–50; March 1984, at 15; Sept. 1984, at 69; March 1990, at 9 [hereinafter JCUS Report, with month, year, and page].

located in the circuit councils, courts of appeals, and district courts. There is a trend to decentralize some aspects of budget and personnel administration and other functions. The Administrative Office has delegated its authority for the fiscal year operating budget to each court unit. Further delegation of authority for personnel classifications, position descriptions, and staff size will be implemented during the next several years.[16] As the courts grow in size and complexity of operations, the balances between national, regional, and local governance authority will require continuing evaluation and adjustment.

Having said all this, we note also that many judges and commentators believe that the current governance arrangements are the best ones to protect judicial independence and promote service to the public.

16. Court units include the offices of clerks, circuit executives, district court executives, and staff attorneys; probation and pretrial offices; and libraries. Funds for the supplies and equipment of chambers are part of the clerks' offices allocation. There are approximately 400 court units.

Part II: Understanding Governance

Federal court governance is the means by which the judicial branch manages its own affairs within the larger constitutional and statutory framework. A definition that would account for every aspect of court governance is beyond the scope of this paper. For present purposes, it is enough to say that governance encompasses the structures and processes for maintaining and regulating performance (other than deciding cases), for allocating resources (including judges and staff, and funds and physical resources to support both), and for seeking adjustments in the judicial system. In the following two parts of the paper, we describe the organizational elements of federal court governance and the functions each element is assumed to serve.

Courts, like all organizations, are attracted to the idea that policy making and administration are separate functions.[17] Judges want to make policy decisions without having to take much time away from their judicial duties to act as administrators. However, the separation between policy making and administration is not and cannot be strictly maintained within any organization. One who implements policy must first interpret it, and the interpretive discretion exercised by administrators within the frame of a policy statement is itself interstitial policy making. Such discretion is not only necessary but desirable if judges are not to oversee administration in detail. Even if it cannot be fully achieved, the goal of the governance system should be to establish the correct degree of discretion for administrators and combine it with the correct amount of oversight by judges and thus sustain the proper balance between the roles of policy maker and administrator.

In most organizations of 27,000 people, the link between policy and administration is a discrete executive and management component—the deputy attorney general, for example, or the corporate chief executive officer. The federal judiciary has historically regarded such a component as inappropriate for the judicial

17. Alice M. Batchelder, The Internal Governance of the United States District Courts: Leaving Well Enough Alone 32–35 (1989) (unpublished LL.M. thesis, University of Virginia).

branch, a creeping threat to the independence of each judge to decide cases free of extraneous pressure. There is a sense among judges that some inefficiencies of management and administration are a reasonable price to pay to avoid this threat. Independence, not managerial excellence, is the bedrock value of the judiciary. Recently, however, some judges have concluded that greater executive management capacity should be created within the judicial branch to manage it more efficiently and to enable it to speak to the other branches with a single, strong executive voice. Whether federal court governance elements should be rearranged to allow for an executive officer is among the fundamental questions addressed later in this paper.

Part III: A Brief Description of Federal Court Governance and Administrative Structures

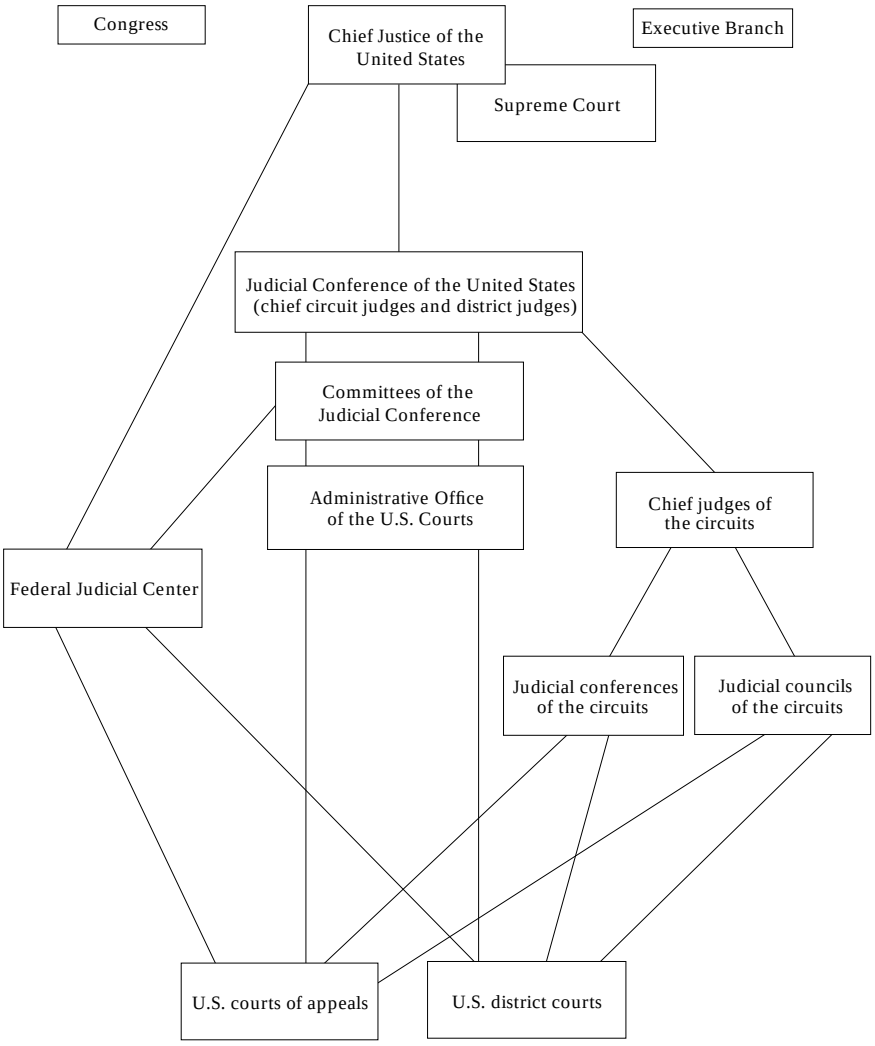
Figure 1 is an organizational chart of the governance and administrative structures of the courts at the national, regional (circuit), and local (district) levels.[18] This part describes those structures and what they do.

Our structural and functional descriptions of court governance will be only approximately accurate. The current governance arrangement is a historical product, rooted in the expansion of the courts and the nation over the past 200 years, and the past century in particular. Current governance arrangements are largely the product of accretion rather than systematic design. An organization chart showing the elements of governance, and the statutory assignments of powers and duties to the elements, oversimplifies how the judicial branch develops and implements administrative policy. In some instances, however, the relationships between governance elements were clearly intended in legislation. For example, the Administrative Office Act of 1939[19] rested on a vision of central administrative support and decentralized management that persists today, albeit much changed in particulars. The important point is that current governance elements and their relationships should be seen as a process in flux and under the influence of numerous factors, some, but not all, of which can be controlled from within the judiciary.

18. Appendix C contains a list of the statutory duties of the various elements of national, circuit, and district court governance. A separate Center publication, Russell R. Wheeler, Origins of the Elements of Federal Court Governance (Federal Judicial Center 1992), describes briefly the origin and evolution of each of the major agencies and other elements of federal court governance since the Constitution's adoption.

19. An Act to Provide for the Administration of the United States Courts, and for Other Purposes, 53 Stat. 1223 (1939).

Figure 1
Federal Judicial Governance and Administration



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A. National Governance Elements[20]

Congress. The judicial branch operates in the shadow of Congress's oversight. Thus, an important function of leadership in the judiciary is to communicate the judiciary's positions about policy persuasively to Congress and to learn Congress's positions. Some proposals for change in the governance structure arise from a desire to improve the effectiveness of communication between the branches. If Congress loses confidence in the judiciary's ability to manage its internal affairs, it may pass legislation that places additional limitations on the scope of the judiciary's freedom to govern itself; in the extreme case, such legislation could erode judicial independence.

Executive branch. The executive branch exercises governance authority over the courts in part as a constitutional participant in the legislative process (e.g., approving, or vetoing, appropriations and judiciary legislation). Executive branch legislative proposals and priorities can influence legislation that directly affects the courts and their governance. The General Services Administration plays a major role in final decisions about the judiciary's space and facilities, and the U.S. Marshals Service, in decisions regarding courthouse security. And, just as Congress affects the courts through jurisdictional change, the Justice Department affects them through its prosecutorial policies, its frequent participation in civil litigation, its representation on the judiciary's rules committees, and its role in selecting new federal judges and controlling the pace of the selection process. Thus, another important function of leadership in the judiciary is to maintain effective relations with the executive branch.

20. Not discussed here are the United States Sentencing Commission or the Judicial Panel on Multi-District Litigation. The commission is a quasi-legislative body that promulgates rules that govern sentencing. Although the panel's mission (transferring, for pretrial, actions pending in different districts that involve common questions of fact) reflects an efficiency goal similar to that which motivated creation of the Judicial Conference, it is generally not considered a governance agency in the same sense as those discussed here.

Chief Justice. The Chief Justice is at the apex of the judiciary's governance pyramid because of several statutory responsibilities,[21] which include presiding over the Judicial Conference (including appointing its committees), selecting the director and deputy director of the Administrative Office, and chairing the Board of the Federal Judicial Center. Moreover, the unique position of the Chief Justice has created a general expectation that the incumbent will speak to Congress and the nation for and about the judiciary, and in special cases, serve the nation in other capacities. The incumbent must balance these significant tasks in court governance with the leadership expected of the Chief Justice of the Supreme Court. Either of these roles might seem to be a full-time job in itself. Some relief is available to the Chief Justice through the statutory authorization to appoint an administrative assistant and determine the assistant's duties. The legislative history of the Administrative Assistant Act clearly contemplated that the incumbent would deal largely with matters of court governance and administration.[22] Nevertheless, some have argued that the demands now placed on the Chief Justice are too great and that some part of the job should be subject to greater delegation.[23]

The incumbent has considerable latitude in meeting the formal and informal expectations of the position, and individual Chief Justices have varied in how they distributed their energies. There is not abundant information from which to draw conclusions about the exercise of the Chief Justice's role in the modern governance structure. Even with eleven presidential administrations since the 1930s, when the modern presidency emerged, the keys to effective

21. See Appendix C for a list of the pertinent statutes. The Chief Justice also has statutory duties outside the third branch, viz., to serve on the Board of Regents of the Smithsonian Institution.

22. 28 U.S.C. § 677. *Hearings on H.R. 6953, H.R. 7377 Before Subcomm. No. 5 of the House Comm. on the Judiciary,* 92d Cong., 1st Sess., esp. at 8 (May 6, 1971) [hereinafter *Hearings*].

23. *See, e.g.*, Peter G. Fish, *The Office of the Chief Justice of the United States: Into the Federal Judiciary's Bicentennial Decade, in* White Burkett Miller Center of Public Affairs, The Office of the Chief Justice 135 (1984); Daniel J. Meador, *The Federal Judiciary and Its Future Administration,* 65 Va. L. Rev. 1031 (1979); Alan B. Morrison & D. Scott Stenhouse, *The Chief Justice of the United States: More Than Just the Highest Ranking Judge,* 1 Const. Commentary 57 (1984).

presidential leadership are still not clear. Information about Chief Justices is even sparser. There have been only three Chief Justices since the 1960s, when the federal courts began to grow significantly, and to the best of our knowledge, all the published studies of the office predate the tenure of the incumbent Chief Justice. Though the management styles of Chief Justices Warren, Burger, and Rehnquist have differed markedly from each other, there is not yet enough information to draw any but sketchy conclusions about what works best.

Supreme Court. Except for the Chief Justice, the members of the Supreme Court have practically no role in the governance of the judiciary (other than the occasional effects their judicial decisions may have on court governance). Although by statute each justice is assigned to one or more circuits as a "circuit justice," this role entails no governance responsibility. The Supreme Court's lack of governance authority distinguishes it from the highest courts of many states, whose members have at least a formal role in the statewide governance of the courts. There has been a long-standing reluctance to involve the Court in the federal judiciary's governance process, arising in part from the sense that the justices are not necessarily knowledgeable about lower court affairs, in part out of a concern that such involvement could compromise the actual or perceived integrity of the Court, and in part out of a concern that the justices should not be distracted from their judicial work. The Court's only governance task is to consider amendments to the federal rules of evidence and of procedure that are forwarded from the Judicial Conference. The Court, in its discretion, may promulgate the amendments so forwarded, although Congress has a statutory layover period during which it can prevent their taking effect. Promulgating the amendments is usually a formality; some justices have objected to the substance of amendments, and others have objected to the Court's being involved in the process of review in the context of governance rather than judicial review.

Judicial Conference of the United States. At Chief Justice Taft's urging, Congress created the Conference of Senior Circuit Judges in 1922 to provide an annual forum in which the presiding judges of the courts of appeals could try to improve performance in the district courts by developing plans for intercircuit assignments and

considering recommendations for case management improvements. The Conference's governance role increased substantially in 1939, when Congress transferred responsibility for federal court budget preparation, data gathering, and administrative support from the Justice Department to the newly created Administrative Office of the United States Courts, which Congress directed to function under the Conference's supervision. The Conference's name was changed in 1948, and district judges became members in 1957.

The Chief Justice presides over the Judicial Conference, which is composed of the chief judges of the courts of appeals, one district judge from each regional circuit, and the chief judge of the Court of International Trade. The circuit judges are Conference members as long as they are chief judges (presumptively seven years). The Conference statute provides that the district judges be chosen for the Conference for three-year terms by the circuit and district judges of their circuits during the circuit conference (although, as a practical matter, circuit judges do not always participate in the selection process). The Chief Justice is directed by statute to call at least one annual meeting; the practice since 1949 has been to hold two meetings each year, one in the spring and one in the fall. Since 1987, the Executive Committee of the Conference has proposed the agendas for the meetings and acted on the Conference's behalf on limited matters between meetings.

The Conference is generally regarded as the "principal policy making body concerned with administration of the United States Courts,"[24] and as the institution by which "[t]he federal court system governs itself on the national level."[25] However, the Conference's organic statute (28 U.S.C. § 331) does not describe or suggest so broad a role. The statute directs the Conference to "make a comprehensive survey of the condition of business" in the federal courts, prepare plans for temporary assignment of judges, receive certificates of judicial unfitness from judicial councils, study the operation of federal procedural rules, and submit suggestions for

24. Administrative Office of the U.S. Courts, Judicial Conference of the United States 1 (1992).

25. Administrative Office of the U.S. Courts, Understanding the Federal Courts 12 (1992).

legislation through the Chief Justice's report on Conference proceedings. The Conference itself has no statutory authority to order administrative action, and in 1991, it deferred indefinitely any action on a Federal Courts Study Committee recommendation that the Conference statute be amended to provide such authority.[26] The Conference thus differs from the circuit judicial councils, which have statutory authority to issue administrative orders.[27] The Conference, in fact, has considerable practical authority, which arises from its statutory responsibility to supervise and direct the Administrative Office of the U.S. Courts, including the Administrative Office's control of the distribution of funds appropriated by Congress.

Among the more than sixty decisions made at its September 1993 meeting, the Conference reaffirmed its position favoring a "relatively small Article III judiciary" but opposing a moratorium on the number of life-tenured judges; forwarded various amendments to the federal rules of procedure and federal rules of evidence to the Supreme Court; approved the courts' fiscal 1995 appropriations request for submission to Congress; adopted a "Hepatitis B and Other Blood-Borne Pathogens Policy" for probation and pretrial services officers; and approved one additional court reporter position for the Eastern District of Wisconsin.[28]

Conference committees. The committees of the Conference perform a vital role in the Conference's policy-making process. Normally, committees meet in person twice each year for one or two days to discuss and prepare materials for submission to the Conference prior to its next meeting; these meetings are supplemented by telephone conference calls, written memoranda, and occasional

26. Report of the Federal Courts Study Committee, April 2, 1990, at 148 (1990) [hereinafter FCSC Report]; JCUS Report, March 1991, at 11.

27. One example of a Judicial Conference policy that is honored even though the Conference has no practical means of enforcing it is the general compliance with its prohibition against the use of electronic media to cover civil court proceedings. *See, e.g.*, Lac Courte Oreilles Band of Lake Superior Chippewa Indians et al. v. State of Wisconsin et al., 17 Media L. Rep. 1381, 1385 (1990). The Federal Rules of Criminal Procedure prohibit electronic coverage of criminal proceedings. This deference is in contrast to an apparent rejection by numerous judges of the Conference policy on the timing of judicial law clerk selections.

28. JCUS Report, Sept. 20, 1993, at 42, 47, 50, 51, 57–58.

subcommittee meetings. The primary staff support for committees is supplied by units within the Administrative Office; some committees also receive substantial research and planning support from the Federal Judicial Center. The committees consider business they have developed on their own as well as matters from the courts, Congress, or other entities that are referred to them by the Executive Committee or the director of the Administrative Office.

Table 1 lists the active committees of the Conference as of January 1994. Almost all of the approximately 240 judges who serve on committees are life-tenured (district and circuit) judges rather than term-appointed (bankruptcy and magistrate) judges. In addition, some committees include Justice Department officials, state supreme court justices, law professors, and practicing lawyers. The Chief Justice makes committee appointments after receiving information from several sources, including applications from judges and advice from the Administrative Office.

Administrative Office of the United States Courts. Congress created the Administrative Office (AO) in 1939. Its director and deputy director, who were appointees of the Supreme Court until 1990, are now appointed and removed by the Chief Justice, following consultation with the Judicial Conference.[29] The director appoints additional staff; at this time the AO has slightly fewer than 1,000 employees and operates on a fiscal 1994 appropriation of $44,900,000, supplemented by funds from the courts' budget. Essentially all the duties of the AO reside in the office of the director, who then delegates them as necessary.

The AO statute identifies the director as "the administrative officer of the courts," who is to act under the "supervision and direction" of the Judicial Conference.[30] Table 1 shows clearly that the AO's organization parallels the committees of the Conference. It might, however, be more accurate to put the matter the other way around: Because explicit authority for many functions lies with the director rather than with the Conference or its committees, the Conference has organized its committees largely according to the AO's statutory duties. Although the statutory language nowhere

29. The change follows a recommendation of the Federal Courts Study Committee. *See* FCSC Report, *supra* note 26, at 150.

30. 28 U.S.C. § 604(a).

designates the AO as responsible for providing staff support to the Conference and its committees, this function arises inevitably in response to the requirement for close communication between those delegated to fulfill the duties of the AO director and the AO's judicial supervisors. It is the Conference itself, rather than the committees, that has supervisory authority over the AO, but, as a practical matter, much of the communication runs directly between AO staff and committee chairs. Furthermore, since the Conference's Executive Committee has taken on additional responsibility for governance between Conference meetings, the Conference has explicitly recognized the AO director as secretary to the Conference and designated the director as an ex officio member of the Conference's Executive Committee.[31]

Federal Judicial Center. Congress created the Federal Judicial Center in 1967 as an independent agency in the judicial branch and charged it with furthering the development and adoption of improved judicial administration in the federal courts. The Center fulfills this responsibility through research and education for the judiciary and its support personnel. The Center is also directed to make recommendations to the Judicial Conference for improvements in judicial administration, provide planning and research assistance to the Conference and its committees, promote judicial federalism, develop judicial history programs, and provide international judicial education. Table 1 shows the committees of the Conference the Center supports.

31. For example, in September 1987, the Conference approved a report on its committee structure that also referred to "the Administrative Office's Conference secretariat function." JCUS Report, Sept. 1987, at 60. In July 1990, the Executive Committee approved a memorandum that referred to "[t]he Secretary of the Conference, who is also the Director of the Administrative Office." Judicial Conference of the United States, Role of the Committees, the Committee Chairs, and the Conference Secretary 3 (Nov. 1993 version of document approved by the Executive Committee on July 5, 1990, attachment to Executive Committee of the Judicial Conference, Memorandum of Action, July 5, 1990, dated July 23, 1990, referenced in JCUS Report, Sept. 1990, at 66) [hereinafter Role of the Committees].

Table 1

Conference Committees and Parallel AO Units (January 1994)

Conference Committee	Parallel AO Unit	FJC Assistance
Executive	Office of Judicial Conference Secretariat	
Administrative Office	Office of Management Coordination	
Automation and Technology	Office of Automation & Technology	√
Bankruptcy System, Administration of	Bankruptcy Division	√
Budget	Office of Finance & Budget	
Codes of Conduct	Office of General Counsel	
Court Administration and Case Management	Office of Court Programs	√
Criminal Law	Probation & Pretrial Services Division	√
Defender Services	Defender Services Division	
Federal--State Jurisdiction	Office of Legislative & Public Affairs	√
Financial Disclosure	Article III Judges Division	
Intercircuit Assignments	Article III Judges Division / Office of Judicial Conference Secretariat	
International Judicial Relations	Article III Judges Division	√
Judicial Branch	Article III Judges Division	√
Judicial Resources	Office of Human Resources & Statistics	√
Long Range Planning	Long Range Planning Office	√
Magistrate Judges System, Administration of	Magistrate Judges Division	
Review of Circuit Council Conduct and Disability Orders	Office of General Counsel	*
Rules of Practice and Procedure	Rules Committee Support Office	√
Security, Space, and Facilities	Office of Facilities, Security & Administrative Services	√

Note: Not shown in the table are the five advisory committees on federal rules (appellate, bankruptcy, civil, criminal, and evidence) that report to the Standing Committee on Rules of Practice and Procedure. Committees in italics have responsibility for oversight of major programs. Some committees also receive support from AO units in addition to those listed.

√ Indicates committees to which the FJC also provides research or education assistance.

*The FJC has provided substantial research assistance to judges and others tasked with analyzing judicial disability governance matters.

The Center employs slightly more than 160 persons and operates on a fiscal 1994 appropriation of $18,450,000 and a small amount of outside funding, mainly funding provided through the statutory Federal Judicial Center Foundation. The director and deputy director of the Center are appointed by the Board of the Center, an eight-member statutory body comprising the Chief Justice as permanent chair, the AO director as a permanent member, two active circuit judges, three active district judges, and one active bankruptcy judge. The judges are elected by the Judicial Conference; none may be a member of the Conference while serving on the Board.

B. Regional and Local Governance Elements

Chief judge of the circuit. The chief judge of the circuit comes to the position as a function of seniority on the court of appeals and age, as specified in 28 U.S.C. § 45. The position developed from the former position of senior judge of the circuit; it received its current title with the recodification of Title 28 in 1948. The current method of selecting the chief judge, enacted in 1982, seeks to balance the values of continuity and fresh perspective by encouraging but not requiring chief judges to serve seven-year terms. In fact, the average tenure of chief judges (district and circuit) selected under the statute has been approximately four years.[32]

The statute places little formal governance or administrative responsibility for the appellate court in the chief judge, noting only that the chief shall "have precedence and preside" at court sessions that he or she attends.[33] The explicit regional governance authority of the chief arises through the statutes creating the circuit judicial councils and circuit conferences, as described below; at the na-

32. Based on information published in *The Third Branch* since 1982, when the current arrangement took effect, covering twenty-eight chief judges in eight circuits and seventeen districts. If all chief judges now in office complete their full terms, the average tenure for all chief judges under the statute will be approximately six years.

33. The statutes covering appointment of court of appeals employees place hiring authority in "the court" or in the judges of the court (for their law clerks and secretaries), except that the chief judge is charged to appoint the senior staff attorney (28 U.S.C. § 715(a)). Of course, in practice much of the hiring of senior staff may fall to the chief judge.

tional level, the chiefs govern through their membership on the Judicial Conference ex officio. A 1981 Federal Judicial Center study of chief judges found that almost all of the administrative tasks that chief judges regarded as essential pertained to their circuit-wide and national leadership rather than to their role as chief judge of the court of appeals.[34] A particularly important responsibility of the chief judge is to review complaints under the Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372(c). The chief judges create a personal link between national and regional court governance elements. And, despite the broadening of their charter, they remain primarily concerned with the administration of the district courts, including the bankruptcy courts as units thereof.

Circuit judicial councils. Congress created the councils (in the same 1939 statute that established the Administrative Office) to see that "the work of the district courts shall be effectively and expeditiously transacted."[35] There was also some expectation, not explicit in the statute, that the councils would be the "administrative linchpin" of the judiciary, to effect the national policies of the Judicial Conference as well as be affected by them.[36] Although the statute requires that the councils consist of equal numbers of circuit and district judges, plus the chief circuit judge, it does not otherwise fix their size, leaving that determination to the active life-tenured judges within the circuit. The current councils range in size from twenty-one (in the Seventh Circuit) to nine (in the Fourth, Ninth, and Tenth Circuits). There is no direct relationship between the number of judges in a circuit and the size of its judicial council.

Unlike the Judicial Conference, a judicial council has explicit authority "to make all necessary and appropriate orders for the ex-

34. Russell R. Wheeler & Charles W. Nihan, Administering the Federal Judicial Circuits: A Survey of Chief Judges' Approaches and Procedures, table 3, at 42 (Federal Judicial Center 1982). Though more than a decade old, this report remains the most complete review of the administrative activities of chief judges. *See also* Arthur D. Hellman, Restructuring Justice: The Innovations of the Ninth Circuit and the Future of the Federal Courts (1990).

35. Compare the current language of the council's statute, which calls for the councils to provide for the "effective and expeditious administration of justice within the circuit." 28 U.S.C. § 332(d)(1).

36. Peter G. Fish, The Politics of Federal Judicial Administration 387 (1973).

peditious administration of justice within its circuit." The statute further directs the judges and employees of the circuit to carry out council orders expeditiously.[37]

The council shares some of the chief circuit judge's responsibility for actions on complaints of judicial misconduct and disability.[38] It has been observed that the councils tend to work informally whenever possible and to tread lightly on all issues that might interfere with the legitimate independence of the judges.[39] At the same time, the enhanced delegation of budgetary authority to individual courts, pressure from Congress to speed and regularize the management of civil litigation,[40] and enhanced capacity of circuit executives to staff the councils have created more formal governance operations at the level of the judicial council. In any event, the council and its administrative agent, the circuit executive, represent key elements of regional court governance.

Circuit judicial conference. The circuit judicial conference, another governance element established by the 1939 statute, was intended to provide an opportunity for judges to confer with one another and with lawyers practicing in the circuit about the administration of justice in the circuit. The conference must be held at least biennially but may be convened annually. The statute directs active circuit and district judges and the bankruptcy judges of the circuit to attend. Participation by the bar is organized according to rules made by each court of appeals.[41] The conferences have not uniformly fulfilled the expectation of fostering grass-roots input and debate on major issues, although in the 1980s, most circuits took steps to revitalize their conferences.

Chief district judge and district court. Like chief circuit judges, chief district judges attain the position through seniority and age,

37. 28 U.S.C. §§ 332(d)(1), 332(d)(2).

38. These and other tasks of the council are noted in Appendix C.

39. Doris Marie Provine, *Governing the Ungovernable: The Theory and Practice of Governance in the Ninth Circuit, in* Hellman, *supra* note 34, at 270; Jeffrey N. Barr & Thomas E. Willging, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980,* 142 U. Pa. L. Rev. 25, 131–44, 173–77 (1993).

40. *E.g.,* through the Civil Justice Reform Act of 1990, 28 U.S.C. §§ 1, 471 (1991).

41. 28 U.S.C. § 333.

and, like chief circuit judges, not all have served the seven-year term contemplated by the statute. Although most district judges recognize considerable authority in the office of chief judge, neither legislation nor Judicial Conference policy calls explicitly for the chief district judge to assume plenary administrative authority for the district court. There are nevertheless many more specific statutory responsibilities and a substantial tradition, which together make the office of the chief judge an important element in decentralized court governance.[42]

District courts are in several ways autonomous administrative entities whose managers deal directly with the Administrative Office on a wide range of matters affecting funding and human resources. Each court selects its own clerk, who acts as the court's administrative agent, particularly in regard to national policies and local discretion regarding financial and personnel matters. Five courts also have "district court executives," and one has a "court administrator." The positions are legacies of a pilot program begun during the 1980s.

The bankruptcy court is a unit of the district court with its own chief judge and, in almost all districts, a separate clerk's office. The Judicial Conference establishes recommendations to Congress for the numbers of bankruptcy judgeships;[43] the courts of appeals appoint bankruptcy judges;[44] the district court designates the chief bankruptcy judge;[45] and the chief bankruptcy judge is charged with ensuring that the business of the court is handled effectively and expeditiously.[46] Although they are units of their district courts, most bankruptcy courts operate with substantial autonomy.

Magistrate judges are also essential to the work of the district court, and about a third of the courts recognize a position of "chief magistrate judge" to exercise administrative and coordinating duties. Nevertheless, the magistrate judges and those who support

42. In particular, see the discussion in Chapter 1 of the Federal Judicial Center's Deskbook for Chief Judges of U.S. District Courts (2d ed. 1993) [hereinafter Deskbook].

43. 28 U.S.C. § 152(b)(2)(3).

44. 28 U.S.C. § 152(a)(1).

45. 28 U.S.C. § 154(b).

46. *Id.*

them do not constitute a separate governance unit similar to the bankruptcy court.

Part IV: A Summary Account of the Status Quo in Federal Court Governance

This part presents a summary of the current structure and operation of federal court governance. It summarizes the descriptive materials presented in Part III. It clarifies the assumptions that, if true, justify the current structure and modes of operation. It establishes a model against which alternative models can be measured; such alternatives are presented later in the paper, with arguments for and against them. The summary is less and more than a description. It is less than a description because it oversimplifies reality by ignoring everything but the skeleton of the relationships between the elements of governance. It is more than a description because it expresses how the designers of such a system would intend for it to operate.

In the current federal court governance structure, central, regional, and local governance elements are presumed to operate in equipoise, but always subject to congressional oversight and control through appropriations and other legislative means. The Chief Justice is the general leader of the judicial branch and the head of each of its key national governance elements. The Judicial Conference, advised by its committees, establishes national policy and communicates the demands and preferences of the judiciary to the legislative and executive branches. The director of the Administrative Office is the agent of the Judicial Conference; all the resources of the office are at work to implement Conference policy. The Federal Judicial Center provides an education and research capacity that is not bound to the exigencies of everyday administration or to supervision by the Judicial Conference. The chief judges of the circuits, through their dual roles as members of the Judicial Conference and chairs of their respective judicial councils, communicate and integrate national and regional policy positions. The circuit judicial councils, composed entirely of life-tenured judges, have sufficient explicit authority to improve the administration of justice within the circuit. The circuit executives are the agents of the judicial councils and carry out the councils' policies with a sufficient professional staff. The circuit judicial conferences provide the

councils with an opportunity to exchange information with other judges, for all the judges to share their views with one another, and for the judiciary to relate to the members of the bar who practice in federal courts. The consultation at the circuit conferences strengthens the legitimacy of council action at the regional level. Chief district judges have substantial local responsibilities for leadership and administration; they are aided in their administrative duties by the clerk of the court, who is a professional court administrator and manager. And their responsibility for the bankruptcy courts, as units of the district court, is successfully delegated to the chief bankruptcy judges.

The current governance structure, as described above, rests on certain implicit assumptions. For purposes of long-range planning, these assumptions should be made explicit and then reviewed with the following questions in mind: Are the assumptions justified in fact, that is, is the governance arrangement operating as this summary says it is? If so, do current governance elements and functions have the legitimacy and vitality that they will require to guide the courts' policy making through a difficult future? Can they meet the needs of today and tomorrow? Finally, if assumptions underlying current governance arrangements are untenable, what should be done to bring theory and practice into alignment?

An analysis of a governance system needs some criteria by which to judge the system's operation. For this effort, we turn, not to our own suppositions about how federal court governance should operate, but to criteria derived from the summary above—that is, assumptions that are apparently built into the current system and accepted by the federal judiciary. We have identified seven such assumptions:

- The Chief Justice is properly the head of the entire federal judiciary.
- The current methods of selecting Conference, council, and committee members properly ensure equal participation by all circuits in national governance and sufficient consultation with affected judges and employees at the national, regional, and local levels.

- Full-time judges should function as the policy makers at the national, regional, and local levels of court governance, and they are capable of doing so.
- Full-time judges should control the effective implementation of policy by administrative staff, and they can do so without constant oversight of that staff.
- Governance structures are properly linked to the hierarchy of judicial decision making; that is, appellate judges should have greater governance authority than trial judges.
- Governance authority properly resides in life-tenured judges.
- The governance arrangements should not and do not impair legitimate judicial independence.

Throughout the remainder of the paper we explore the validity of these assumptions by describing alternative governance arrangements and assessing arguments that can be made in support of and in opposition to these alternatives. After analyzing the operation of the current system by comparing it with alternative arrangements, we return to these seven assumptions to assess their continued validity.

Part V: Arguments for and Against an Alternative Approach to Federal Court Governance

We turn now to an analysis of the current federal court governance arrangements and an alternative to those arrangements. As already noted in the prefatory Note About Method, we set out the alternative arrangements discussed here, not because we endorse them or believe no other alternatives merit analysis, but because they have been offered for analysis by others or they otherwise provide an effective means of analyzing current arrangements.

Section A deals with national arrangements; section B deals with circuit and district arrangements.

A. Federal Court Governance at the National Level

In this section, we first analyze three arguments for revising the current arrangements of federal court governance at the national level:

1. The demands on the office of Chief Justice are too great for any incumbent.
2. The Judicial Conference and its committee system are unwieldy, and the structure of the Conference gives overrepresentation to small circuits, to appellate judges, and to life-tenured judges.
3. The Administrative Office and the Federal Judicial Center are unresponsive to the judges who are authorized to establish their policies.

We then set forth an alternative arrangement based on a quasi-corporate model. Under the alternative arrangement:

1. The Chief Justice would be specifically recognized as head of the federal judiciary, but many current governance responsibilities of the Chief Justice would be met by the incumbent of a new position of executive judge for the federal courts, an appointee of the Chief Justice.

2. The Judicial Conference and its committees would be replaced by a small judicial board, elected by judges or their representatives and chaired by the executive judge.
3. The Administrative Office and the Federal Judicial Center would be merged into a single national support office.

We offer this analysis in the form of specific arguments, for each of which we offer a specific response.

1. Federal court governance is at risk because more demands are placed on the office of Chief Justice than any incumbent can reasonably fulfill.

The argument

The Chief Justice is expected to serve on, preside over, and manage the Supreme Court, defend the Court from outside attack, and occasionally serve the nation extrajudicially. In addition to all that, the Chief Justice is expected to provide executive leadership for federal court governance, mainly by presiding over the Judicial Conference and the Federal Judicial Center Board and performing the many other tasks that stem from those duties.[47] Try as one might, no individual can devote adequate time to all those duties.

Professor Daniel Meador pointed out fifteen years ago that the Chief Justice's work as an appellate judge "alone is more than enough for the time and talents of any one individual."[48] The additional demands of Supreme Court leadership and the need to respond to "at least fifty-three statutes that assign duties to the Chief Justice" create "a workload that can be carried only by one of nearly superhuman energy."[49] Staff assistance, mainly from the administrative assistant and the Administrative Office, cannot help enough. Chief Justice Burger warned ten years after his appointment "that if the burdens of this office continue to increase it may be impossible for its occupant to perform all the duties well and still survive."[50] Chief Justice Rehnquist, although not indicating that he is unable

47. Fish, *supra* note 36, at 135.
48. Meador, *supra* note 23, at 1042.
49. *Id.* at 1044.
50. Warren G. Burger, Address Before the American Enterprise Institute Conference 8 (Dec. 14, 1978) (transcript on file with the Federal Judicial Center).

to handle the work, has not discouraged consideration of alternative concepts.[51] Some have argued that, apart from the pressure of the work, the current role of the Chief Justice could damage the Court, by interfering with judicial responsibilities or by creating conflicts when cases dealing with judicial administration matters in which the Chief Justice has been involved come before the Court.[52] Moreover, a substantial commitment of time by the Chief Justice to executive leadership duties might engender criticism that the Chief Justice was insufficiently attentive to Supreme Court duties.

The response

Claims that the Chief Justice's duties are beyond the capacity of one individual would surprise the Secretary of Defense or the Secretary of Health and Human Services or the chief justices of our larger states. The fifty-three statutory duties listed by Professor Meador include many ministerial tasks, such as receiving the Administrative Office director's waiver of civil service retirement coverage and providing the Library of Congress with lists of books for its law library.[53] The problem with these duties is that they clutter up the statute books and should be assigned elsewhere.

The position is certainly a very demanding one, but there is little information on which to base the assumption that the job is beyond the capacity of a single individual. Especially, precious little comparative information is available from which one could conclude that it is impossible for the Chief Justice to meet all the position's constitutional duties and also attend adequately to needs of federal court governance. It is true that Chief Justice Burger, and some who wrote about the office during his tenure, feared that future Chief Justices would find it impossible to do the job as structured. We do not know, though, whether those fears were rooted in conditions unique to the position when he held it (e.g., the law explosion that occurred during his tenure and the concomitant growth of the judiciary and its institutions). We can draw some in-

51. FCSC Report, *supra* note 26, at 146.

52. Fish, *supra* note 36, at 133. *See also* Diarmuid F. O'Scannlain, On Governance of the Federal Judiciary (1992) (unpublished LL.M. thesis, University of Virginia).

53. Meador, *supra* note 23, at 1055–59.

sight from the fact that the current Chief Justice has not promoted the idea that the office needs restructuring.

Furthermore, there is little foundation to fears that the Chief Justice's off-the-bench governance activities could affect the Supreme Court's work. The Judicial Conference traditionally eschews comments on a proposed bill's substantive merits (i.e., matters that might arise in litigation), although it typically notes the workload impact of a proposed bill. It is eminently reasonable to assume that the nation's chief judicial officer will manage the position with sufficient skill and integrity to avoid conflicts.

2. The Judicial Conference's procedures and composition threaten the long-term legitimacy of federal court governance decisions.

a. Conference organization, size, and procedures are inconsistent with effective policy making.

(1) A large, part-time, collegial body is incapable of providing the executive decision making that the judiciary will need in the future.

The argument

Federal court governance at the national level consists of exercising the responsibilities expressed or implied in the Judicial Conference statute and supervising the Administrative Office's statutory functions. "Judicial control over these functions," as the report of the Conference's 1987 Committee to Study the Judicial Conference said, "is vital to the maintenance of judicial autonomy and independence."[54] The question is, what governance arrangement will ensure both judicial control and effective action?

The current arrangement, based on the 1939 governance assumptions, is this: Before each semiannual Conference meeting, twenty-seven individuals, each occupying one of the most demanding positions in the public service, receive thick agenda books of committee reports that intersperse vital policy proposals with arcane management recommendations, about sixty items per meeting.[55] The Conference members individually determine the rec-

54. Report of the Committee to Study the Judicial Conference 3 (Aug. 20, 1987) (unpublished manuscript, on file with the Office of the Judicial Conference Secretariat, Administrative Office of the U.S. Courts).

55. *See supra* text accompanying note 28.

ommendations' merits without formal consultation, then discuss and vote on the most controversial items during a one-day Conference meeting.

In 1939, eleven judges, meeting once a year for two to five days,[56] could supervise an Administrative Office that served, in an early official's words, "as fiscal administrator, as budget officer and as gatherer of statistics."[57] About 100 people[58] performed duties listed on one page in the Statutes at Large[59] for a judicial system of 233 circuit and district judgeships[60] and about 2,200 support personnel.[61] Whether the Conference was capable of much more governance did not concern those who promoted the 1939 statute, because they saw the circuit councils as the judiciary's main governance element. Judge John Parker, one of the primary architects, said that having the judiciary handle its "financial affairs" was "a very small part of the bill." To him, its major feature was the circuit councils—"unifying the administration of justice in the hands of the chief judicial officers of the courts, . . . [who] shall be furnished with the facts with respect to the administration of justice in their circuits . . . in quarterly reports by the administrative officer."[62]

56. Henry P. Chandler, Some Major Advances in the Federal Judicial System, 1922–1947, 31 F.R.D. 307, 331 (1963). A review of the proceedings of the Conference of Senior Circuit Judges (Report of the Attorney General, U.S. Department of Justice) suggests that Conference meetings in the 1930s usually lasted three days.

57. Will Shafroth, *New Machinery for Effective Administration of Federal Courts,* 25 A.B.A. J. 738 (1939).

58. Steven Flanders, *Distributing Administrative Responsibility Within the Federal Court System* (1989), *in* Federal Courts Study Committee, 2 Working Papers and Subcommittee Reports, July 1, 1990.

59. 53 Stat. 1223–24 (1939).

60. Administrative Office of the U.S. Courts, History of the Authorization of Federal Judgeships, Including Procedures and Standards Used in Conducting Judgeship Surveys, Table 7 (Number of Authorized Judgeships, 1789 to 1990) at 145 (no date).

61. *See* Table, Article III Judgeships, Judicial Personnel, and Staff per Judgeship Since 1900, *in* Bermant et al., *supra* note 1, n.96, at 45.

62. *Hearings on H.R. 2973,* subsequently amended and reintroduced as H.R. 5999, a Bill to Provide for the Administration of the United States Courts, and for Other Purposes, Before the House Comm. on the Judiciary, 76th Cong., 1st Sess. 20 (1939).

Two developments have rendered the 1939 assumptions invalid. First, most power has accumulated in Washington, D.C., not the circuits. Power comes from the authority to allocate resources, and Congress has assigned most resource allocation tasks to the Administrative Office, to be carried out under Conference supervision. Second, to accommodate this congressional policy, the Administrative Office has necessarily become a multipurpose bureaucracy to administer a complex spending plan and provide legal, management, and policy advice and support to the courts. The size of the Washington, D.C., staff of the judiciary has gradually outgrown the size of the life-tenured judiciary that is its chief client.[63]

The Conference is incapable of making the policy to direct this new arrangement. It cannot create the rules for effective resource allocation, oversee their administration, and plan and execute a legislative agenda. The standard judicial administration view is that if a jurisdiction's supreme court does not make administrative policy, policy should be made by a twelve to fifteen judge council—"a compact body . . . capable of meeting together regularly and conveniently . . . pursuing frank and searching discussion."[64] The Conference is in session only two days a year and, with twenty-seven

63. District and Circuit Judges, AO and FJC Staff, All Other Judicial Branch Personnel

	Active Status District and Circuit Judges	%	AO and FJC Staff	%	All Other Judicial Branch Personnel	%
1962	353	5.7	165	2.7	5,627	91.6
1972	479	5.9	258	3.2	7,386	91.0
1982	609	4.0	613	4.0	14,106	92.0
1992	715	2.6	1,104	4.0	25,612	93.3

Source: Personnel tables in the Administrative Office of the U.S. Courts, Annual Report[s] of the Director, 1962, at 160; 1972, at 258–59; 1982, at 34; and 1992, at 98. Figures represent the persons in office (not positions or judgeships) on the last day of the respective reporting year. Staff figures are staff members in place on the last day of the reporting year. Figures for 1982 and 1992 include Federal Judicial Center staff as well as Administrative Office staff. The 1962 and 1972 figures are for the Administrative Office only.

64. American Bar Association, Commission on Standards of Judicial Administration, Standards Relating to Court Organization 78 (1974). The recommended council size is in Standard 1.32(a)(ii), at 76.

members, is unwieldy. Moreover, the Conference will grow as more circuits are added. But as the Conference grows large, effective governance increasingly will demand a heightened capacity to act quickly to take advantage of windows of opportunity as they arise, especially with respect to legislation.

The inadequacy of the current governance structure is not apparent on a daily basis or after a superficial review. The courts function, their administrative needs get met, and the worst legislative proposals are defeated. That the system has functioned adequately, however, is not to say that it is up to the challenge of the twenty-first century. To recall the Chief Justice's warning, as workload increases and fiscal austerity continues, "[b]oth lawyers and judges will be subjected to additional rules and regulations designed to maximize the efficient use of the federal and state court systems."[65] The result will be a somewhat larger, more complex, and much more austere judicial branch, for which the current governance mechanisms will be inadequate.

The response

The Judicial Conference structure accords with the nature of the judicial branch. In this regard, the judiciary is much like Congress: a small institution with a high proportion of principals. The main purpose of the governance structure is to ensure that principals have the support they need to exercise their constitutional tasks. Unlike members of Congress, though, the constitutional officers of the judiciary do their work in sites across the country. They thus need a body such as the Conference to represent them in governance decisions. If the federal courts face a future of more work and fewer resources, there will be greater need, not less, for the governance system to be in touch with judges throughout the country. A large representative Conference, supported by a broad committee structure, is the means of preserving broad-based judicial control and involvement in difficult decisions that implicate judicial independence.

The Conference's participatory structure functions efficiently. The Administrative Office, although large in comparison with its

65. Rehnquist, *supra* note 9, at 15, 16–17.

size in 1939, is still a very small agency by Washington standards, hardly beyond the Conference's capacity to control. Moreover, governance decisions need not wait until the Conference's semi-annual meetings. Specifically to avoid that kind of inefficiency, the Conference in 1987 strengthened its Executive Committee, to "provid[e] the judiciary with consistency and continuity of administration beyond what the Conference can provide at its meetings and what the Chief Justice should be expected to provide."[66] The Executive Committee meets almost monthly, in person and by phone. Its jurisdiction includes acting on the Conference's behalf "on any matter requiring emergency action," working with the Administrative Office director to "fashion spending plans for the federal judiciary's . . . appropriations," preparing the Judicial Conference agendas, monitoring the jurisdiction of Conference committees and assigning matters to the committees, and "[c]oordinat[ing] legislative liaison on behalf of the Conference" (but leaving to each committee the responsibility to develop "substantive" legislative positions for Conference consideration).[67]

Most matters move through the committee structure to Conference decision within six months. Important, complex, and controversial matters take longer. The current structure produces legislative and administrative results. The most important legislative result has been an increase in appropriations of over 1,000% in the last two decades (as compared with a 330% increase in the legislative budget and a 430% increase in the executive branch budget).[68]

66. Report of the Committee to Study the Judicial Conference, *supra* note 54, at 5.

67. Jurisdiction of Committees of the Judicial Conference of the United States, May 1993.

68. The appropriations to support the federal judicial system (not including the Supreme Court) grew from $183 million in fiscal 1973 to $2.4 billion in 1992, an increase of 1,217%. In the same twenty-year period, the total appropriations for the legislative branch grew to $2.035 billion, a 336% increase, and the executive branch's appropriations increased by 431%.

The 1973 figures on which these calculations are based come from "1973 Actual Column" of the 1975 U.S. Budget Summary, Table 3, at 45–47 (judiciary), 289 (legislative and executive). The 1992 figures are from the President's January 1993 budget document, Budget Baselines, Historical Data, and Alternatives for the Future, Table 5.2, at 336. Judiciary budget calculations do not include Supreme Court budgets (for 1992 drawn from 1992 Actual Column of the judiciary's fiscal

That support has enabled the judiciary to manage a greatly increased caseload. Administratively, the current structure has yielded a large decentralization program, delegating to the courts many responsibilities regarding resource allocation that Congress has assigned to the director of the Administrative Office. The Conference's recent creation of an Economy Subcommittee of the Budget Committee will invest the judiciary's administration with a stronger review and coordination capability.

Conditions that Conference critics do not like are not a result of the governance structure. For example, the Conference and the Administrative Office operate a network of legislative and executive branch contacts that is far more extensive and effective than most judges realize. No amount of judicial branch reorganization, though, will change the fact that Congress simply sees things—mandatory minimum sentences, for example—much differently than the judiciary sees them. Clerks and some judges complain about resource allocations, but it is impossible to please everyone, especially in an era of scarce resources.

(2) The Conference committee system contributes to the lack of executive leadership within the judiciary.

The argument

The Conference's growing ineffectiveness has led to a large and powerful committee system.[69] Three-fourths of all substantive Conference decisions for the last six years approved committee recommendations without debate.[70]

1994 budget request document). Executive branch figures were reduced by $117.111 billion in offsetting receipts noted for the entire federal budget in 1992 and $8.363 billion in undistributed intragovernmental transactions in 1973. The 1992 executive branch appropriation used for these calculations is $1.464 trillion.

69. The current committee structure is listed in Table 1, *supra.*

70. The Conference approved a consent and discussion calendar format at its September 1987 meeting, to be implemented at the following meeting. JCUS Report, Sept. 1987, at 57. Based on a count of 669 decisions (excluding testimonial and memorial motions), 505 were approved from the consent calendar, and 164 were debated and acted upon from the discussion calendar. (The count encompasses ten meetings. Reports for September 1992 were not readily available.)

The committee system compounds the problems created by the Conference. Twenty-five active committees[71] with over 260 members create miscoordination and overlap that will increase as the courts grow in size and their need for governance increases. The committee structure, paralleling the Administrative Office's organization, nurtures a clientele mentality, protecting the sometimes conflicting interests of life-tenured and term-appointed judges, probation and pretrial services officers, clerks of court, automation supporters, courthouse construction proponents, and advocates of enhanced security. This environment encourages committee chairs and members with firm policy preferences to advance particular agendas regardless of whether those agendas comport with budget realities or more pressing judicial branch needs. The Conference itself is too large and meets too infrequently to coordinate the committees' work. Committee chairs, under the Conference's rules, usually do not attend Conference sessions unless a committee item is on the discussion agenda.[72] The danger that committee chairs or members will inadvertently misrepresent Conference policy has led the Executive Committee to caution them to make clear that they are speaking as individual judges when, in conversations with legislators and executive branch officials, they voice opinions that are contrary to Conference policy.[73]

The committees compromise the role of the Administrative Office, whose statute directs it to function under Conference supervision. The committees become active because the Conference is institutionally incapable of providing that supervision. Thus, the Executive Committee has had to stress that the committees should only "study and make policy recommendations to the Conference," and "not [be] involved in making day-to-day management decisions for the Judiciary or for the Administrative Office."[74] On the other hand, the Administrative Office sometimes must step into policy vacuums that occur because much of the committees' business is

71. *See* Table 1, *supra*. Twenty-five includes the advisory committees to the Standing Committee on Rules of Practice and Procedure.

72. *Id.*

73. Role of the Committees, *supra* note 31, at 3.

74. The admonition appears twice. *See* Role of the Committees, *supra* note 31, at 1, 2.

complex and unfamiliar to the members. Materials for the committees' semiannual meetings are sometimes even thicker and more detailed than those for Conference meetings, and members' mastery of the material varies. Since they frequently meet away from Washington, D.C., committees often must proceed without complete staff resources or incur the additional costs of adequate staff presence. When committees cannot act effectively, there is a risk that the Administrative Office, in order to keep the ship afloat, will be forced into a policy-maker role, thus preserving only the illusion of judicial control.

To a lesser degree, the committees compromise the work of the Federal Judicial Center, which is directed by statute "to provide staff, research, and planning assistance to the Judicial Conference . . . and its committees."[75] The Center's staff is sometimes faced with conflicting committee requests for research and educational services.

The response

The Conference committee system is not a response to recent developments. It is as old as the Conference itself.[76] As the 1987 Committee to Study the Judicial Conference said, "[a]n extensive Conference committee system is important to allow the Conference to complete its work in an efficient and effective manner. It is also important because it involves many judges with different viewpoints from across the nation and thus ameliorates the adverse impact of the Conference's national authority on the judiciary's traditions of regionalism and independence."[77]

The Conference's committee structure involves many judges in governance and thus maintains close bonds between the Conference structure and the judiciary that it serves. Committees obviously require coordination and monitoring, but that is true in any large organization. It is far better to have the committees and pro-

75. 28 U.S.C. §§ 623(a), 620(b)(4).

76. The Conference formed eight committees at its first meeting. Report of the Judicial Conference, Memo of First Two Meetings, Dec. 28, 1922, and Sept. 26, 1923 (unpublished manuscript, on file with the Federal Judicial Center).

77. Report of the Committee to Study the Judicial Conference, *supra* note 54, at 20.

tect against occasional jurisdictional overlap than to do without them. The Conference's Executive Committee, assisted by the Office of the Judicial Conference Secretariat in the Administrative Office, provides the overall coordination the system needs by monitoring committee work to avoid duplication of effort and unintentional inconsistencies in policy recommendations. Although there is naturally a close working relationship between the committees and the Administrative Office, that does not mean that one controls the other. Rather, both work for the Judicial Conference, and any Conference policy prevails in the event of a conflict. Energetic committee members who are willing to shoulder special obligations and carry the lead for the Conference in a particular policy arena provide an important service to the judiciary.

The committees, moreover, are an efficient way to ensure that the judicial perspective controls the many decisions necessary to keep the courts operating effectively. The judges who serve on the Conference committees master the subjects within their committees' particular jurisdiction. It is in the nature of a judge's job to separate wheat from chaff, and judges bring this skill to their committee work. Committee material is extensive, but not all of it requires detailed review. Putting it before the committees, though, ensures judicial control; a judge may always spot some seemingly innocuous item that needs attention.

The federal courts derive an auxiliary benefit from a large committee system. It enables judges to exchange ideas and information with colleagues from other circuits across the country. Most federal judges work in relative isolation from colleagues outside of their particular courts, certainly outside of their circuits. Committee work, along with Federal Judicial Center seminars, provides an opportunity for cross-pollination as a valuable side benefit to the primary task at hand.

b. The Conference's composition contradicts the suggestion that "[d]emocratically adopted and endorsed conclusions and proposals of the Judicial Conference represent the view of the Judiciary branch on all matters."[78]

(1) Smaller circuits are disproportionately represented.

The argument

Each circuit has two voting representatives on the Judicial Conference. Judges in smaller circuits thus have more influence through their representatives than do judges in larger circuits. Judges who represent 37% of the nation's federal judges can cast a majority of the twenty-seven votes on the Conference, while judges representing 54% of the nation's judges control only 38% of Conference votes (see Table 3, Appendix B). A member of the Ninth Circuit's court of appeals noted that his "interest in the governance of the judiciary . . . is diminished by four and one-half times that of my brother and sister judges on the [court of appeals for the] First Circuit," and with respect to district judges, the "problem is even worse."[79] This malapportionment would not be objectionable if the Conference were still what it was in 1922, a small advisory council that developed temporary assignment plans and judicial improvement recommendations. Today, however, federal court governance consists of making rules and regulations about resource allocation, and resource allocation will be even more important in the future. A judge's influence on those allocation decisions—which judicial branch elements and operations get more resources and which get fewer—should not depend on the circuit in which the judge serves.

78. Report of the Ad Hoc Committee to Study the Relationship Between the Federal Judicial Center and the Administrative Office of the United States Courts, September 24, 1991, at 15. The Judicial Conference and the Board of the Federal Judicial Center approved the report in a joint, September 1991 meeting. JCUS Report, Sept. 1991, at 72.

79. Diarmuid F. O'Scannlain, On Governance of the Federal Judiciary 61 (1992) (unpublished LL.M. thesis, University of Virginia).

The response

In our federal republic, unequal population units sometimes have the same number of votes. Each state—California and Rhode Island alike—has equal votes in the Senate because each state is a fundamental unit of the American polity. Each circuit—the Ninth and First alike—has equal votes in the Conference because each circuit is a fundamental unit of the federal judiciary. And, in fact, there is much less disproportion in circuit size than there is in the size of the states. As Table 2 in Appendix B shows, a few circuits are considerably smaller and one or two considerably larger, but most occupy a middle range in terms of percentage of all judgeships.

More important, Conference members vote as federal judges, not circuit agents. Circuit representation merely promotes an appreciation of all perspectives. By analogy, when courts assess conflicts in law between circuits, they do not give larger circuits' decisions more weight than smaller circuits' decisions. Finally, as noted earlier, much Conference business is actually done by Conference committees. The Chief Justice determines committee membership, subject only to Conference determinations that some committees should have a representative from each circuit. In fact, larger circuits have greater representation on committees than do smaller circuits (the correlation coefficient between the number of judgeships in each circuit and each circuit's representation on Conference committees is .83); moreover, the largest circuit has the greatest number of committee chairs (see Figure 2 and Tables 2 and 3, Appendix B).

(2) Appellate judges are disproportionately represented.

The argument

Nationally, for every circuit judge there are almost four district judges. Yet, on the Judicial Conference, for every circuit judge, there is only one district judge. The statute also favors circuit judges in other ways. It allows both circuit and district judges to help select the circuit's district judge representative. Chief circuit judges, as ex officio Conference members, have presumptive seven-year Conference terms,[80] during which they can establish effective

80. *See* discussion at text accompanying note 32 *supra.*

working relationships with one another and Conference staff. The district judge representatives serve three-year terms. Few have served additional terms (although that pattern may be changing at least slightly).

There is precedent for appellate judges' governing the nonadjudicatory activities of trial courts, but there are no principles to justify it other than the common observation that "[g]iven the judiciary's traditional hierarchical arrangement, the notion that appellate judges might be outvoted by district judges would hardly be appropriate."[81] If there were solid principles to justify having judges govern judges on courts below theirs in the jurisdictional hierarchy, those principles should override the long-standing institutional resistance to involving the Supreme Court's associate justices in the governance of the courts of appeals and district courts. The Court's only significant involvement is in rule making, and many observers question even that.[82] Applying the same logic to the Conference means, at the least, that circuit judges should not have more power than district judges.

The response

To the degree they represent anyone, circuit judges serve on the Conference ex officio as council chairs and represent all the judges in their circuits. To the degree they serve as circuit judges, they do so to bring a distinct perspective to governance matters affecting the district courts, which stems mainly from the fact that they regularly observe the district courts' operations but are not intimately involved in those operations. The purpose of appellate judges' predominance in governance is not to serve the appellate judges. It is to serve the decision-making process. Appellate judges exercise authority in federal court governance greater than the simple ratio of their numbers for the same reason that they review

81. O'Scannlain, *supra* note 79, at 63.

82. *See, e.g.*, Judge Jack B. Weinstein, Reform of Court Rule-Making Procedures 102 (1977) and Justice White's statement, quoting Justice Douglas, at the time the Court considered the 1993 civil rules amendments, *in* Communication from the Chief Justice of the United States, Transmitting Amendments to the Federal Rules of Civil Procedure and Forms, Pursuant to 28 U.S.C. § 2072, H.R. Doc. No. 74, 103d Cong., 1st Sess. (1993).

appeals from district court judicial decisions—because they have a distinct perspective on the business under review. Similarly, the district judges on the Conference bring a distinct perspective to matters of appellate court governance. Furthermore, membership on Conference committees, which exercise significant influence over Conference actions, roughly reflects the proportion of circuit and district judges in the system; of the twenty-four committee chairs, fourteen are district judges, nine are circuit judges, and one is a bankruptcy judge (see Table 3, Appendix B).

(3) Term-appointed judges are excluded from membership.

The argument

Since 1957, when district judges joined the Conference, Congress has created two new judicial positions: bankruptcy judge and magistrate judge. Bankruptcy and magistrate judges now represent over 40% of federal judgeships.[83] Without them, the system would need an increase in life-tenured judges that would fundamentally change the character of the federal judiciary. Continuing to deprive term-appointed judges of any formal role in the governance authority will eventually undermine the legitimacy of national governance policy. Decisions about how to administer the courts should include participation of all those essential to the system's operation. Among other things, Conference deliberations do not include the particular perspectives of bankruptcy judges, whose work is different from that of circuit and district judges. Because effective implementation of many Conference decisions requires the support of and participation by term-appointed judges, those judges should participate in making the decisions and thereby gain a vested interest in them. Fully proportionate representation is not necessary to achieve these goals.[84]

83. *See* text following note 6 *supra*.

84. For example, the Bankruptcy Reform Act of 1978 provided for a single bankruptcy judge member of the Judicial Conference, but before it could take effect, that provision was repealed by legislation enacted in the wake of the 1982 *Marathon Pipeline* decision. One bankruptcy judge and one magistrate judge, or perhaps two of each, would suffice to ensure representation of the perspective of these term-appointed judges.

The response

The overriding purpose of federal court governance is to support the judiciary's ability to exercise the judicial power of the United States. Essential to that ability is preserving judicial independence as created by Article III. Only judges with the protections of Article III exercise the judicial power of the United States, and thus they are the only appropriate persons to wield governance authority. Only they have the enlightened self-interest to exercise that authority to ensure the survival and promotion of Article III's institutional protections. Although term-appointed judges are fully committed to the third branch and its institutional role, they simply cannot have the same appreciation for judicial independence and the need to preserve it as circuit and district judges have. The argument above for bankruptcy and magistrate judge membership on the Conference, carried to its logical conclusion, would also put staff members on the Conference; they too are "essential to the system's operation," and their absence would also require life-tenured judges to do much more work. Moreover, token representation by one or two term-appointed judges would be seen as just that, a token.

Bankruptcy judges and magistrate judges serve in significant numbers on Conference committees—about 14% of all federal judges serving on those committees,[85] with higher proportions on committees that directly affect their interests. Also, enough life-tenured judges have served previously as bankruptcy or magistrate judges to be familiar with the needs and perspectives of these judges.

3. The Administrative Office and the Federal Judicial Center are under only the nominal control of the judges who are supposed to determine their policies.

The argument

Congress has told the Administrative Office to exercise its functions under the "supervision and direction" of the Judicial Conference and has told the Federal Judicial Center to act under the

85. Term-appointed federal judges hold 33 of the 239 federal judge seats on committees (*see* Table 3, Appendix B).

"direction and supervision" of its Board,[86] but neither the Conference nor the FJC's Board is structured to provide such supervision and direction.

Conference members, including the Executive Committee, are all busy judges. They do not have the time necessary to master all the issues involved in effective supervision of the Administrative Office. The chairs and members of the individual committees are usually much closer to the specific Administrative Office units within their jurisdiction and provide those units with some direction, despite Executive Committee admonitions not to do so.[87] Similarly, the judges on the FJC's Board, like those on the Judicial Conference, all have full-time judicial duties that prevent them from exercising close policy supervision of the Center director and staff. Finally, because the two agencies perform similar functions, there is overlap and lack of coordination, which mitigates the ability of separate sets of judicial branch principals to exercise firm chain-of-command control.

The response

Statutory directives for "supervision" and "direction" do not mandate micromanagement. It is unrealistic and counterproductive for a policy-making body or individual to oversee the daily work of professional staff members who were hired because of their mastery of complex subject matter and who operate under the guidance of capable agency management. This statement is as true for the Administrative Office and the Center as it is for a large corporation or university. Inevitably, staff will make some policy decisions, if for no other reason than that the barrier between policy making and management execution is one of the most porous in organizations.

Successful operation of service agencies, such as the Administrative Office and the Center, consists in having the governing bodies set broad policies and then select highly qualified individuals to direct the agencies so as to promote those broad policies. Both

86. *See* 28 U.S.C. §§ 604(a), 623(a).

87. Role of the Committees, *supra* note 31, at 1.

agencies' accomplishments in the last several years demonstrate that the governing bodies are up to that challenge.

Furthermore, both agencies' staffs work closely with judges throughout the courts. Most executive branch bureaucrats rarely see their ultimate bosses or the consumers of their services and thus forget for whom they work. Senior staff of the Administrative Office and the Center are in constant contact with judges, who are both their bosses and the consumers of their services. Some judges and senior court managers will always complain that the Administrative Office and the Center are not responsive, but that does not make it so. Some judges and court managers make more demands than either agency can honor, and some demands that the agencies should not honor.

Finally, that the Center and the Administrative Office are separate, rather than a single agency, does not affect their responsiveness to their policy-making boards. In fact, if the Conference and the Center's Board have difficulty in monitoring agency performance, combining the two agencies would only result in a larger, and thus less manageable, operation.

4. An Alternative Arrangement: Congress should pattern national court governance on a quasi-corporate model that provides a governance mandate to the Chief Justice and replaces the current Conference structure with an executive judge and a small judicial board, supported by a combined Administrative Office and Federal Judicial Center.

a. The judiciary, at the national level, should adopt a quasi-corporate model for its governance structure.

The argument

To achieve effective judicial branch governance, Congress should mandate a national-level governance system adapted from standard and well-accepted organizational models. The system proposed below responds to the unique needs of the judiciary, combining elements of corporate models found in private business and other elements found in the governance of large organizations in and out of government.

- The Chief Justice should be statutorily acknowledged as the head of the federal judicial system but relieved of day-to-day responsibilities through appointment of an executive judge and election of a judicial board.
- A nine-member, elected judicial board, chaired by a full-time executive judge appointed by the Chief Justice, should serve as a corporate board of directors and assume the work currently performed by the Conference and many of its committees. The executive judge should exercise overall responsibility for implementing the board's policies, mainly by appointing and supervising the director of the judiciary's support agency, promoting system-wide administrative consistency through the appointment of chief circuit and district judges, and serving as the judiciary's primary agent in its relations with Congress, the executive branch, the state courts, the press, and other groups.
- The director of a new Office of Court Support and Administration should be responsible for the effective day-to-day operation of the courts' national support services, basically those duties assigned now to the Administrative Office and the Federal Judicial Center. The director would have the benefit of a single line of supervision from the executive judge, thus avoiding the conflicting demands made on both agencies today by Conference committee chairs and other judges in the system.

The essence of this plan is presented in the following revised outline to Chapter 15 of Title 28. Its components are analyzed more closely in sections b, c, and d.

CHAPTER 15 ~~CONFERENCES AND COUNCILS OF JUDGES~~
Governance of the Courts of the United States

Sec

331 ~~Judicial Conference of the United States~~ *Responsibilities of the Chief Justice of the United States* [see text, this section]

332 ~~Judicial councils of circuits~~ *Judicial Board of the United States Courts* [see text, this section]

333 ~~Judicial conferences of circuits~~ *Executive Judge of the United States Courts* [see text, this section]

334 ~~Judicial Conference of the Court of International Trade~~ *Judicial councils of circuits* [see text, section B]

335 *Circuit–district councils on judicial discipline* [see explanation, section B]
336 *Conferences of circuits* [see text, section B]

The response

The current statutory scheme has shown great capacity for evolution and adaptation, precisely because it does not create statutory mandates for any more details than are necessary. Rather than mandate one particular approach by statute, Congress should preserve the flexibility that the current statutes provide.

For example, if possible, Chief Justices should have the flexibility to delegate more or less responsibility, based on the needs of the times and the leadership style with which they feel most comfortable. Some Chief Justices will be more active, whereas others will be more inclined to delegate, but the prestige and moral authority of the Chief Justice remains a vital element of the system. Giving statutory form to the approach described above would force a single model, one of substantial delegation, and it would deprive the courts permanently of the prestige and moral authority of the Chief Justice. For example, Chief Justice Burger made limited use of the Conference's Executive Committee, whereas Chief Justice Rehnquist has delegated more extensively to it. The next Chief Justice may prefer a different approach, and the times may demand it. It is neither necessary nor wise to preclude flexibility through a statutory straightjacket.

The current statutes and Conference rules can accommodate numerous variations. A Chief Justice, for example, could appoint a judge as administrative assistant and delegate to that judge many of the duties that an executive judge would perform. The legislative history of the administrative assistant statute anticipated such an appointment.[88] Or, with effective lobbying, a Chief Justice could in effect create an executive judge position and a judicial board by

88. Title 28 U.S.C. § 677 authorizes the Chief Justice to appoint an administrative assistant, and § 133(b) provides that if the administrative assistant or the director of the Federal Judicial Center or Administrative Office is an active judge, the President may appoint another judge to the court on which the person serves. Section 133(b), although enacted in 1990, was contemplated when the original administrative assistant statute was proposed. *See* Testimony of Rowland F. Kirks, *in Hearings, supra* note 22.

appointing a judge as director of the Administrative Office and chair of the Executive Committee, persuading the Federal Judicial Center Board to appoint that same judge as director of the Center,[89] and persuading the Judicial Conference to delegate more authority to the Executive Committee, perhaps by assigning it the functions now exercised by the Budget Committee, the Judicial Resources Committee, and other major line committees. And if new conditions demanded a return to current arrangements, no statutory change would be necessary to effect it. As long as Congress and the judiciary maintain effective communications, there is no reason to believe that Congress will object to administrative adjustments in the governance structure that respond to new conditions without forcing the more permanent alterations that statutes create.

Some small statutory changes could be worth considering, such as providing magistrate and bankruptcy judges with Judicial Conference membership. And some members of the Federal Courts Study Committee suggested making the Executive Committee a statutory body.[90] But these minor adjustments are far different from the rigid and revolutionary changes proposed above.

89. There is no constitutional or statutory bar to judges' holding nonlegislative administrative offices, and, because there would be no issue of salary augmentation, it is difficult to see legal objections to the arrangement. Because the Administrative Office director is an ex officio member of the Executive Committee, the judge would not have to be a Conference member. If the Chief Justice decided that the judge should be a Conference member, however, the judge would have to be, for practical purposes, a district judge. A circuit judge can be a Conference member only if he or she is a chief circuit judge, and it is unlikely that one could serve all the positions referenced above and be chief judge of a circuit.

The judge could serve full-time in Washington without depriving his or her court of its full complement of judges, because 28 U.S.C. § 133(b) creates a temporary judgeship for the court of any active judge selected as either AO or FJC director.

90. FCSC Report, *supra* note 26, at 146.

b. The Chief Justice should be statutorily recognized as the head of the judicial system through the following amendment to Title 28.

> *§ 331. Responsibilities of the Chief Justice of the United States*
>
> *In addition to the exercise of judicial duties as prescribed or authorized by statute, the Chief Justice of the United States shall take care that the courts of the United States are effectively administered.*

The argument

As the Federal Courts Study Committee concluded, whatever changes are made in the national governance structure, "it is essential that the Chief Justice continue to be the acknowledged head of the entire federal judiciary."[91] But such an acknowledgment has, in Professor Meador's words, no "clear statutory mandate."[92] The language above, based on the Constitution's charge to the President,[93] would provide the mandate, and it would clear away any doubt that system maintenance is a responsibility of the office and one criterion for selecting its incumbent.

The response

The nation does not need a statute stating what everyone already accepts: that the Chief Justice is the head of the third branch. Activist Chief Justices have not been inhibited by the absence of a statutory mandate. Moreover, such a codification could lead to satellite arguments over whether some specific action was within the Chief Justice's statutory jurisdiction. It could also make the Chief Justice responsible for actions beyond his or her control. For that reason, Chief Justice Hughes argued against vesting governance authority in the Chief Justice and Supreme Court instead of the Judicial Conference: A scandal in a clerk's office, for example, could bring disrepute on the Chief Justice "as the responsible officer who apparently had been neglectful in a matter which did not seem important at the time . . . ."[94]

91. *Id.*

92. Meador, *supra* note 23, at 1044.

93. "[H]e shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

94. *Quoted in* Fish, *supra* note 36, at 137.

c. The Judicial Conference and its current committee structure should be replaced with a small judicial board, chaired by a full-time executive judge, and served by such committees and ad hoc bodies as it wishes to establish.

(1) Congress should abolish the Judicial Conference and create a judicial board and executive judge through the following amendments to Title 28.

§ 332 Judicial Board of the United States Courts

(a) There is established in the judicial branch of government a Judicial Board of the United States Courts, which shall develop and promulgate such policies as are necessary to ensure the effective administration of the courts of the United States.

(b) The Judicial Board shall be composed of the Executive Judge, who shall serve as chairperson; two judges of the courts of appeals of the United States; four judges of the district courts of the United States; one bankruptcy judge; and one magistrate judge. Each judge shall serve a term of five years and shall be eligible to serve another term. [provision for staggered terms upon Board's creation] No more than two members may be from any single circuit. Judges in active service and retired judges certified pursuant to § 371(f) of this title are eligible to serve on the Judicial Board.

(c) When there is a vacancy on the Judicial Board, other than the Executive Judge, the Chief Justice shall nominate judges to be considered for election to the Board. The courts of appeals members of the Judicial Board shall be elected by majority vote of all the circuit judges in active service and retired circuit judges certified pursuant to § 371(f) of this title. The district judge members of the Judicial Board shall be elected by majority vote of the district judge members of the circuit councils serving at the time of the election, except that the votes of the members of the various councils shall be weighted, according to procedures announced by the Chief Justice, to reflect the ratio of district judges in each circuit to all district judges in the country. [bankruptcy and magistrate judges to be selected similarly from bankruptcy and magistrate judges on the councils]

(d) The members of the Judicial Board in active status, except the Executive Judge, shall be assigned, by their respective courts, a judicial workload, as determined by the respective court, no greater than one-half the workload typically carried by a judge of that court. The Judicial Board shall make provision for the temporary assignment of judges as necessary to allow the courts to dispose of judicial business.

(e) The Judicial Board shall meet at least quarterly and shall conduct its meetings electronically or in Washington, D.C.

(f) A majority of the Judicial Board may, at any time, recommend to the Chief Justice that the Executive Judge be dismissed for such reasons as it may determine.

(g) The Judicial Board shall:

(1) Submit to the Office of Management and Budget, for incorporation into the President's budget without change, annual estimates of the expenditures and appropriations necessary for the maintenance and operation of the courts, including support agencies created within the judicial branch of government, and prepare an annual fiscal plan for the appropriations so provided. [implementing provisions as necessary]

(2) Submit to Congress quarterly reports on the business of the courts of the United States and, as necessary, recommendations for legislation to improve the operation of the courts. Copies of such reports shall also be submitted for information to the Attorney General.

(3) Develop and revise as necessary a long-range plan for the courts of the United States.

(4) Continuously survey the condition of business in the courts of the United States and prepare plans for the assignment of judges to or from circuits or districts where necessary.

(5) Exercise the authority provided in § 372(c)(1) of this title [regarding recommendations for grounds for impeachment].

(6) Exercise the authority provided in §§ 2071 through 2075 of this title [assuming Judicial Conference and Supreme Court duties in promulgating rules amendments].

§ 333 Executive Judge of the United States Courts

(a) The Chief Justice of the United States, after consultation with the Judicial Board of the United States Courts, shall appoint from among the circuit and district judges an Executive Judge, who shall serve at the pleasure of the Chief Justice, except that no person may serve as Executive Judge for more than ten years.

(b) The Executive Judge shall be relieved of all judicial duties while serving as Executive Judge. If the Executive Judge is on active status when chosen, the President shall appoint, with the advice and consent of the Senate, another judge to the court on which the Executive Judge serves. If the Executive Judge resumes the duties of an active judge of that court, the President shall not appoint a judge to the first vacancy that occurs thereafter on that court.

(c) The Executive Judge shall be the chairperson of the Judicial Board of the United States Courts.

(d) The Executive Judge shall, with the concurrence of a majority of the Judicial Board of the United States Courts:

(1) Appoint the director of the Office of Court Support and Administration.

(2) Appoint, from among the judges of a court of appeals or district court in which there is a vacancy in the office of chief judge, the chief judge of such court, after consultation with those judges pursuant to § 45(a) or 136(a) of this title [see text § B.3.a infra].

(3) Appoint the members of such committees of the judicial branch as are mandated by law or that the Executive Judge, in consultation with the Judicial Board, deems necessary.

(e) The Executive Judge shall also:

(1) Present to Congress matters needing legislative attention, including deficiencies in proposed legislation, respond promptly to requests from Congress for comment on proposed legislation, and keep the Committees on Appropriations, Committees on the Judiciary, and other members of Congress, as appropriate, fully informed about the administration of the courts and the judiciary's views on legislative proposals that implicate the administration of justice in the federal courts.

(2) Consult regularly with the Attorney General of the United States on matters of common interest.

(3) Supervise the activities of the Director of the Office of Court Support and Administration.

(4) Cooperate to the fullest extent possible with the judges of the state courts in assessing the administration of justice in the United States and seeking means of cooperation between the two systems.

(5) Take other actions as he or she deems necessary to secure the effective administration of the courts of the United States, provided that he or she shall keep the Judicial Board fully advised of all such actions.

(6) Submit to the Chief Justice and to the Judicial Board a quarterly report on the judge's activities and plans.

The argument

The judicial board. The statutes would replace the current twenty-seven-member Conference structure with a nine-member judicial board, chaired by a full-time executive judge. The board would exercise the three basic functions of federal court governance necessary to meet the challenges of the future: assigning responsibility, preserving representation, and enhancing efficiency.

These statutes provide a clear assignment of policy responsibility for federal court governance; they replace the current arrangement under which the Judicial Conference gets its power indirectly from the statutory authority of the Administrative Office. Resource allocation, management of interbranch relations, and planning are lodged unequivocally in the judicial board, and clear executive responsibility is lodged in its chair.

The arrangement also provides for direct representation of the various elements of the judiciary, freeing the governing body from the current condition whereby each circuit, regardless of size, has the same number of votes on the Judicial Conference.

Replacing the current Judicial Conference with a judicial board and executive judge would provide the judiciary with an improved mechanism for making hard choices among the many needs and wants of federal judges and court managers. A nine-member body is a traditional size within the judiciary, one judge larger than the current Executive Committee. Such a group is small enough to work efficiently, either in person or in telephone meetings. Unlike the Executive Committee, however, the judicial board would have plenary power to act. And, because each member by statute would carry only a half caseload, members would have more time to devote to governance than the members of the current Executive Committee. Most judges might not want to serve more than one term, but such service should not be precluded.

Another proposal to reduce the size of the national policy-making body would also establish a nine-member body. Judge O'Scannlain has suggested that the Conference be reformulated, with three members of the Supreme Court (including the Chief Justice), three circuit judges, and three district judges, to meet once a month rather than twice a year.[95] Although this proposal would solve most of the problems of the current arrangement, it would perpetuate the overrepresentation of appellate judges. Furthermore, as Judge O'Scannlain also noted, the members of the Supreme Court would probably not be eager to take on these system-wide governance tasks.[96]

The executive judge. A full-time executive judge serving as chair of the board would correct a serious court governance defect that is a legacy of the 1939 statute. By directing the Conference of Senior Circuit Judges to supervise the Administrative Office, that statute failed to provide the judiciary with what President Roosevelt's Committee on Administrative Management was providing to the executive branch: "a responsible and effective chief executive as the center of energy, direction, and administrative management."[97]

95. O'Scannlain, *supra* note 79, at 84–85.

96. *Id.* at 82–83.

97. Louis Brownlow, Charles Merriam & Luther Gulick, Report of the President's Committee on Administrative Management, with Studies on Administrative Management in the Federal Government 3 (Washington, D.C., 1937).

Judges in the 1930s opposed the idea of an executive for the courts. The Conference rejected a district judge's proposal that "the formal organization of the Judicial Branch . . . be presided over by a 'Chancellor of the United States' to be appointed by the Supreme Court."[98] President Roosevelt's 1937 court reorganization bill would have created a Supreme Court-appointed "proctor" of the federal courts to analyze docket statistics, propose intercircuit transfers, and recommend means of speeding case flow. The proposal provoked strong criticism from the judiciary.[99] Although the need for such an official was apparent to some, the Conference itself was still an innovation in the 1930s, and the judiciary was suspicious of any threat of central authority.

Recommendations for such a position, however, have continued to surface, attesting to its merits. Calls similar to those rejected in the 1930s reemerged in the 1960s, from Chief Justice Burger early in his tenure[100] and again in 1985,[101] from Professor Meador

98. U.S. District Judge Louis Fitz (S.D. Ill.) to Senior Circuit Judge Samuel Alschuler (7th Cir.), September 2, 1931, *quoted in* Chandler, *supra* note 56, at 368. The idea goes back much further, as seen in early twentieth century calls for a high-level "judicial manager." *See State-Wide Judicature Act,* 1 J. Am. Judicature Soc'y 101, 102 (1917). In the wake of Benjamin Cardozo's call for a "Ministry of Justice," the Journal of the American Judicature Society carried an article praising the capacity of the English Lord Chancellor to play that role, Kenneth M. Johnson, *The Lord Chancellor as a Minister of Justice,* 13 J. Am. Judicature Soc'y 52 (1929).

99. *See* Fish, *supra* note 36, at 116–19. The judge who proposed the proctor idea was William Denman of the U.S. Court of Appeals for the Ninth Circuit.

100. "When I came to my present post I thought I saw an important function that needed to be performed in the federal court system, and it was one that could be performed only by a very distinguished judge then in senior status, as [Third Circuit Judge William Hastie] became soon after I came to my present office.

It had to be a man, a judge who had the complete confidence and respect of all the other judges in the United States. Judge Hastie ideally fitted this position, and I proposed it to him. . . .

When he declined ["because it would have severely limited, if not perhaps entirely foreclosed" his sitting on cases] I ultimately abandoned the idea because I could find no other judge available with the unique combination of talents and experience that he possessed." Remarks of Chief Justice Burger at the Memorial Service for Judge Hastie, June 18, 1976, 535 F.2d 8 (1976).

101. Richard Wiley & Laurence Bodine, *Q & A with the Chief Justice,* 71 A.B.A. J. 91, 93 (January 1985).

in 1979,[102] and from the ABA in 1986.[103] In 1990, the Federal Courts Study Committee urged consideration of the idea.[104] The need for such a position is by now clear. At 27,000 persons, the federal judicial system has more employees than five of the fourteen Cabinet departments.[105] Working with a small but representative board of judges, and with the courts' national administrative agency serving as staff to the executive judge through a clear chain of command, the third branch would have the governance mechanisms to enable it to make and implement the correct choices.

The executive, furthermore, must be a judge. A judge in such a position can command more respect from other judges and from other high officials of the government than even the most competent non-judge. The executive judge would be the counterpart to a member of the congressional leadership or to a high-level presidential appointee. Furthermore, one who has exercised the judicial power of the United States can best shape administrative policies that meet judges' needs. The executive judge would still be able to consult with, and receive complaints from, judges and key administrators. Finally, a judge is in the best position to reject other judges' requests that are incompatible with the needs of the system. Non-judges sometimes accede to unreasonable requests from judges because doing otherwise is impolitic, and they are in a quandary when a judge presents a reasonable request that must nevertheless be rejected because other needs are more compelling.

102. Meador, *supra* note 23, at 1041.

103. American Bar Association, Standing Comm. on Federal Judicial Improvements, Report to the House of Delegates, February 1986, approved by voice vote.

104. FCSC Report, *supra* note 26, at 145–46. The 1987 Committee to Study the Judicial Conference deferred action on such a proposal, but the Executive Committee subsequently determined that "it was unnecessary to seek legislation to establish the position of 'administrative judge.'" Executive Committee of the Judicial Conference, Memorandum of Action, Feb. 17, 1988 (unpublished, on file with the Office of the Judicial Conference Secretariat, Administrative Office of the U.S. Courts). *See also* O'Scannlain, *supra* note 79, at 81, 86–91, and Report of the Committee to Study the Judicial Conference, August 1987, at 13 (proposing creation of an "administrative judge").

105. Office of Management and Budget, The Budget for Fiscal Year 1994, at 38.

The response

The judicial board. A nine-judge judicial board is too small to provide the consultative governance appropriate for a geographically dispersed federal court system. Today, judges across the country know little of the details of federal court governance, but they do know that their chief circuit judge and district court representative participate in the Conference. The board could not represent all the circuits, and the legitimacy of its decisions would suffer accordingly. National elections would not provide the bond that now exists between a circuit's Conference representatives and its judges. Rather, they would involve federal court governance in national electoral campaigns and cabals and provoke the need for regulations about such details as the use of official mail to promote one's candidacy.

A small board would make it especially difficult for the courts to deal with the revenue crunch they face. Judges throughout the system will accept resource allocations if they believe that colleagues on the Conference helped make them. With the board, they would fear parochialism: policy set according to the views of a handful of judges.

Although the major reordering suggested above would be inconsistent with the broad-based approach to governance that best suits the judiciary, some incremental changes in Conference structure and procedures may be advisable. The Conference has been resilient in adapting to new needs and conditions, as shown by the 1987 reorganization of its committees, which resulted in greater authority for the Executive Committee and a new agenda format. More recently, the Economy Subcommittee was conceived and made operational in remarkably short order. Additional changes that could further enhance Conference members' ability to make informed policy decisions would be greater opportunities for premeeting briefings and longer Conference sessions, as long as the additional time was used productively. Some have also suggested continuing the trend begun in 1987 of enhancing the authority of the Executive Committee. The growing complexity of federal judicial governance and the fast pace of legislative developments may suggest that there is some value in the Conference's delegating more administrative and implementation duties to the Executive

Committee, thus freeing the Conference to focus more on policy issues. Such a division of labor could build on current arrangements. Today, for example, the Conference approves the judiciary's appropriations request, but the Executive Committee adopts the specific spending plan once that appropriation becomes law.

The executive judge. Similarly, the executive judge proposal is inconsistent with the needs and character of the judicial branch. The judicial branch does not need such power to be placed in the hands of one individual. Federal court governance serves only to enable judges to accomplish their constitutional and statutory tasks independently and effectively. Unlike the executive branch, the courts do not need strong executives to administer complex programs for national security, public health and safety, fiscal and financial management, and income redistribution.

Centralizing federal court governance in a single position, even with a small board for oversight, places too much power in the hands of one individual, whose actions could impinge on judicial independence and autonomy. For example, an executive judge so minded could use the court's administrative apparatus to mount a campaign of intimidation by investigating a particular judge on charges of minor voucher irregularities. Withholding resources from a particular judge or court could also be part of such a campaign.

A separate danger would be the executive judge's relationship with the Chief Justice. Regardless of how much better suited a judge than a non-judge may be to represent the judicial branch, no judge can do so as well as the Chief Justice. But under the proposal, the Chief Justice would inevitably fade from the governance scene. Also, the executive judge would be tempted or impelled to seek a reputation independent of that of the Chief Justice or the judicial board. Some ambitious judges would see the position as a way to establish their visibility for appointment to the Court. It is not enough to say that the executive judge will be appointed by, and serve at the pleasure of, the Chief Justice as advised by the judicial board. A common Washington phenomenon is for high-level appointees to go into business for themselves. Top aides in Congress become junior legislators. Presidents Reagan and Bush each fired his chief of staff after the chief had caused him considerable em-

barrassment. An ambitious judge, with the constitutional protections of life tenure and secure salary, would be even less worried than a chief of staff might be about offending the official nominally in charge.

Finally, the proposal could frustrate one of the fundamental goals of modern judicial administration: to bring high-level management expertise to the courts. Creating a full-time executive judge position could place authority in the hands of an individual who does not have the kind of experience necessary to manage a large and multifaceted organization like the federal judicial system, which contains numerous internal power centers and has multiple ties to other branches of government. Good preparation for the federal courts' chief executive officer would be service as a governor, corporate executive, or university president, not service as a chief judge or a managing partner of a law firm. The position of director of the Office of Court Support and Administration would become a secondary post, unable to attract the kind of first-rate executive talent necessary to promote effective federal judicial administration.

(2) The executive judge and judicial board should rely on a smaller group of committees than currently exists and make greater use of ad hoc advisory groups and other means of learning the views and preferences of judges and senior court managers.

The argument

The executive judge and judicial board would not need the extensive committee structure that supports the Judicial Conference. A full-time executive judge and half-time judicial board, meeting often, could do most of the work that current committees perform during the three to four days they meet each year. As a side benefit, having the board take over the committee functions would reduce the number of committee members and chairs who pursue their own personal policy agendas or attempt to manage units of the national support staff. A reduction in the number of committees would also reduce uncoordinated contacts with legislators by committee chairs and result in a more systematic liaison effort managed by the executive judge. And the statutory requirement that the board meet in Washington, the seat of the Office of Court Support

and Administration, would remove the satellite controversies with Congress over the location of Judicial Conference committee meetings[106] and ensure that all necessary support staff can be available to assist the board as it exercises its governance responsibilities.

Some governance functions, however, require specialization beyond what the judicial board can provide. The judicial board would probably maintain the statutorily authorized committee on rules, and those on financial disclosure, codes of conduct, and disability orders. Beyond that, the executive judge, consulting as necessary with the judicial board and director of the Office of Court Support and Administration, would appoint ad hoc advisory groups of judges (and, when appropriate, senior managers) to ensure that judicial and staff perspectives are known and considered as the board develops policy and as the office implements it in such areas as automation, education, efficiency and economy, probation and pretrial functions, and space and facilities and security. The advisory groups would serve as long as the need exists, could be chaired by judicial board members when necessary, and would report directly to the executive judge and judicial board.

A large number of Conference committees are no longer necessary to broaden participation in federal court governance. Modern technology can provide a national discussion forum to complement the greater efficiency that a nine-member judicial board will achieve. The courts could develop "electronic town meetings" that would allow the entire judiciary to hear arguments on matters of fundamental importance, particularly with respect to legislation, and to vote on referenda to guide the executive judge and judicial board.

The response

The proposal assumes that a full-time executive judge and a judicial board, assisted by a few standing committees and some other ad hoc groups, could do the work that over 200 judges now perform during and between the meetings of the Conference committees. The effect of abolishing the committees would be precisely the

106. Senate Comm. on Appropriations, Report to Accompany S. 3026, S. Rep. No. 331, 102d Cong., 2d Sess. 81 (1993).

opposite of what the proponents of the revised structure want to achieve. With fewer points of judicial oversight, the judiciary's administrative apparatus would be forced into unchecked policy making.

Periodic national referenda among the entire federal judiciary, however, would promote too much democracy. Although federal judges across the country do not want to be ruled by a small group meeting regularly in Washington, they do not have the time to enmesh themselves in the arcana of legislative proposals and administrative details. That is one of the major values of the Judicial Conference and its committees—groups of judges, broadly representative of their colleagues, who voluntarily assume the responsibility to become familiar with administrative issues and vote on them intelligently. Putting legislative ideas up to a referendum of more than 1,000 judges is a perversion of democratic government, and it would encourage politicking by judges on a grand scale. Plebiscites are anathema to the traditions and functioning of the judicial branch.

This is not to deny that some changes in the committee structure might be desirable, but the Conference has shown itself quite capable of revising that structure as necessary. The last major change was in 1987, but additional adjustments have been made as conditions demanded.[107] Some have suggested reducing the number of committees as a general matter, but that could be pursued without the radical changes proposed above. Finally, it is not necessary to meet only in Washington to ensure necessary staff participation. Although electronic conferencing is not a good idea for judicial plebiscites, Washington staffers could participate electronically in relevant meeting segments, now that technology is becoming available for such purposes. Moreover, having the committee members meet at self-contained sites away from Washington fosters camaraderie, communication, and concentration on committee business.

107. Most recently, two committees were combined into a single Committee on Security, Space, and Facilities, and a new Committee on International Judicial Relations was created.

d. The Administrative Office and the Federal Judicial Center should be combined into a single Office of Court Support and Administration.

The argument

There is no need at this time to maintain two national agencies in the third branch to support the judges and their personnel. Separate agencies foster interagency rivalry, result in redundant functions, and needlessly complicate lines of authority. It is illogical to separate a system's administrative apparatus from its research and education apparatus. The judicial board and the administrative program divisions that staff it should be able to design research and undertake educational programs without having to turn to a separate agency. A single agency would be fully capable of providing those services. Furthermore, the Federal Judicial Center occasionally offers policy suggestions and recommendations at odds with those of the Judicial Conference, thus impeding a successful legislative strategy. For example, the Conference has twice disapproved legislative proposals to let each district court decide for itself whether it wants to implement a mandatory court-annexed arbitration program; the Center, however, charged by Congress to study arbitration and make legislative recommendations about it, has endorsed these proposals.[108]

The response

Principle, not expediency, led the judiciary to ask Congress to create a separate judicial research and education agency,[109] and the judiciary remains true to the principle. In 1987, the Judicial Conference asserted "that both agencies provide complementary types of support to the Conference,"[110] and the 1991 ad hoc

108. JCUS Report, Sept. 20, 1993. *See also* Statement of Hon. William W Schwarzer to the Subcomm. on Courts and Administrative Practice, Senate Comm. on the Judiciary, October 29, 1993 (unpublished, on file with the Federal Judicial Center).

109. Russell R. Wheeler, *Empirical Research and the Politics of Federal Judicial Administration: Creating the Federal Judicial Center*, 53 Law & Contemp. Probs. 31, 51 (1988).

110. JCUS Report, Sept. 1987, at 60.

committee that the Chief Justice appointed to study the relationship between the two agencies referred to the "unique support capabilities available from both the FJC and the AO."[111] The Federal Courts Study Committee, despite proposals that it do so,[112] declined to recommend that the agencies be combined.[113]

Having separate but mutually supportive agencies for administration and for education and research will be important as the federal courts deal with the resource allocation demands of the next decades. The Administrative Office will face major challenges in providing administrative support and management assistance to the courts as they cope with resource shortages of the future. If it were to assume responsibilities for educational and research programs, that would limit its ability to provide administrative and management support. Moreover, research and education functions are more effectively performed by an agency not encumbered by day-to-day operational responsibilities. Demands for creating specialized education programs for judges and court personnel—including programs for judicial education and effective court management—risk being subjugated to more immediate administrative needs. Furthermore, separate agencies can help the judiciary weigh policy options better than can a single agency. The independence of the Center from direct control by the Conference, its committees, and the Administrative Office enhances the credibility of the Center's research reports and conclusions. Chief Justice Rehnquist recently described the Administrative Office and the Center as "two separate but mutually reinforcing support agencies, . . . provid[ing] the courts and the Judicial Conference complementary services

111. Report of the Ad Hoc Committee to Study the Relationship Between the Federal Judicial Center and the Administrative Office of the United States Courts, *supra* note 78, at 6.

112. Judge John Godbold, then director of the Federal Judicial Center, in a May 30, 1989, letter to Chief Judge Levin Campbell, chairman of the Federal Courts Study Committee's Structures Subcommittee, noted the suggestions of "two circuit executives . . . that your subcommittee consider whether the FJC should be merged with the AO" and explained why he believed they should not. Federal Courts Study Committee, 2 Working Papers and Subcommittee Reports, July 1, 1990.

113. The recommendations are described in Federal Courts Study Committee, *supra* note 112.

and, on occasional matters of policy, diverse perspectives that benefit the decision-making process."[114]

B. Federal Court Governance at the Regional and District Levels

This part of the paper presents the arguments for and against certain changes in the governance arrangement at the circuit and district levels, specifically:

1. Limiting council membership to trial judges, inasmuch as the object of circuit council governance is almost exclusively the trial court.
2. Substantially revising the circuit judicial conference.
3. Vesting the selection of chief judges in a national official (the executive judge) and providing greater specificity in the chief judge's statutory authority and duties.

Except for having the executive judge appoint the chief circuit and district judges, the alternative arrangement considered here would not reallocate authority between the national level and the circuit and district levels. (We take up that topic briefly in the Conclusion.) The alternatives that follow, however, would markedly alter relations between circuit and district judges in regard to governance. As we did in section A, we analyze the strengths and weaknesses of these alternatives in order to promote assessment of the current governance arrangements.

1. Congress should relieve circuit judges of governance responsibility for district courts, through the following amendment to Title 28.

§ ~~332~~ *334* Judicial councils of circuits

(a)(1) ~~The chief judge of each judicial circuit shall call, at least twice in each year and at such places as he or she may designate, a meeting of the judicial council of the circuit, consisting of the chief judge of the circuit, who shall preside, and an equal number of circuit judges and~~ *There is established, in each judicial circuit, a council consisting of* district judges of the circuit *in* ~~as~~ such number ~~is~~ *as* determined by majority vote of all such judges of the circuit in regular active service *and in retired service as certified pursuant to § 371(f) of this title, and one bankruptcy judge and one full-time magistrate judge if the*

114. Chief Justice William H. Rehnquist, 1992 Year-End Report on the Federal Judiciary, at 10.

number of district judges is ten or fewer. If the number of district judges is greater than ten, additional equal numbers of bankruptcy judges and full-time magistrate judges shall be members of the council, but the total number of such judges shall not exceed twenty-five percent of the district judges.

(2) The council shall adopt procedures for the selection of members from among the district judges, bankruptcy judges, and magistrate judges in regular active service and in retired service as certified pursuant to § 371(f) of this title.

(3) The council shall meet at least twice in each year.

(4) The council shall elect a chairperson from among its members, who shall serve as chair for a term equal to the length of the term of a council member. If the chairperson's regular term as council member expires before his or her term as chairperson expires, the council shall stay the selection of a replacement member until the chairperson's term as chairperson expires.

(b) The council shall be known as the Judicial Council of the circuit.

(c) The ~~chief judge~~ *chairperson* shall submit to the council the semiannual reports of the Director of the ~~Administrative~~ Office of ~~the United States Courts~~ *Court Support and Administration*. The council shall take such action thereon as may be necessary.

(d)(1) Each judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice *in the district and bankruptcy courts* within its circuit, *except that no council may issue orders to an individual judge, either sua sponte or based on a complaint, arising from an allegation of judicial unfitness on the part of any judge.* [rest of section unchanged, except subpoenas issued by clerk of district court or council chair rather than clerk of court of appeals]

(2) All judicial officers and employees *of the district and bankruptcy courts* of the circuit shall promptly carry into effect all the orders of the judicial council.

(3) Unless an impediment to the administration of justice is involved, regular business of the courts need not be referred to the council.

(4) [Review of local rules; no change]

(e) The judicial council of each circuit may appoint a circuit executive. [no changes in current § (e) or (f) except to substitute "chairperson" for "chief judge" and eliminate duties relating to court of appeals]

§ 335 Circuit–district councils on judicial discipline [Establish in each circuit, a seven member council, chaired by the chief judge of the court of appeals, and including three circuit judges elected by the court of appeals and three district judges elected by the judicial council to handle allegations of judicial discipline and unfitness. The new council will exercise the authority of the previous circuit judicial

council under 28 U.S.C. § 372(c), and have all appropriate order, hearing, and subpoena authority.]

The argument

The composition and mission of today's judicial councils reflect the limited objectives of the 1939 statute: in order "that the work of the district courts shall be effectively and expeditiously transacted" circuit judges should take "such action as may be necessary," and "the district judges [should] promptly . . . carry out the directions of the council as to the administration of the business of their respective courts."[115] Despite numerous changes in the council statute, a predominantly circuit judge governance body is still overseeing a predominantly trial judge activity. The circuit judges' slight membership majority does not accord with the roughly 7 to 1 ratio of trial judges to circuit judges nation-wide. Congress has broadened the council's goal, changing it from the language above, solely about district courts, to a goal of "effective and expeditious administration of justice within [the] circuit." That, however, does not change the fact that most council business is district and bankruptcy court business. In fact, in one way, this statutory broadening of the council's mission simply worsens matters, by involving district judges in administering appellate courts, albeit in a minor way.

Chief Justice Hughes described the 1939 statute's rationale in these terms: "The Circuit judges know the work of the district judges by their records that they are constantly examining [and] know the judges personally in their districts."[116] Today, as noted by the Conference committee responsible for court administration matters, "the administrative issues and needs of the two courts are distinctive and not readily perceived or addressed by judges with limited or no experience in the other forum."[117] A 1992 Federal Judicial Center survey found almost 60% of the district judges to be

115. An Act to Provide for the Administration of the United States Courts, and for Other Purposes, 53 Stat. 1223, 1224 (1939).

116. *Quoted in* Fish, *supra* note 36, at 153.

117. Report of the Judicial Conference Committee on Court Administration and Case Management to the Judicial Conference Committee on Long Range Planning, Feb. 16, 1993, at 9 (unpublished manuscript, on file with the Office of the Judicial Conference Secretariat, Administrative Office of the U.S. Courts).

moderately or strongly in favor of "eliminat[ing] appellate court administrative supervision of district courts," and only 16% moderately or strongly opposed. Circuit judges responded at roughly inverse levels.[118] Moreover, although Congress traditionally directed the councils to review district court rules and plans,[119] the 1990 Civil Justice Reform Act vested review authority for district courts' civil justice cost and delay reduction plans in committees of the circuit's chief district judges (and the single chief circuit judge).[120]

Congress should continue this trend by revising the circuit council statute to limit its membership and jurisdiction to the district and bankruptcy courts.[121] This change would preserve the courts' current authority to handle their "regular business" without intervention but would provide a separate review body if a trial court's administrative activities became "an impediment to the administration of justice." The difference between the proposal and the status quo is that the review of a trial court or trial judge would be conducted by a body of judges who are familiar with the problems and operations of trial courts. That same body would constitute the separate review body to which individual courts would submit such plans as Congress wanted reviewed. The statute would

118. Federal Judicial Center, Planning for the Future: First Report of Results from a Survey of United States Judges, Dec. 1992 (unpublished manuscript, on file at the Federal Judicial Center).

119. Local rules (28 U.S.C. § 2071(c)(1)). *See also* the council review duty codified at 28 U.S.C. § 332(d)(4); 1964 Criminal Justice Act (18 U.S.C. § 3006A(a) (1968)); Jury Selection and Service Act (28 U.S.C. § 1863(a)); 1975 Speedy Trial Act (18 U.S.C. § 3165(c)).

120. 28 U.S.C. § 474(a). Although the statute directed the Judicial Conference to review the plans further and authorized it to request changes (28 U.S.C. § 474(b)), the Conference's Executive Committee delegated this authority to its district judge-dominated Committee on Court Administration and Case Management. JCUS Report, March 1992, at 12.

121. This proposal draws on the Report of the Judicial Conference Committee on Court Administration and Case Management, *supra* note 117, at 10–11. The committee's recommendation was in the context of its parallel proposal to create a single district in each circuit, and thus a circuit-wide district council for administrative matters. The committee also recommended that Congress create an appellate council in each circuit, to consist of the courts of appeals sitting as a committee of the whole for administrative matters. *Id.* at 9. The proposal offered above assumes that each court of appeals can govern itself without such a statutory arrangement.

also give an appropriate governance role to the bankruptcy and magistrate judges. Bankruptcy and magistrate judges should have some representation on the council for the same reason they should have some representation on the national governing body: to bring their perspective to bear on matters of court governance and to give them a vested interest in the work of, and policies adopted by, the council.

Congress, though, should retain a joint circuit–district review body to consider disciplinary matters, including complaints filed under 28 U.S.C. § 372(c). Such a procedure, according to the 1993 Report of the Judicial Conference Committee on Court Administration and Case Management, "should continue to provide assurance to the public that complaints are reviewed and acted on without undue influence arising from close working relationships among the participants."[122]

The response

The circuit is the basic building block of the federal judiciary. Its parts are all the courts in the circuit, but it is an entity greater than the sum of its parts. To dismember circuit governance would be counterproductive. The resource allocation challenges facing the federal courts over the next several decades require collective decision making, not the confusion that would arise from dividing governance responsibility between the circuit and district courts. Diminished appropriations over the next several decades will require painful choices by the courts to ensure that they remain capable of doing those things essential to the exercise of the judicial power.[123] One limitation on effective resource allocation is the situation currently possible whereby one court enjoys surplus resources while an adjacent court struggles with inadequate resources. Eliminating courts of appeals from the purview of the circuit-wide council would require trial courts to spread the pain of

122. Report of the Judicial Conference Committee on Court Administration and Case Management, *supra* note 117, at 11–12.

123. For useful perspectives on long-range planning in judicial councils, see the papers by Chief Judge J. Clifford Wallace, Judge Otto R. Skopil, Jr., Judge William W Schwarzer, Charles W. Nihan, and Russell R. Wheeler in Long-Range Planning for Circuit Councils (Federal Judicial Center 1992).

limited resources solely among themselves. Rather than restrict the council's purview, Congress should assign the current councils more authority, particularly authority to determine the best allocation of resources among the courts of the circuit. Circuit councils with increased authority to assign priorities for in-circuit spending projects for both appellate and district courts, and to promote the temporary reassignment of judges within the circuit, can play a vital role in the efficient allocation of resources.

As a matter of fact, today's councils are a substantial improvement over the councils as created in 1939. Today, district judges have, for practical purposes, half the voting strength on the councils, whose mandate now covers all phases of judicial administration within the circuit. All judges and employees must carry out council orders. The current composition of the councils fosters objective problem solving by creating a distance between the source of the problem in an individual court and the body authorized to decide on a solution.

The beneficiary of circuit judges' participation in circuit governance is not the appellate judiciary. It is the decision-making process. Precisely because most of the business before the council is trial court business, it is important to have significant participation by circuit judges and the perspective they bring. Chief Justice Hughes's justification for circuit judges' prominence on the councils still rings true: Judicial review of how district judges do their work provides circuit judges with an overview of the capacities of the district judges, particularly when considering administrative orders in the area of case assignments. Circuit judges provide an antidote to the understandable tendency among trial judges to accommodate one another. And circuit judge service dilutes inappropriate contact between appointing officers and those they will work with on a daily basis. That is why, for example, the courts of appeals appoint bankruptcy judges with the assistance of the councils[124] and why the courts of appeals appoint federal defenders.[125] Furthermore, maintaining the councils does not preclude Congress's delegating to chief district judge committees such sec-

124. 28 U.S.C. § 152.
125. 18 U.S.C. § 3006A(g)(2)(A).

ondary functions as it wishes (e.g., approval of delay reduction plans).

Finally, while a rotating chairperson for the council is the only feasible approach within the context of the proposal, it would have the unintended effect of promoting the power of the circuit executive. The circuit executive would be the permanent fixture in the council machinery, with a greater institutional memory, probably greater contacts among the many district judges of the circuit, and greater mastery of the administrative details. (Such a phenomenon is well known in the state courts that provide for frequent rotation of chief judges.)

2. Congress should amend the circuit judicial conference statute to broaden its purpose, through the following amendment to Title 28.

Congress should renumber old § 333 ("Judicial conferences of circuits") as § 336 (see § A.4.a, *supra*) and revise it as follows.

> § 336 ~~Judicial c~~ *C*onferences of circuits
>
> The chief judge of each ~~circuit~~ *court of appeals and the chairperson of each circuit judicial council* ~~shall summon biennially, and~~ may *jointly* summon *from time to time, but not more than* annually, the circuit, district, ~~and~~ bankruptcy, *magistrate, and territorial* judges of the circuit, in active service *and in retired service as certified pursuant to § 371(f) of this title, and such other employees of the circuit as they may select,* to a conference *of the circuit, to be held at or near a major metropolitan area within the circuit and* at a time ~~and a place~~ that ~~he~~ *they* designates, for the purpose of considering the business of the courts and advising *the Judicial Board of the United States of the conference's recommendations for* ~~means of~~ improving the administration of justice within such circuit *and the courts of the United States*. ~~He~~ *The chief judge of the court of appeals and the chairperson of the Judicial Council of the Circuit* shall preside at such conference *in alternate years*~~., which shall be known as the Judicial Conference of the circuit. The judges of the District Court of Guam . . . their respective circuits~~.
>
> The court of appeals *and the judicial council* shall ~~provide by its rules for~~ *develop plans to ensure* representation and active participation at such conferences *by members of the Congress and the Executive Branch; judges of the state courts; the Executive Judge, Judicial Board, and Office of Court Support and Administration officials;* members of the bar of such circuit *(including representatives of all significant segments of the bar), the news media, and other persons who have an interest in improving the operation of the judicial branch of government. Any registration or participation*

> *fee charged for attendance at such conference shall not exceed the direct costs of the attendee's participation.*

The argument

Circuit conferences have a future in the judiciary, but not in the form mandated by the 1939 statute. That statute brought judges and lawyers together when most judges functioned in physical isolation and judicial improvement activities were sporadic. These conditions have changed. Multijudge court meetings and telephone, fax, and electronic mail technologies readily bring judges together, as do educational programs offered by the Federal Judicial Center and other groups, bench–bar advisory committees and public hearings for rule making, statutorily required bar committees to advise on appellate rules and internal operating procedures,[126] and civil and criminal justice planning groups.[127] Conferences present modest substantive programs, often at resort settings at which the bar overwhelms the bench, leading the appropriations committees to call for "holding them biennially at the most economical location convenient to judges in the circuit."[128] Some circuits charge lawyers' registration fees or receive other financial contributions to ensure the kind of conference they want. Most firms are happy to subsidize the conferences in return for a chance for their lawyers to rub elbows with the judges, but the arrangements create an obvious risk of favoritism.

To be worthwhile, conferences must be user-oriented. Circuits so inclined should hold no-frills conferences at which the judges can converse with the various constituencies whose support will become increasingly vital to the courts' survival. As courts face choices about how best to serve their clients, and which clients most need service, the conferences can be a valuable source of information.

126. 28 U.S.C. § 2077.

127. 18 U.S.C. § 3168 (mandating Speedy Trial Act planning groups); 28 U.S.C. § 478 (mandating civil justice delay and cost reduction advisory groups).

128. Senate Comm. on Appropriations, Report to Accompany S. 3026, S. Rep. No. 331, 102d Cong., 2d Sess. 81 (1993).

The response

Despite developments since 1939, only the circuit conference statute obligates federal judges to meet together, and with the lawyers who practice before them, expressly to consider the immediate and long-term problems affecting the administration of federal justice. Without the statutory mandate, judges would not have the benefit of periodic contact with all their circuit, district, bankruptcy, and magistrate colleagues, or the contact with lawyers that the conference uniquely provides. Allowing circuit conferences only if they follow the "close-to-the-customer" orientation described above is to sacrifice a simple and effective device on the altar of faddism. Nothing stops a circuit from including in its conference any of the individuals whose attendance the proposed statute would mandate. Many circuits have revamped their conference rules and procedures to increase participation by various types of lawyers within the circuit.

As to site and finances, the private sector and other branches of government know well that occasional retreats in alternative settings provide a necessary format for considering long-term issues. And there is no public policy reason why the bar should not have the option of bearing some of the conference costs beyond the direct costs of lawyer participation. No judge would decide an issue differently because the organized bar had a disproportionate role in supporting a bench–bar conference.

Finally, the statute provides flexibility for those who want to meet less often. And, in fact, if a circuit's judges determined, in their own best judgment, that they did not want to hold a conference, it is hard to see who would force them to meet. But it is important to keep the statutory obligation on the books, because it prompts the kind of interaction and consultation described above.

3. Chief judges should be selected according to administrative ability, and their duties should be clearly specified by statute.

a. Congress should revise 28 U.S.C. §§ 45(a) and 136(a) (selection of chief circuit and district judges) with the following substitute language.

(a)(1) ~~The chief judge of the circuit shall be the circuit judge in regular active service who is senior in commission of those judges~~

~~who~~ *Whenever a chief judge of a court of appeals [a district court] notifies the Executive Judge that he or she wishes to remain in active status but no longer serve as chief judge, or whenever such judge leaves active status by reason of death, retirement, or resignation of his or her judicial commission, or disability under § 372(b) of this title, the Executive Judge shall nominate and, with the consent of a majority of the Judicial Board, designate another judge of the court to be chief judge. Before designating a chief judge, the Executive Judge shall consider a list that the active judges of the court shall recommend, such list to include the names of at least two judges of the court who meet the criteria described elsewhere in this section.*

~~(A) are~~ *The chief judge so designated shall be* sixty-four years of age or younger, *unless no active judge of the court meets this requirement. No judge shall serve as chief judge after attaining the age of seventy years unless no other circuit judge is qualified to act as chief judge.*

~~(B) have served for one year or more as a circuit judge; and~~

~~(C) have not previously served as chief judge.~~

(2) [Delete existing language] *Each chief judge so designated shall serve a term of seven years and may be reappointed to additional terms, subject to the provisions of paragraph (1).*

(3) [Delete existing language] *Whenever no judge of the court has been designated chief judge pursuant to subparagraph (a)(1), the active judge senior in status shall serve as acting chief judge until a chief judge has been designated.*

The argument

The seniority system's chief virtue is that it offends no one. Judges become chiefs according to the confluence of age and appointment date, rather than administrative ability or aptitude. Not all chief judges have served the full seven-year term that the statute's drafters hoped would ensure continuity. Judges averse to administration nevertheless assume the job when it falls to them rather than shirk a statutory responsibility or risk the job's passing to another judge with even less aptitude.

Federal courts will grow larger as judgeships increase, making the management task of each chief judge more demanding. The time has come to adopt a selection system that picks chief judges with management skills and aptitude. Of the district judges responding to the Center's 1992 survey of federal judges, almost 60% supported strongly or moderately the idea of "select[ing] chief

judges for their administrative ability rather than by seniority."[129] The American Bar Association's Court Organization Standards recommend two options for selecting chief judges for appellate and trial courts: appointment by the chief justice (the executive judge in the scheme proposed above) or election by the court over which the chief judge presides.[130]

Appointment by the executive judge after consultation with the court in question combines the advantages of both methods. The executive judge would be able to use the selection process to inject into federal court governance some community of purpose and alleviate the centrifugal tendencies that frustrate effective policy making and execution. However, the executive judge would realize the short-sightedness of appointing a chief judge solely for reasons of policy compatibility, without giving serious consideration to the wishes of the other judges on the court. Thus, the search, made in consultation with the court in question, would be for judges who were capable administrators and had the respect of their colleagues. Among the criteria that could enter the calculus of both the executive judge and the court would be demographic diversity, thus resulting in the selection of more women and minority chief judges.

The response

The seniority system recalls Churchill's assessment of democracy: "the worst form of government except all those other forms that have been tried from time to time."[131] The Federal Courts Study Committee recognized that the current method "is not faultless," but it concluded that the method "operates well in practice and is preferable to any other method."[132] Among other things, the

129. Fourteen percent of the district judges had mixed feelings on the proposition, and 17% were moderately or strongly opposed to it. Circuit judges did not respond positively: 62% were strongly or moderately opposed to the proposition, 11% had mixed feelings, and 14% moderately or strongly supported the proposition. (In both groups, small percentages either had no opinion or did not answer the question.) Federal Judicial Center, *supra* note 118, at 21.

130. American Bar Association, Commission on Standards of Judicial Administration, *supra* note 64, Standard 1.33(b), at 82.

131. From Political Quotations 28 (Daniel B. Baker ed., 1990).

132. FCSC Report, *supra* note 26, ch. 8, esp. at 152.

seniority system ensures that the chief judge will be one who has observed the court and its administration as an active participant.

Many of the district judges in the Center survey who favored the abstract concept of "selection based on administrative ability" would have responded differently had they been offered the specific proposal above: selection by a judge in Washington who was unfamiliar with the court's needs and character but eager to pull the court into line with national policy goals. Even if such a system might work in state courts, as recommended by the American Bar Association, it would not work in the much larger federal court system, which operates on the assumption that the government that works best is the government closest to home. Removing seniority as the selection criterion would also prompt divisive campaigning by would-be chiefs, who would try to curry favor with the executive judge and encourage support from colleagues. These actions would have a depressing effect on judges' morale. Such considerations are what led the Commission on Revision of the Federal Court Appellate System to withdraw its draft proposal for selection of chief judges by the appellate court and propose something similar to the statute as finally enacted.[133]

Meddling with the method of chief judge selection also poses a risk to the judiciary's efforts to broaden demographic diversity within its leadership. Women judges and racial and ethnic minority judges are now coming into chief judge positions through the same rules that their predecessors followed. To change the rules now could deprive some of them of the leadership positions that they are now scheduled to enter through the operation of the statute; specifically, it would deprive those who might not enjoy the favor of whoever is selected as executive judge.

Should the judiciary conclude that chief judges need more administrative ability, there are ways to reach that goal without the drastic alternative of national selection. One way is to provide chief judges—when they assume the position and throughout their tenure—with even more education in management than they cur-

133. *Compare* the Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change 68 (June 1975) *with* its Structure and Internal Procedures: Recommendations for Change, A Preliminary Report 108 (April 1975).

rently receive. As a protection against the occasional administratively incompetent chief judge, Congress might consider authorizing the judges of any court to certify to the circuit council that the current chief judge should be replaced, whereupon the circuit council could authorize the next judge in line of eligibility to assume the position.

b. The authority of chief judges should be clearly established by the following amendment to Title 28 (the amendment is to the chief district judge statute; a similar amendment should be enacted in the chief circuit judge statute).

§ 136 Chief judges~~; precedence of district judges~~

(b) The chief judge shall, *in consultation with the other judges of the court* ~~have precedence and preside at any session which he attends.~~

(1) ensure that the rules of the court are observed and that the business of the court is handled effectively and expeditiously;[134]

(2) make special assignments of cases among the judges of the court insofar as rules of court do not prescribe the assignment of business or cases among the judges, or when cases present exceptional circumstances not provided for in the rules of the court;[135]

(3) appoint the chief bankruptcy judge from among the judges of the district's bankruptcy court;

(4) appoint, remove, and supervise the work of the clerk of court, the chief probation officer, and the chief pretrial services officer;

(5) appoint divisional presiding judges in divisions of the court having more than one judge permanently assigned;

(6) appoint such committees of the court as the court may by majority vote establish or that the chief judge believes are necessary for the effective administration of the court.

The argument

Title 28 contains elaborate provisions on chief judge selection,[136] and numerous ministerial and quasi-ministerial duties of

134. Drawn from 28 U.S.C. § 154(b), concerning the chief judge of the bankruptcy court.

135. *Cf.* 28 U.S.C. § 137, ¶ 2: "The chief judge of the district court shall be responsible for the observance of such rules and orders [as the court may adopt], and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe."

136. 28 U.S.C. §§ 45(d), 136(d).

chief judges, courts, and subordinate officials,[137] but it provides no clear statutory directive that the chief judge serve as the chief executive officer of the appellate or district court. The closest things to an assignment of plenary authority are the provisions of sections 45 and 136 that the chief circuit and district judges have precedence at sessions they may attend and section 137's directive that the chief district judge see to it that the other judges observe any rules they may have adopted for case assignment. One commentator suggests that these provisions grant ministerial authority rather than decision-making authority.[138] Some chief judges have tried unsuccessfully to direct a judge to clean up a backlog of pending motions, withdraw an administrative order creating confusion in the clerk's office, or cease behaving tyrannically in the courtroom. Such judges often tell the chief judge, in effect, "you and I received the same commission, and I have no intention of changing my behavior." The chief judge can either try to mobilize the entire court to confront the judge, which may not be effective, or seek help from the circuit council, which may not be well equipped to provide it.

Subsections (b)(1) and (b)(2) of the proposed statute assign the chief district judge specific responsibility to try to resolve difficult situations with recalcitrant judges. While they would not impair judicial independence, the provisions should serve to make judges more responsive to the court's administrative needs. The chief judge could seek the support of the circuit council where necessary.

The response

The requisites of leadership vary by the type of organization being led. Leadership in any professionally dominated institution rests not on orders and mandates, but on consultation and counseling. This is especially true among federal judges, who fiercely but appropriately guard their independence against any action that threatens to allow nonjudicial considerations to affect how they should decide and manage cases. Federal appellate and district courts have been guided by some very effective chief judges, who

137. *See* Appendix C, *infra*, and Nationally Prescribed Duties of Chief District Judges, *in* Deskbook, *supra* note 42, app. at 111.

138. Batchelder, *supra* note 17, at 50.

have led their courts well without the benefit of a statute as proposed here. The federal judiciary has also had its share of weak chief judges, but few of them would have been made any stronger by the authority in the contemplated statute. As the Federal Judicial Center's *Deskbook for Chief Judges of U.S. District Courts* observed, "[d]espite the paucity of specific authority . . . chief district judges have—and are perceived as having—a sizable reservoir of authority."[139] Judge Batchelder's 1987 survey of thirty-six large district courts revealed strong opposition among chief judges to "legislation by which Congress would establish any further regulation of district court administration."[140] It is instructive that the Federal Courts Study Committee, in a lengthy chapter on federal court administration, including recommendations with respect to chief judge selection and training,[141] made no recommendation of the type offered above. Furthermore, in specifying the duties of the chief judge, there is the risk of satellite controversy over whether an action of a chief judge falls within the statutory authority. Silence has its virtues.

The proposed statute is deficient in another way: It assumes that the chief judge is better equipped to manage the court than is the court as a whole equipped to manage itself. Although it may be true that most courts cede to the chief judge the authority to manage the court, it is not wise to mandate such an arrangement by statute. The management literature stresses the value of participatory management, especially among professionals, and Congress should not restrict the use of such approaches. It would be particularly dangerous to authorize the chief judge to appoint court officers without specific approval of the other judges. For one thing, after the chief judgeship changed hands, the court would be saddled with the former chief's staff, in whom the court may have little confidence.

139. Deskbook, *supra* note 42, at 7.
140. Batchelder, *supra* note 17, at 55.
141. FCSC Report, *supra* note 26, at 152–53.

Part VI: Conclusion

Segments of the federal judiciary are debating the proper forms of its governance. The debate is older than, but has been spurred by, the current long-range planning process. We prepared this paper to inform that debate and that process. We are not advocating a new governance arrangement. We have presented an alternative against which to weigh the strengths and weaknesses of the current arrangement. In analyzing the current structure, readers should step back from the detailed dialectic presentation in Part V. They should ask whether, taken in its entirety, governance is operating as it should, both for today and to meet the challenges of the future. They should also ask whether the judiciary is capable of accommodating over any brief period of time any major change in its governance structure. The judiciary is an evolutionary organization, not a revolutionary one, but changes sometimes occur rather quickly. The federal judiciary moved from no governance system at all before 1922 to having the essential components in place seventeen years later, in 1939.

Our concluding comments are organized around three central questions:

- Why is the analysis of structure important?
- What has the analysis revealed about the rationale for the current governance arrangement?
- What should be the fundamental purpose of court governance?

A coda to this concluding part rosters with brief comment a number of somewhat smaller proposed adjustments to current governance arrangements that emerged during our preparation of this paper or that others called to our attention when they reviewed it.

A. Why is the analysis of structure important?

The paper's specific topic—governance structures—is not the only aspect of court governance currently under discussion within the judiciary. There is also interest in the proper allocation of governance authority among the three levels. Should sizable amounts of authority now vested in national-level structures be reallocated to

circuit-wide bodies, or to individual districts? Conversely, should the national-level bodies be vested with more authority than they now possess?

We put our attention where we did for two reasons. First, there is considerable interest in the structures per se and whether they should be altered, or preserved, to meet the demands of the long term. Second, whether Congress should reallocate authority, and if so, the best way to do so, turns in part on the structures that would exercise that reallocated authority. For example, the alternative arrangement analyzed in this paper has implications for the reallocation of national, regional, and local authority: The chief judges would become appointees of the executive judge, and the circuit councils would consist of trial judges only. In general, any structural change that is not trivial is likely to have some effect on the distribution of power. Similarly, if it is deemed desirable to reallocate authority between national, regional, and local levels of governance, that reallocation may require some structural reorganization. All this is to say little more than that the structure and function of organizations are, or should be, closely attuned to each other.

There is a related point not addressed in the earlier analysis, which is that some changes in court structures would require modifications in governance arrangements. For example, if, as has been proposed,[142] the number of district courts were reduced to one per circuit, the distribution of governance authority at the regional and local levels would have to be modified. Or, if the regional circuits were eliminated, as some have proposed,[143] that would require changes in the governance institutions based on the circuit concept.

142. Report of the Judicial Conference Committee on Court Administration and Case Management to the Judicial Conference Committee on Long Range Planning, Feb. 16, 1993, *supra* note 117, at 11.

143. See the various proposals described in Judith A. McKenna, Structural and Other Alternatives for the Federal Courts of Appeals, ch. 6 (Federal Judicial Center 1993).

B. What has the analysis revealed about the rationale for the current governance arrangement?

What does this analysis say about how current forms of governance operate, and thus about their potential for serving the judiciary's future needs? After describing the current governance arrangement in Part III, we presented in Part IV a set of assumptions that, if true, tend to support and justify the current arrangement. What does the analysis of arguments for and against the alternative arrangement in Part V teach us about those seven assumptions presented in Part IV?

1. The Chief Justice is properly the head of the entire federal judiciary.

No one disputes that the Chief Justice is, in the Federal Courts Study Committee's words, "the acknowledged head of the entire federal judiciary";[144] but that fact does not end the relevant inquiry. For one thing, the phrase could mean anything, from being a hands-on executive in the style of activist Presidents, constantly monitoring the performance of the bureaucracy, to a much more reserved role, in which the incumbent delegates heavily but, through selected interventions, provides direction on crucial issues. As we noted earlier, the lack of experience with different Chief Justice "styles" and the dearth of published comparative analysis (particularly any accounts of the incumbent Chief Justice's administration) make it difficult to assess how much any Chief Justice can accomplish.

The lack of agreement on the Chief Justice's role compounds the difficulty of assessing the various proposals judges and others have offered for a "chancellor" or "executive judge." Proponents argue that another national governance position should be created for a life-tenured judge within or beside the office of the Chief Justice—a position whose incumbent, unlike any Chief Justice, could devote his or her full time to governance responsibilities. They also argue that the incumbent could bring coordination and consistency to the judiciary's internal management and promote the judiciary's positions on policy matters to the executive and legislative

144. FCSC Report, *supra* note 26, at 146.

branches. Were such a position to be created, to work either with the Judicial Conference or with a much smaller policy body, a great deal of power would gravitate to this new officer. This is power that now resides in the Chief Justice, in the Conference and its many committees, and in the Administrative Office as the Conference's agent. The matter presents two trade-offs that the judiciary must weigh. First, to what degree would the federal courts lose the institutional and moral authority that only a Chief Justice can provide, in return for a full-time executive presence that no Chief Justice can provide? Second, to what degree should the federal courts expand authority at the apex of the governance pyramid, even assuming it would increase efficiency and reduce confusion throughout the governance system?

2. The current methods of selecting Conference, council, and committee members properly ensure equal participation by all circuits in national governance and sufficient consultation with affected judges and employees at the national, regional, and local levels.

Defenders of the current governance structure regard it as a largely democratic institution because the life-tenured judges, whose judicial work is the raison d'être of governance, govern themselves through Conference and council membership, committee work, and governance in their own courts. The most problematic aspect of adequate participation appears at the national level, where it is assumed that equal representation of each circuit ensures equal and equitable participation by all judges through their representatives. Equal circuit participation, however, is not necessarily the same as equal representation for judges from each of the circuits. If this is a problem, it is primarily a problem of the Conference itself, with its "one-member, one-vote" rule. Circuit representation on Conference committees, in contrast, correlates closely with circuit size. We are not aware of any charge that, within the Conference, small circuits use their governance dominance to the detriment of large circuits. If, however, as many predict, the governance decisions over the next decades will be primarily about resource allocation, the potential for such a result will grow.

Methods of selection for participation in regional governance, housed in the judicial council, are controlled generally by a statutory framework that specifies how the chief judge shall be selected and sets certain limits on the council's membership. The statute provides that the number of judges on the council be determined by majority vote of the circuit and district judges of the circuit, but it is silent as to the method to be used for selection. Selection methods may reflect important values for a circuit's judges. In the Ninth Circuit, for example, the nonelective methods used to select both circuit and district judges are explicitly justified on the grounds of avoiding "excessive politicization" of the process.[145] This exemplifies the concern that, in judicial governance, frank electioneering for an office would be at least unseemly.

There is very little prescribed structure for the governance of individual appellate or district courts. The statutes dictate who will be chief judge and nothing else. Courts have in fact created many different kinds of governance mechanisms, most built around committees and individual assignments. It appears that there are considerable infusions of democratic elements into these local governance arrangements.

3. Full-time judges should function as the policy makers at the national, regional, and local levels of court governance, and they are capable of doing so.

Participating in court governance has always been a supplementary responsibility for federal judges. Participation has required rather large numbers of judges to devote relatively small amounts of time, and a smaller number of judges to devote considerably more. Except for some chief judges, governance participants do not take reduced caseloads and thus must manage full judicial calendars while attending to the demands of their governance responsibilities. As noted earlier, these demands may include mastering large amounts of arcane administrative information and working with colleagues, in very brief periods of time together, to fashion sensible policy and oversee the work of the Administrative Office

145. Order Governing the Judicial Council of the Ninth Circuit, as amended January 22, 1992 (on file with the Circuit Executive, U.S. Court of Appeals for the Ninth Circuit).

staff assigned to work for them. If, as some currently claim, many federal judges already carry overwhelming workloads, the ability of hundreds of judges to do both of their jobs effectively could be put into question. At some point, this seeming paradox may get public attention, because it seems plausible that a much smaller number of judges, including a chancellor or executive judge, all working full-time or half-time on governance matters, could do much of the work currently done by most of the committees.

Again, the issue presents trade-offs. If, as developed in Part V, the chief purpose of federal court governance is to ensure support for those who exercise Article III's judicial power, judicial branch governors should be drawn broadly from those who have been commissioned to exercise that power and who stay close enough to it not to lose touch with the reality of judicial life in a federal courthouse. Surely a corps of judges who serve only as administrators, far removed from the daily work of the court, would sooner or later lose credibility in the eyes of their judicial colleagues. Furthermore, Congress might balk at the costs of creating more active judgeships in order to let the executive judge and judicial board devote substantial time to governance matters. However, how effectively can any $3 billion, 27,000-person enterprise be governed entirely by part-timers?

4. Full-time judges should control the effective implementation of policy by administrative staff, and they can do so without constant oversight.

It is unrealistic to expect that part-time governors can maintain close oversight of hundreds of administrators with senior positions at the national, regional, and local governance levels. It is futile to attempt to maintain a bright line between policy making and administration. Staff will inevitably make policy; this can be a source of relief rather than of worry to the judges both in and out of the governance structure. The challenge for governance is to make sure that staff policy making is merely interstitial, fashioned within the larger policy framework established by judges.

But today's apparently comfortable governance–staff relationship may not be sustainable. The judiciary and its administrative support staff will continue to grow in size, budget, and complexity

to meet the needs and wants of the population as reflected in jurisdictional changes and litigation behavior. Whatever problems may now exist in the oversight function will not be solved by inaction. In 1962, there was one staff member at the judiciary's Washington, D.C., headquarters for every two life-tenured judges in the country. In 1992, there were three Washington, D.C., staff members for every two judges.[146] This trend is very likely to continue.

5. Governance structures are properly linked to the hierarchy of judicial decision making; that is, appellate judges should have greater governance authority than trial judges.

What principle justifies a greater role in governance for appellate judges than for trial judges? There are several possibilities. One is that appellate judges are as knowledgeable about the administration of trial courts as are trial judges. A point against this principle is that there is little evidence that it is true, at least as to much of what constitutes the administration of the district courts. Circuit judges do, however, have a familiarity with trial judge performance, based on a review of appeals from their decisions, a familiarity that other trial judges do not have. Also, circuit judges are sometimes drawn from the ranks of the trial courts—but not because they are outstanding administrators.

Another principle is that the traditional hierarchy of the judiciary's decision-making and review processes must be reflected in its governance arrangements because it would undermine the judiciary's case decision-making and review procedures if judges with judicial superiority suffered governance inferiority. A point against this principle is that there is no reason to believe that circuit judges will lose their judicial superiority over trial judges if they cannot review administratively how the trial judges govern their courts, plan for juror utilization, and assign cases.

A third principle is that any exercise of power, especially public power, needs review, to minimize the occurrence of error and abuse of power. Checks and balances are essential; some argue that trial judges are not particularly well suited to check one another and that only circuit judges are well situated to perform that function for the trial courts. A point against this principle is that, by a

146. *See* data at *supra* note 63.

contrary assessment, alternative governance arrangements like the one described above, in which trial judges oversee trial courts on a circuit-wide basis, may offer a superior way to provide an external check on the trial courts.

We do not judge the persuasiveness, or lack of it, of any of these principles, but we note that there appears to have been almost no contemporary attention paid within the judiciary to articulating the rationale for this central ingredient of current governance arrangements.[147] The assumptions justifying this aspect of the governance arrangements emerged from the 1891 creation of a separate appellate court for each circuit. Those assumptions have been subjected, as best we can tell, to almost no contemporary analysis.

6. Governance authority properly resides in life-tenured judges.

The federal courts are currently served by 837 life-tenured judges and approximately 700 full-time term-appointed judges. Although term-appointed judges make a vital contribution to the system, they have almost no role in its governance. There are several practical reasons to consider their inclusion—the perspective they can provide, the legitimacy their participation will lend to decisions reached, and the risk of their alienation if they are continually excluded.

On the other hand, term-appointed judges, by definition, do not have the protections of Article III and may have less incentive to nurture those protections than do judges who enjoy them. Moreover, giving term-appointed judges meaningful representation would result in a Judicial Conference or other governance body unwieldy in size. The judiciary should also consider, however, whether the courts can sustain a situation in which almost half of the nation's federal judges have no representation on the national governing body, less than 15% representation on the committees that support that body, and no official representation on the regional governing bodies.

147. The Report of the Judicial Conference Committee on Court Administration and Case Management, *supra* note 117, at 13, stated, without more, that the "administrative and operational problems and opportunities in the trial and appellate courts are sufficiently different to warrant separate governance structures."

7. The governance arrangements should not and do not impair legitimate judicial independence.

There are two ways in which the governance structure might impair judicial independence. First, authority and power might be so located within the governance arrangement that some life-tenured judges could intervene improperly in the exercise of Article III's judicial power by other judges. This has seldom arisen as a practical problem, though it has been litigated, most notably to a nondefinitive result in the case of *Chandler v. The Judicial Council of the Tenth Circuit*.[148] It is probably true that any system of governance will, in the future, further restrict the individual autonomy of judges, in order to solve difficult problems of allocating increasingly scarce resources. The question is whether the additional rules and regulations that seem inevitable can accomplish their legitimate purposes without compromising any judge's legitimate exercise of the federal judicial power. At the outset of this paper, we recalled Judge Schwarzer's caution that the line between legitimate judicial independence and a judge's operational autonomy is not a bright one, and decisions about space, facilities, and staffing could influence a judge's morale and how the judge exercises the judicial power. However, he also noted that protections of operational autonomy may make a judge's life more comfortable without any effect on the judge's independence. Can the governance system provide tighter resource management and demand greater accountability without sacrificing the core value of judicial independence?

The second way in which the governance structure might impair judicial independence is if the communication between the judicial branch and the other branches, especially Congress, is ineffective because of insufficient concentration of authority in the courts' governance apparatus.

C. What should be the fundamental purpose of court governance?

It is worth emphasizing—because it tends to be forgotten—that in the final analysis courts do not exist to govern themselves effectively. The appropriate standard by which to judge court governance arrangements is not whether they produce impressive bud-

148. 394 U.S. 74 (1970).

geting systems or extensive legislative contact. The correct standard is whether governance helps judges "to secure the just, speedy, and inexpensive determination of every action"[149]— weighing the costs of federal adjudication to both parties and taxpayers. Federal court governors might ponder the significance of a joint project on "trial court performance standards" of the National Center for State Courts and the Justice Department's Bureau of Justice Assistance. The project assesses the links that join court structure and governance with service to the public. The project report observes that "court reform has focused on the structures and machinery of the courts, not their performance (what courts actually accomplish with the means at their disposal), and on the needs of judges and court personnel, rather than directly on the needs of those served by the courts."[150]

This conclusion from the project suggests a set of questions about federal court governance that are, admittedly, much easier to ask than to answer. For example, does court performance in a circuit vary depending on the composition and operating procedures of its circuit council? Do district courts with strong chief judges perform more effectively than those with weak chief judges? Have federal courts nationally performed better or worse when led by activist chief justices? Do differences between districts or circuits in their modes of governance contribute at all to differences in the fairness of decisions, the expedition of dispositions, or the costs of litigation? Answering these questions will stretch the methods and interpretive capacities of researchers and policy makers to the limit, and it may be beyond them. The questions are, nevertheless, important ones. A long-range plan for the governance of the courts that does not address these questions is unlikely to produce lasting benefits.

Coda: Other Suggestions

The judiciary's current round of long-range planning and analysis has stimulated numerous suggestions for adjustments of the

149. Fed. R. Civ. P. 1.

150. Commission on Trial Court Performance Standards, Trial Court Performance Standards, with Commentary 1 (National Center for State Courts 1990).

current arrangements. As we developed this paper, we also kept track of these other suggestions as we learned of them. Most of the suggestions have been directed at individual governance elements rather than at the overall arrangement; thus, they have been less far-reaching than the alterations analyzed in Part V. We present the suggestions in this concluding part, along with brief commentary about some of them. Some of the suggestions also appear in Part V; we do not mean to suggest that any item listed here would be generally regarded as merely technical or uncontroversial. They seem, however, to be of a different order of magnitude than the major changes dissected above. Perhaps for that reason, they may strike some readers as worthy of consideration for implementation in the short term.

1. Changes at the national level

Conference procedures—If there is a strong sense within the Conference and beyond it that its current modus operandi provides insufficient time for debate and discussion, the Conference could meet more often than twice a year, or extend the duration of their meetings, or both. It might also consider premeeting briefings for Conference members. Conference members could arrive a day or two early, at which time issues on the discussion calendar could be presented (perhaps in the form of debate between advocates, including but not limited to members of the originating committee). Such a change could provide more comprehensive information without compromising the Conference's need to honor rules of parliamentary debate. Conference members are the best judges of whether these changes would be worth the extra time they would require. Because Conference procedures are not statutory, they could be tried out on an experimental basis.

In regard to the imbalance in representation on the Conference arising from variability in circuit size, the Conference could experiment with weighted voting procedures. Such an experiment, even if made permanent, would seem not to require statutory revision. This innovation would have serious implications for redistribution of voting power in the Conference. The attractiveness of the idea depends on whether the current voting scheme is considered to create a serious problem. To gauge its seriousness, one would

need to know whether and how often bloc voting on the Conference has allowed representatives from smaller circuits to outvote representatives from larger circuits. Also, most of the circuits fall within a middle range in terms of proportion of total judges; the variance among those circuits is probably not enough to justify a weighted voting scheme. There are, however, some outliers on either end of the spectrum, which some may believe present a greater difficulty. Of course, in the whole scheme of things, this particular problem, if it is one, is merely a side issue to the question of circuit size and circuit splitting.

Conference composition—Conference membership for bankruptcy and magistrate judges has often been discussed and may be less controversial now than it has been in the past. Bringing term-appointed judges into the Conference as members would require statutory change; allowing their participation as nonvoting observers, as is currently the practice on some circuit councils, would not.

Many reviewers of an earlier draft of this paper were surprised to learn that the Judicial Conference statute authorizes circuit judges to participate in the selection of the circuit's district judge representative, noting that the statutory requirement is not honored in many circuits. Changing the requirement would, of course, require a change in the statute, but the current mandate is probably in the category of statutory nuisances that are easier to accommodate than to change, especially because the statute tells the judges to "choose" a district judge, a broader concept than "elect" or "vote for."

Delegations of authority—Some items that now go on the Conference consent calendar could be disposed of by the Executive Committee, sparing Conference members unnecessary work. The Conference may want to make additional delegations to the Executive Committee, based on an effort to emphasize the Conference's policy-making role and the Executive Committee's role as an executive manager. Labeling decisions as "policy" as opposed to "execution" is, of course, much more difficult than merely stating the distinction.

Some have suggested that the Director of the Administrative Office should have more authority to deal with matters that are clearly administrative.

Finally, judges and others are often surprised to learn that the Conference gets much of its authority indirectly through statutory assignments to the Administrative Office. There appears to be little, if any, sentiment, however, that this statutory arrangement is a problem or that it needs a cure.

Conference committees—There have been suggestions that the Conference reduce the number of its committees. The committee system was last realigned in 1987, and that change brought with it a procedure to assess periodically whether each committee should continue or be terminated. The Executive Committee is probably the best judge of whether a more far-reaching examination and overhaul is necessary or desirable.

In regard to the procedures for Conference committees, there is an undercurrent, much stronger at some times than at others, that staff presence at and participation in committee meetings are not optimally managed. On the one hand, committee members sometimes complain that too many staff attend as passive "back benchers." On the other hand, inadequate staff support for committee meetings, especially those held away from Washington, D.C., can contribute to a sense of inefficiency. One possible innovative solution to the problem of staff support at committee meetings might be to utilize new forms of teleconferencing, especially video-conferencing, by expanding the communications facilities available in the Thurgood Marshall Federal Judiciary Building.

See also an alternative arrangement for national governance (section 4, below).

2. Circuit governance

Council composition—District judges have expressed a continuing interest in further adjustments of council membership following the lines sketched out in section B of Part V. There appears to be no statutory bar to weighted voting within a council, which would provide district judges with more influence than does the one-judge, one-vote principle. Any actual proposal to effect this change would be controversial.

Statutory change would also be necessary to provide council membership for bankruptcy and magistrate judges. Like Conference membership, however, this issue may be less controversial than it has been in the past.

Circuit conferences—Some judges appear to favor consideration of a statutory change to make circuit conferences optional, either the events themselves or individual participation.

3. Chief judges

There is clearly a sentiment among some judges that seniority is not the best method of selecting chief judges because it does not account for differences in administrative ability. There seems to be an equally strong concern, however, that any other method of selection could create more problems than it solves. One way to resolve this conflict is to ask for a statutory change that would allow the districts to devise their own selection methods, or to choose from among a small list of methods. This approach is not without its own serious questions, such as how often could a district change its selection process? One possible way to resolve dissatisfaction with the current method would be to authorize the judges of a district to certify to the Chief Justice, the Judicial Conference, and the circuit council that a current chief judge should be relieved of his or her duties and replaced by the next judge in the seniority queue. Such a procedure would be used rarely, but there may be a few instances in which it would solve a problem. A relatively modest change would be for the Conference or councils to encourage eligible judges who agree to be chief to serve the full seven-year term. This policy would be in line with the intent of the 1982 statute's drafters that chief judges should serve long enough to establish some continuity and stability in the office.

4. An alternative arrangement for national governance

One of the reviewers of an earlier draft of this paper used governance recommendations made or raised by the Federal Courts Study Committee to constitute an alternative national governance arrangement. With permission, we present that arrangement here, with only technical editorial changes. The similarities and differ-

ences between this arrangement and the arrangement analyzed in Part V will be clear.

Another Alternative Governance Arrangement
(Derived from Federal Courts Study Committee Report, p. 146)

a. *Judicial Conference.* Preserve the Judicial Conference as a broad-based policy-making body that meets once a year.

b. *Executive Committee.* Recognize the seven-member Executive Committee as the principal body for day-to-day policy making and resource allocation (fulfill role now filled by the Executive Committee and Budget Committee).
   1. Make its authority clear by statutory change.
   2. Committee meets bimonthly in D.C. or electronically.
   3. The FJC Director and AO Director are ex officio nonvoting members.
   4. Appointed by the Chief Justice from members of the Judicial Conference.
   5. Approves chairman of the Executive Committee selected by the Chief Justice.
   6. Oversees the work of the Administrative Office.
   7. Continues to act as traffic cop and overseer for committee system.

c. *Chairman of Executive Committee is full-time executive for federal courts.*[151]
   1. Day-to-day administrative / executive authority for operation of the third branch except for the Supreme Court and the FJC.
   2. Article III judge appointed by the Chief Justice with approval of the Executive Committee.
   3. Offices are at the Supreme Court chambers in the Thurgood Marshall Federal Judiciary Building.
   4. Presides over the Judicial Conference and the FJC Board during absence of the Chief Justice.
   5. Recommends committee appointments to the Chief Justice.

151. The AO Director or administrative assistant to the Chief Justice could fill this position if an Article III judge is appointed to either position.

6. Supervises and evaluates the AO Director.
7. Other duties as delegated by the Chief Justice.

Appendix A

Letter from Judge Otto Skopil, December 21, 1993

COMMITTEE ON LONG RANGE PLANNING

OF THE

JUDICIAL CONFERENCE OF THE UNITED STATES

232 PIONEER COURTHOUSE
555 S.W. YAMHILL STREET
PORTLAND, OREGON 97204

JUDGE OTTO R. SKOPIL, JR.
CHAIRMAN

TELEPHONE
(503) 326-3543
FAX: (503) 326-4900

JUDGE SARAH EVANS BARKER
JUDGE EDWARD R. BECKER
JUDGE WILFRED FEINBERG
JUDGE ELMO B. HUNTER
JUDGE JAMES LAWRENCE KING
JUDGE VIRGINIA M. MORGAN
JUDGE A. THOMAS SMALL
JUDGE HARLINGTON WOOD, JR.

CHARLES W. NIHAN
LONG RANGE PLANNING OFFICE
(202) 273-1810
FAX: (202) 273-1826

December 21, 1993

Dear Judge:

I write to invite you to attend a one and one-half day meeting of the Committee on Long Range Planning in Washington, D.C., on Thursday, March 3, and Friday morning, March 4, 1994. The purpose of this meeting is to assist our Committee in developing recommendations on judicial governance for inclusion in the judiciary's first long range plan. You are one of a small number of judges, judicial administrators, and academics who are being invited to participate.

2

The Long Range Planning Committee intends to submit a proposed long range plan to the Judicial Conference in March of 1995. We expect to complete a draft plan and circulate it for public comment by August 1994. Among the subjects selected for treatment in that first plan is the internal governance of the federal courts. To that end, the Committee is studying the current state of judicial governance in order to identify possible long-term problems, needs, and concerns. We have directed inquiries on this subject to other Conference committees, and the meeting described above should provide an excellent opportunity for frank and open discussion with individuals like yourself who are knowledgeable and experienced in governance matters.

The specific agenda will be distributed in advance of the meeting. Some of the basic issues that will be addressed include the following:

1. How should national leadership in the judiciary be constituted and exercised? Specifically--

   a. Should the authority and responsibility currently held by the Judicial Conference of the United States and agencies of national judicial administration (i.e., Administrative Office of the United States Courts and Federal Judicial Center) be modified or reallocated?

   b. Should the composition, functions, or operational methods of the Judicial Conference be reexamined?

   c. Should the Federal Judicial Center retain its structure of internal governance and relative autonomy within the judicial branch?

d. Is there a need for a full-time chief executive officer in the governance of the federal judiciary? If so, what powers and duties should be assigned to that officer, and what method of selection, tenure, and qualifications would be appropriate? And what should be that officer's relationship to other key figures in the governance scheme (i.e., Chief Justice, Judicial Conference, Director of the Administrative Office, etc.)?

2. What is the appropriate distribution of governance functions between and among central, regional, and local authorities in the federal judiciary? Specifically--

a. Should there be greater centralization or decentralization of governance and administrative authority? In this context, should a distinction be drawn between the authority to make policy and responsibility for its implementation?

b. Should circuit judicial councils continue to exist? If so, are changes needed in their composition, functions, or operational methods?

c. Should district courts be governed separately from the court of appeals in each circuit? If so, what governance structure would be appropriate for those courts?

d. Should the authority of chief judges or the method of their selection be altered?

3. What is an appropriate balance between effective governance authority in the federal courts and the constitutionally guaranteed independence of federal judges?

This meeting is only a preliminary step in the Committee's planning process. After we develop all of our recommendations, there will be a series of public hearings to obtain input on the plan as a whole. However, given the critical and sensitive nature of these issues, we hope that the views communicated in the March meeting will enable the Committee to circulate tentative recommendations on governance that are especially well informed and focused.

You will receive, in due course, additional information on the meeting location and available lodging and, by the middle of February, an agenda and set of background readings from the Federal Judicial Center. Since this is an official meeting of a Judicial Conference committee, you will be entitled to reimbursement of travel expenses from court funds.

To facilitate preparations, we would appreciate a response to this invitation by Friday, January 21, 1994. Would you please communicate your decision by faxing the enclosed response form to Mr. Jeffrey Hennemuth of our Committee staff? If you are unable to attend but would still like to share your views on governance with the Committee, please feel free to do so in writing addressed to me.

Any questions about this invitation can be answered by Mr. Hennemuth at 202/273-1810.

Sincerely,

Otto R. Skopil, Jr.

Enclosure

Appendix B

Tables and Figures

(Data are as of December 1993)

The tables and figures in this appendix demonstrate some relationships between number of judgeships and magistrate judge positions in the circuits and the circuits' relative representation on the Judicial Conference and Conference committees. Tables 2 and 3 list the circuits (counting the Court of International Trade as a "circuit" for present analytical purposes) in ascending order of total judgeships. Figure 2 is a scatterplot diagram that plots the relationship between Conference members per circuit and judgeships per circuit.

Table 2
Judicial Conference Representation and Life-Tenured Judgeships, by Circuit

Circuit	Total Circuit and District Judgeships	Percentage of Total Circuit & District Judgeships	Percentage of Conference Membership (excluding Chief Justice)
Int'l Trade	9	1.0	3.8
Federal	12	1.5	3.8
D.C.	27	3.2	7.7
First	35	4.2	7.7
Tenth	49	5.8	7.7
Eighth	54	6.5	7.7
Seventh	57	6.8	7.7
Fourth	67	8.0	7.7
Second	75	8.9	7.7
Eleventh	75	8.9	7.7
Third	76	9.1	7.7
Sixth	79	9.4	7.7
Fifth	95	11.4	7.7
Ninth	127	15.2	7.7
All	837	99.9	100.0

Table 3
Composition of Judicial Conference Committees[a] by Circuit and Personnel Type

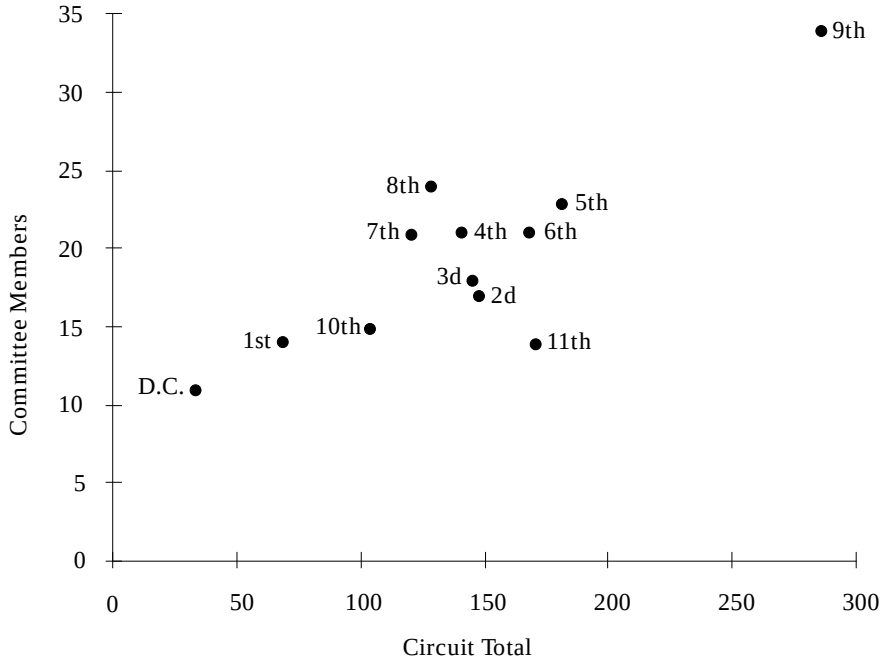
Circuit	Percentage of all Cir./Dist. Judgeships	Cir.	Dist.	Bank-ruptcy	Magis-trate	All Judges	Others	Comm. Chair Cir.	Comm. Chair Trial[c]
Int'l Trade	1.0		1			1			
Federal[b]	1.5	4	0	0	1	5	0	0	0
D.C.	3.2	5	5	0	1	11	9		2
First	4.2	2	10	0	2	14	3	1	1
Tenth	5.8	6	7	1	1	15	2	2	0
Eighth	6.5	5	14	2	3	24	0	2	1
Seventh	6.8	4	16	1	0	21	3	0	1
Fourth	8.0	2	13	4	2	21	3	0	1
Second	8.9	4	11	2	0	17	6	1	
Eleventh	8.9	1	13	0	0	14	3	1	1
Third	9.1	5	13	0	0	18	2	0	3
Sixth	9.4	10	8	2	1	21	4	0	0
Fifth	11.4	5	13	2	3	23	6	1	0
Ninth	15.2	12	16	3	3	34	0	1	5
Total	99.9	65	141	17	16	239	41	9	15

[a]Includes the five advisory rules committees, but not the soon-to-be-appointed Committee on International Judicial Relations.

[b]For purposes of this table, the one Court of Federal Claims judge committee member is listed under the "magistrate judge" heading for the Federal Circuit. We recognize that there are differences in the appointment process and jurisdiction of magistrate judges and Court of Federal Claims judges. We have not included Court of Federal Claims judges in the total number of circuit, district, bankruptcy, and magistrate judges reflected in the percentages in the second column.

[c]Includes 14 district judge chairs and one bankruptcy judge chair (a Fourth Circuit bankruptcy judge chairs the advisory committee on bankruptcy rules).

Figure 2
Federal Judge Judicial Conference Committee Members per Circuit Versus Total Federal Judgeships per Circuit



Note: Figure does not include Federal Circuit and Court of International Trade judges or part-time magistrate judges or recalled bankruptcy judges. As noted in text, the correlation coefficient (.83) is quite high, suggesting that the larger the circuit, the more of the circuit's judges are on Conference committees.

Appendix C

Statutory Authority for Court Governance

Thomas E. Willging
Federal Judicial Center
(Originally prepared for the Subcommittee on Court Governance of the Judicial Conference Committee on Court Administration and Case Management and subsequently revised, June 1992)

This document lists the entities[152] responsible for court governance and sets forth a detailed breakdown of the statutory authority and obligations of each entity. The following judicial offices and collective entities are assigned explicit responsibility for governance.[153]

The Chief Justice of the United States
Judicial Conference of the United States
Administrative Office of the U.S. Courts
Federal Judicial Center
Judicial Council of the Circuit
Judicial Conferences of the Circuits
Chief Judge of the Circuit
Court of Appeals
Circuit Executive
Clerk, Court of Appeals
District Court
Chief Judge of the District
Clerk, District Court
District Court Executive
Bankruptcy Court

152. We have not included several agencies or courts within the judicial branch, such as the United States Sentencing Commission and the Court of International Trade, and have not included any courts created under Article I of the U.S. Constitution.

153. We have not attempted to define or limit the term "governance" and have included all of the administrative assignments of responsibility that we could identify.

Chief Judge of the Bankruptcy Court
Clerk, Bankruptcy Court
Judicial Panel on Multidistrict Litigation

Looking simultaneously at the functions and the entities entrusted with responsibility for them reveals a host of patterns or models of governance. The relationships among the entities vary with the issue to be addressed. An entity may have authority to approve or disapprove some actions of another entity and only have authority to make suggestions as to other actions of the same entity on a different issue. The resulting mosaic of court governance is more complex than an outline can document. For example, one model, used to implement the Speedy Trial Act and the Jury Selection and Service Act, has the district courts adopt a plan that must be approved by the circuit council. In the Civil Justice Reform Act (CJRA), however, Congress created a variation: A committee, composed of the chief district judges and the chief judge of the circuit, is authorized to review plans and suggest changes. The possible variations are numerous, if not endless.

What follows is a list of authorities and obligations as found in statutes enacted by Congress. We have not examined how any entity responds to any of these statutes. This listing should not be read to denote that entities proceed in a particular manner or that they act with any particular frequency. Whether the entity delegates its statutory powers and duties to other entities or individuals is also beyond the scope of this listing.

In relation to courts other than the Supreme Court, the **Chief Justice of the United States** has statutory governance authority or a statutory obligation to:

Appointing

- appoint an administrative assistant to perform whatever duties the Chief Justice may assign and to appoint other "necessary employees" with the approval of the Chief Justice [28 U.S.C. § 677];
- appoint or remove the Director and Deputy Director of the Administrative Office of the United States Courts, "after consulting with the Judicial Conference" [28 U.S.C. § 601];

- appoint members of various committees and commissions, such as the Federal Courts Study Committee [§ 103 of Public Law 100-702](all 15 members), and the National Commission on Judicial Discipline and Removal (3 members) [§ 411 of Public Law 101-650];
- designate seven judges to serve on the Judicial Panel for Multidistrict Litigation [28 U.S.C. § 1407(d)]; and
- appoint the chairman and two members of the Federal Judicial Center Foundation Board [28 U.S.C. § 629(b)].

Assigning Judges

- based on a certification by the chief judge or the circuit justice of the circuit that a need exists, the Chief Justice may designate or assign temporarily (1) a circuit judge to serve as a circuit judge in another circuit [28 U.S.C. § 291(a)]; (2) a district judge to serve in another circuit, either in a district court or a court of appeals [28 U.S.C. § 292(d)]; (3) a district or circuit judge to sit in another district as a transferee judge in multidistrict proceedings [28 U.S.C. § 1407(b)]; (4) a judge of the Court of International Trade to serve in any district court or court of appeals [28 U.S.C. § 293(a)]; (5) a retired Supreme Court Justice "to perform such judicial duties in any circuit . . . as he is willing to undertake" [28 U.S.C. § 294(a)]; or (6) a retired judge to serve outside his court or circuit to perform "such judicial duties as he is willing and able to undertake" [28 U.S.C. § 294(d)]. The Chief Justice may also revoke any of the above assignments [28 U.S.C. § 295].

Presiding and Convening

- summon the Judicial Conference of the United States for annual and special meetings and preside at those meetings [28 U.S.C. § 331] and
- serve as the "permanent Chairman of the Board" of the Federal Judicial Center [28 U.S.C. § 621(a)(1)].

Reporting and Receiving Reports

- request that the Attorney General report to the Judicial Conference of the United States on matters relating to the busi-

ness of the federal courts and the cases in which the United States is a party [28 U.S.C. § 331] and

- submit an annual report to Congress "of the proceedings of the Judicial Conference and its recommendations for legislation" [28 U.S.C. § 331].

The **Judicial Conference of the United States** has statutory authority or a statutory obligation to:

Appointing

- recommend judges to serve on the United States Sentencing Commission [28 U.S.C. § 991(a)].

Assigning Judges

- "make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary" [28 U.S.C. § 331];
- determine "the number of full-time . . . and part-time United States magistrates, the locations at which they shall serve, and their respective salaries" [28 U.S.C. § 633(b)]; and
- promulgate regulations to implement the statute permitting recall of retired bankruptcy, Claims Court, and magistrate judges "for a period of five years" [28 U.S.C. § 375(h)].

Automation

- review annual long-range plans "for meeting the automatic data processing equipment needs of the judicial branch" [28 U.S.C. § 612(b)(1)] and supervise the Director of the Administrative Office in reprogramming certain deposits from the Judiciary Automation Fund [28 U.S.C. § 612(i)].

Civil Justice Reform Act (CJRA)

- "develop one or more model civil justice expense and delay reduction plans" [28 U.S.C. § 477(a)(1)];
- "prepare a comprehensive report on all [CJRA] plans" [28 U.S.C. § 479(a)];

- study, "on a continuing basis," ways to improve litigation management and dispute resolution services in the district courts [28 U.S.C. § 479(b)(1)]; and
- "prepare, periodically revise, and transmit . . . a Manual for Litigation Management and Cost and Delay Reduction" [28 U.S.C. § 479(c)(1)].

Counsel in Criminal Cases

- approve or disapprove applications for grants from Community Defender Organizations [18 U.S.C. § 3006A(g)(2)(B)].

Court and Case Management Procedures

- "submit suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business" [28 U.S.C. § 331].

Court Reporting, Recording, and Interpreting

- request or approve a circuit council's request for certified interpreters in a given language [28 U.S.C. § 1827(b)(1)];
- determine the number and qualifications of court reporters, rates they may charge, records they must keep, and reports they must file [28 U.S.C. § 753(a),(c),(d)]; and
- establish by regulations the types of electronic sound recordings or other means that may be used to create a verbatim record of court proceedings [28 U.S.C. § 753(b)].

Court Sessions

- grant or withhold consent to a proposal of a court of appeals to pretermit a regular session of the court at any place [28 U.S.C. § 48(c)].

Fees, Fines, and Costs

- prescribe reasonable and uniform fees and costs in the courts of appeals [28 U.S.C. § 1913] and
- prescribe fees other than the filing fee in the district courts [28 U.S.C. § 1914(b)].

General Administration

- supervise and direct the Director of the Administrative Office [28 U.S.C. § 604(a)] and
- approve budget estimates for the courts and the Administrative Office before presentation to the Office of Management and Budget [28 U.S.C. § 605].

Judicial Conduct and Status

- prescribe rules for the conduct of proceedings regarding judicial conduct and disability, conduct proceedings, issue "necessary and appropriate orders," review complaints (based on referrals from judicial councils or records of felony convictions of judges), determine whether "consideration of impeachment may be warranted," and transmit determinations and related records to the House of Representatives. On these matters, the Conference may act through a standing committee or as a whole [28 U.S.C. § 331 and § 372(c)(8)] and
- promulgate rules regarding the judicial duties and administrative work of a judge who has retired on senior status to determine whether the judge qualifies to receive the salary of the office [28 U.S.C. § 371(f)(2)].

Jury Procedures

- "develop and conduct an experiment" in combining juror summoning and qualifying procedures [28 U.S.C. § 1878(a)].

Legislation

- make "recommendations for legislation" [28 U.S.C. § 331].

Pretrial Services

- direct and supervise the Director of the Administrative Office in the creation of pretrial services in the district courts [18 U.S.C. § 3152(a)].

Rule Making

- "carry on a continuous study of the operation and effect of the general rules of practice and procedure" and recommend to the Supreme Court changes "to promote simplicity

in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay" [28 U.S.C. § 331] and

- review rules issued by courts (except the Supreme Court and the district courts) for "consistency with Federal law." The Conference may modify or nullify any rule found to be inconsistent with federal law [28 U.S.C. § 331].

Sentencing

- "submit to the [Sentencing] Commission any observations, comments, or questions . . . whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines . . . , and otherwise assessing the Commission's work" [28 U.S.C. § 994(o)].

Supervision

- supervise and direct the Director of the Administrative Office [28 U.S.C. § 604(a)].

The **Administrative Office of the United States Courts** is supervised by a Director, who is supervised and directed by the Judicial Conference. The Director is "the administrative officer of the courts" [28 U.S.C. § 604(a)] and has extensive and detailed statutory authority and obligations. The following partial listing of the Director's authority comes primarily from 28 U.S.C. § 604(a). Other authority is in specific statutes that affect the judicial branch, such as the Civil Justice Reform Act. The Director has a statutory authorization or a statutory obligation to:

Court Reporting, Recording, and Interpreting

- establish programs for certification, utilization, and employment of interpreters and a program for "special interpretation services" in the courts [28 U.S.C. § 604(a)(14)–(16)].

Fees, Fines, and Costs

- "establish procedures and mechanisms within the judicial branch for processing fines, restitution, forfeitures of bail

bonds or collateral, and assessments" [28 U.S.C. § 604(a)(18)].

General Administration

- submit to the Office of Management and Budget estimates of the expenditures and appropriations necessary for the maintenance and operation of the courts and the Administrative Office and the judicial survivors annuity fund [28 U.S.C. § 605];
- fix compensation for clerks, librarians, law clerks, secretaries, and various other employees of the courts [28 U.S.C. § 604(a)(5)];
- "determine and pay necessary office expenses of courts, judges," and other court officials [28 U.S.C. § 604(a)(6)];
- regulate and pay annuities to widows and dependent children of various judges and officials [28 U.S.C. § 604(a)(7)];
- regulate and pay necessary travel and subsistence expenses incurred by judges and other judicial branch employees [28 U.S.C. § 604(a)(7)];
- purchase, exchange, transfer, distribute, and assign "lawbooks, equipment, supplies, and other personal property for the judicial branch" [28 U.S.C. § 604(a)(10)(A)];
- audit vouchers and accounts of the courts and other judicial branch offices [28 U.S.C. § 604(a)(11)];
- provide accommodations to the courts and other judicial branch offices [28 U.S.C. § 604(a)(12)];
- receive and expend funds for court security equipment and protective services [28 U.S.C. § 604(a)(22)];
- "supervise all administrative matters relating to the offices of the United States magistrates" [28 U.S.C. § 604(a)(d)(1)]; and
- provide facilities and pay necessary expenses of judicial councils and the Judicial Conference arising out of the administration of the Judicial Conduct and Disability Act, 28 U.S.C. § 372 [28 U.S.C. § 604(h)(1)].

Judicial Conduct and Status

- "periodically compile the orders that are required to be publicly available under" the Judicial Conduct and Disability Act, 28 U.S.C. § 372(c)(15) [28 U.S.C. § 604(a)(20)(C)] and
- include in the annual report filed with Congress a summary of complaints filed with each judicial council under the Judicial Conduct and Disability Act, 28 U.S.C. § 372(c) [28 U.S.C. § 604(h)(2)].

Reporting and Receiving Reports

- submit a report to the annual meeting of the Judicial Conference and to Congress of the activities of the Administrative Office and the state of business of the courts, with statistical data and recommendations [28 U.S.C. § 604(a)(3)(4)] and
- report to Congress annual statistics regarding the business of magistrate judges, appeals from their decisions, and their professional backgrounds and qualifications [28 U.S.C. § 604(d)(3)].

Research and Statistics

- examine the state of the dockets of the courts, secure information about the needs of the courts, and transmit semiannual reports on the business of the courts to the chief judges of the circuits [28 U.S.C. § 604(a)(2)];
- report to Congress annually statistical tables that will accurately reflect the business of the bankruptcy courts [28 U.S.C. § 604(a)(13)];
- report to Congress annually "statistical tables that will accurately reflect the business imposed on the federal courts by the savings and loan crisis" [28 U.S.C. § 604(a)(24)]; and
- gather, compile, and evaluate statistical and other information relating to magistrate judges [28 U.S.C. § 604(d)(2)].

Rule Making

- periodically compile the rules adopted pursuant to the rule making power of courts [28 U.S.C. § 604(a)(20)(A)];
- promulgate all necessary rules and regulations, which may be published in the Federal Register [28 U.S.C. § 604(f)]; and

- issue rules and regulations regarding the administration of the magistrate judges' offices [28 U.S.C. § 604(e)].

Supervision

- "supervise all administrative matters relating to the offices of clerks and other clerical and administrative personnel of the courts" [28 U.S.C. § 604(a)(1)].

The **Federal Judicial Center** is supervised by a Board composed of the Chief Justice, six judges elected by the Judicial Conference, and the director of the Administrative Office [28 U.S.C. § 621(a)]. The following partial listing of the authority and obligations of the Center and its Board comes primarily from 28 U.S.C. §§ 620–624. Other authority may be found in specific statutes that affect the judicial branch, such as the Civil Justice Reform Act. The Center, under the supervision of its Board, or the Board itself, has statutory authority or a statutory obligation to:

Appointing

- appoint and fix the duties of the director and deputy director, who serve at the pleasure of the Board [28 U.S.C. § 624(1)].

Automation

- "study and determine ways in which automatic data processing and systems procedures may be applied to the administration of the courts" [28 U.S.C. § 623(a)(5)].

Court and Case Management Procedures

- develop and present to the Judicial Conference "recommendations for improvement of the administration and management of the courts" [28 U.S.C. § 620(b)(2); 28 U.S.C. § 623(a)(2) contains similar language in relation to the Center's Board].

Education and Training

- stimulate, create, develop, and conduct programs of continuing education and training for personnel of the judicial branch and others whose participation would improve the programs of the judicial branch [28 U.S.C. § 620(b)(3)] and

"formulate recommendations for improvements . . . in the training of the personnel of [the federal] courts, and in the management of their resources" [28 U.S.C. § 623(a)(2)].

History

- "conduct, coordinate, and encourage programs relating to the history of the judicial branch" [28 U.S.C. § 623(a)(7)].

Research and Statistics

- conduct research and study the operation of the courts and stimulate and coordinate such research on the part of others [28 U.S.C. § 620(b)(3)];
- provide "staff, research, and planning assistance" to the Judicial Conference and its committees [28 U.S.C. § 620(b)(4)]; and
- recommend to public and private agencies aspects of the operations of the federal courts deemed worthy of special study [28 U.S.C. § 623(a)(6)].

Foreign Judicial Assistance

- provide information and advice on judicial administration to personnel of "the courts of foreign countries" and acquire information from them [28 U.S.C. § 620(b)(6)].

Federalism

- cooperate with the State Justice Institute in the establishment and coordination of research and programs [28 U.S.C. § 620(b)(5)]; generally, consider state–federal relations in research and education efforts.

Reporting and Receiving Reports

- submit to the Judicial Conference at least one month before the annual meeting a report of the activities of the Center and any recommendations to the Conference [28 U.S.C. § 623(a)(3)] and
- present to other agencies whose programs relate to the administration of justice recommendations for improvement of that agency's programs or activities [28 U.S.C. § 623(a)(4)].

The **Judicial Council of the Circuit ("Circuit Council")** has statutory authority or a statutory obligation to:

Appointing

- appoint a circuit executive and decide whether to delegate one or more of a host of administrative duties, such as administrative control of all nonjudicial activities of the court of appeals and other duties not specified in the statute [28 U.S.C. § 332(e)];
- approve continuation of the authority of a bankruptcy judge to sit for up to 180 days after expiration of the term of appointment [28 U.S.C. § 152(a)(1)];
- approve continuation in office of a magistrate judge for up to 180 days after expiration of a term of appointment [28 U.S.C. § 631(f)]; and
- certify that "substantial service is expected to be performed" by a retired bankruptcy or magistrate judge if recalled for a five-year period [28 U.S.C. § 375(a)(1)].

Assigning Judges

- approve the temporary transfer of a bankruptcy judge to or from any district within any circuit [28 U.S.C. § 155(a)];
- consult with the Administrative Office to set places of holding court and duty stations for bankruptcy judges [28 U.S.C. § 152(b)(1)]; and
- consent to the designation or assignment of a judge to another court [28 U.S.C. § 295].

Counsel in Criminal Cases

- review and modify district court plans for providing counsel to indigents in criminal cases and supplement such plans with a plan for providing counsel in criminal law appeals [18 U.S.C. § 3006A(a)].

Court and Case Management Procedures

- issue "all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit" [28 U.S.C. § 332(d)(1)];

- take such action on the semiannual reports from the Director of the Administrative Office "as may be necessary" [28 U.S.C. § 332(c)];
- deal with the regular business of a court, but only if "an impediment to the administration of justice is involved" [28 U.S.C. § 332(d)(3)];
- resolve deadlocks at the district court level regarding the division of the business of the court among the judges [28 U.S.C. § 137];
- set limits and conditions on the use of facilities and services to provide administrative information in bankruptcy cases in which the costs of such facilities and services are paid by the assets of the estate [28 U.S.C. § 156(c)];
- establish a bankruptcy appellate panel (BAP) and, with another circuit council, recommend a joint BAP panel to the Judicial Conference [28 U.S.C. § 158(b)];
- adopt rules for disposing of obsolete court records [28 U.S.C. § 457]; and
- order records of courts to be held at a location other than that selected by the court [28 U.S.C. § 457].

Court Reporting, Recording, and Interpreting

- determine whether the number of authorized court reporters is insufficient and whether additional reporters should be provided on a contract basis [28 U.S.C. § 753(g)].

Court Sessions

- decide whether to consent to district court decisions to pretermit a regular court session [28 U.S.C. § 140(a)].

Judicial Conduct and Status

- prescribe rules for the conduct of proceedings relating to judicial misconduct and disability and act on investigative committee reports, for example, by certifying disability, suspending case assignments, censuring or reprimanding, or dismissing the complaint [28 U.S.C. § 372(c)(6),(11)];
- certify that senior judges are performing substantial judicial duties and are entitled to retain chambers and staff [JCUS

resolution; note that the chief judge of the circuit now has to make a similar certification if the senior judge is to retain the salary of the office under 28 U.S.C. § 371(f)(1)];

- resolve deadlocks at the district court level regarding the residence of judges at or near a place of holding court [28 U.S.C. § 134(c)];
- approve accommodations, including chambers and courtrooms, for courts and judges [28 U.S.C. § 462(b)];
- remove a bankruptcy judge for cause during a term of office [28 U.S.C. § 152(e)]; and
- remove a magistrate judge from office for misconduct during a term [28 U.S.C. § 631(i) (authority contingent on a tie vote by the district court)].

Jury Procedures

- review and approve or direct the creation of an alternative plan for the random selection of jurors [*circuit council plus chief judge of the district whose plan is under review;* 28 U.S.C. § 1863].

Pretrial Services

- jointly recommend, with a district court, the creation of pretrial services in that district [18 U.S.C. § 3152].

Rule Making

- review local rules of court for consistency with national rules and modify or nullify any inconsistent rules [28 U.S.C. § 332(d)(4)].

Speedy Trial Act

- review and approve or modify Speedy Trial Act plans [*circuit council plus chief judge of the district whose plan is under review;* 18 U.S.C. § 3165] and promulgate guidelines for use by all district courts to implement the act [18 U.S.C. § 3166(f)].

Judicial conferences of the circuits ("circuit judicial conferences") are obligatory meetings of each circuit's active life-tenured and bankruptcy judges; senior judges attend at their discretion and magistrate judges attend if invited. 28 U.S.C. § 333 directs each

court of appeals to "provide by its rules for representation and active participation at such conference[s] by members of the bar of such circuit." The chief circuit judge must convene a conference at least once every two years but no more often than annually. The conference has two statutory functions:

Judicial Improvement

- "considering the business of the courts and advising means of improving the administration of justice within such circuit" [28 U.S.C. § 333].

U.S. Judicial Conference Member Selection

- providing the forum where the circuit and district judges of each judicial circuit may choose that circuit's district judge representative to the Judicial Conference [28 U.S.C. § 331].

A **Chief Judge of the Circuit** is selected according to criteria set forth in 28 U.S.C § 45 and has statutory authority or a statutory obligation to:

Appointing

- appoint a bankruptcy judge if a majority of the judges on the court of appeals cannot agree [28 U.S.C. § 152(a)(3)].

Assigning Judges

- designate or assign a district judge to sit on the court of appeals [28 U.S.C. § 292(a)];
- designate or assign a circuit judge within the circuit to "hold a district court in any district within the circuit" [28 U.S.C. § 291(b)];
- designate or assign temporarily a district judge to sit on another district court in the circuit [28 U.S.C. § 292(b)] or as a transferee judge in a multidistrict proceeding [28 U.S.C. § 1407(b)];
- certify the need for a temporary assignment of a judge from another circuit to serve on a district court or the court of appeals [28 U.S.C. § 292(d)]; and
- consent to the assignment of an active district judge to another court [28 U.S.C. § 295].

Civil Justice Reform Act (CJRA)

- serve with chief district judges of the circuit on a committee to review the civil justice expense and delay reduction plans pursuant to the Civil Justice Reform Act of 1990 [28 U.S.C. § 474(a)].

Judicial Conduct and Status

- review complaints of misconduct and disability and dismiss them or appoint an investigating committee, which shall include "himself and equal numbers of circuit and district judges of the circuit" [28 U.S.C. § 372(c)(3),(4)].

Presiding and Convening

- call meetings of the circuit council at least twice a year [28 U.S.C. § 332(a)(1)];
- preside over any session of the court and have "precedence" [28 U.S.C. § 45(b)]; and
- summon all the judges of the circuit at least biennially to a circuit judicial conference and excuse judges who cannot remain for the entire conference [28 U.S.C. § 333].

Supervision (general)

- supervise the circuit executive's performance of the duties delegated to him by the circuit council [28 U.S.C. § 332(e)].

A **Court of Appeals** has statutory authority to:

Appointing

- appoint bankruptcy judges [28 U.S.C. § 152(a)(1)] and
- approve the hiring of personnel in the clerk's office [28 U.S.C. § 711(b)].

Counsel in Criminal Cases

- appoint a Federal Public Defender [18 U.S.C. § 3006A(g)(2)(A)].

Court and Case Management Procedures

- direct the order and timing of panels, authorize the hearing and determination of cases by separate panels, and, in large courts, establish en banc rules [28 U.S.C. § 46].

Court Sessions

- pretermit any regular session of court at any place for insufficient business or other good cause, with the consent of the Judicial Conference [28 U.S.C. § 48(c)].

Rule Making

- issue local rules to prescribe the conduct of its business [28 U.S.C. § 2071(a)] and
- provide in its rules for representation and active participation by members of the bar at the circuit judicial conference [28 U.S.C. § 333].

The **Circuit Executive** has the administrative authority that the circuit council chooses to delegate pursuant to 28 U.S.C. § 332(e), including the authority or obligation to:

General Administration

- exercise administrative control of all nonjudicial activities of the court of appeals and administer the personnel system and budget of the court of appeals [28 U.S.C. § 332(e)(1)–(3)] and
- maintain a modern accounting system, establish property control records, and undertake a space management program [28 U.S.C. § 332(e)(4)–(5)].

Presiding and Convening

- arrange meetings of the judges of the circuit and the circuit council, prepare the agenda, and serve as secretary [28 U.S.C. § 332(e)(9)].

Reporting and Receiving Reports

- prepare an annual report to the circuit and the Administrative Office, "including recommendations for more expeditious disposition of the business of the circuit" [28 U.S.C. § 332(e)(10)].

Research and Statistics

- conduct "studies relating to the business and administration of the courts within the circuit" and prepare appropriate recommendations and reports to the chief judge, the circuit

council, and the Judicial Conference [28 U.S.C. § 332(e)(6)] and

- collect, compile, and analyze statistical data to prepare reports to the chief judge, the circuit council, and the Administrative Office [28 U.S.C. § 332(e)(7)].

Representation Outside the Courts

- represent the circuit to various entities, including the states in the circuit and other public and private groups [28 U.S.C. § 332(e)(8)].

The **Clerk of the Court of Appeals** has statutory authority or a statutory obligation to:

Appointing

- "appoint necessary deputies, clerical assistants and employees in such number as may be approved by the Director of the Administrative Office" [28 U.S.C. § 711(b) (approval of the court needed)].

Fees, Fines, and Costs

- pay into the Treasury "all fees, costs and other moneys collected by him" [28 U.S.C. § 711(c)].

A **District Court** has statutory authority or a statutory obligation to:

Appointing

- designate a bankruptcy judge to serve as chief bankruptcy judge [28 U.S.C. § 154(b)];
- appoint magistrate judges, decide whether to concur in a Judicial Conference designation of a magistrate judge to serve adjoining districts, and approve the continuation of magistrate judges in office for up to 180 days after the expiration of their terms [28 U.S.C. § 631(a),(f)]; and
- appoint a clerk of the district court and one or more court reporters [28 U.S.C. §§ 751(a), 753].

Assigning Judges

- determine which of the judges shall maintain a residence at or near a particular place for holding court [28 U.S.C. § 134(c)];
- establish rules to guide magistrate judges in the discharge of their duties [28 U.S.C. § 636(c)]; and
- consent or not to the assignment of cases to the district as a transferee court by the Judicial Panel on Multidistrict Litigation [28 U.S.C. § 1407(b)].

Civil Justice Reform Act (CJRA)

- adopt and implement a civil justice expense and delay reduction plan [28 U.S.C. § 471] and
- assess annually the condition of the court's civil and criminal dockets, in consultation with the court's CJRA advisory group [28 U.S.C. § 475].

Counsel in Criminal Cases

- formulate a plan for providing counsel to indigents in criminal cases [18 U.S.C. § 3006A(a)].

Court and Case Management Procedures

- divide the business of the district court among its judges [28 U.S.C. § 137];
- refer Chapter 11 cases and related matters to the bankruptcy court [28 U.S.C. § 157(a)]; and
- establish arbitration programs by local rule [28 U.S.C. § 651(a) (designated courts only)].

Court Reporting, Recording, and Interpreting

- appoint one or more court reporters [28 U.S.C. § 753(a)].

Court Sessions

- establish times and places for conducting the business of the court [28 U.S.C. § 139], adjourn or pretermit any regular court sessions [28 U.S.C. § 140], and order special sessions of court [28 U.S.C. § 141].

Judicial Conduct and Status

- remove a magistrate judge from office for cause [28 U.S.C. § 631(i)].

Jury Procedures

- formulate a plan for the random selection of jurors [28 U.S.C. § 1863].

Pretrial Services

- jointly recommend, with the circuit council, the creation of pretrial services in the district [18 U.S.C. § 3152(b)].

Rule Making

- issue local rules to prescribe the conduct of the court's business [28 U.S.C. § 2071]; such rules may affect the division of business of the bankruptcy court [28 U.S.C. § 154(a)].

Speedy Trial Act

- formulate a Speedy Trial Act plan [18 U.S.C. § 3165].

The **Chief Judge of the District** is selected according to criteria set forth at 28 U.S.C. § 136 and has statutory authority or a statutory obligation to:

Appointing

- appoint a magistrate judge if a majority of district judges cannot agree [28 U.S.C. § 631(a)] and
- appoint any officer of the district court (e.g., the clerk) if a majority of district judges cannot agree [28 U.S.C. § 756].

Assigning Judges

- enforce rules and orders for the division of business among the judges of the court and divide the business of the court and assign cases unless the rules of the court otherwise prescribe [28 U.S.C. § 137] and
- designate the duties of magistrate judges in the district if the majority of the district judges are unable to agree [28 U.S.C. § 636(c)].

Civil Justice Reform Act (CJRA)

- appoint members of an advisory group to recommend a civil justice cost and delay reduction plan [28 U.S.C. § 478(a) (after consulting with the other judges of the court)] and
- serve on a committee to review the plans [28 U.S.C. § 474(a)].

Court Reporting, Recording, and Interpreting

- advise the circuit council whenever the number of authorized court reporters is insufficient and whenever additional reporters should be provided on a contract basis [28 U.S.C. § 753(g)].

Presiding and Convening

- preside over and "have precedence" at any session of the court [28 U.S.C. § 136(b)].

The **Clerk of a District Court** has statutory authority or a statutory obligation to:

Appointing

- "appoint . . . necessary deputies, clerical assistants and employees in such number as may be approved by the Director of the Administrative Office" [28 U.S.C. § 751(a) (with the approval of the court)].

Fees, Fines, and Costs

- pay into the Treasury "all fees, costs and other moneys collected by him" [28 U.S.C. § 751(e)].

A **District Court Executive** has no statutory duties. A pilot program was created in 1981 by the Judicial Conference, which enumerated a list of duties. They are published in W. Eldridge, The District Court Executive Pilot Program 10–12 (Federal Judicial Center 1984).

The **Bankruptcy Court** has statutory authority or a statutory obligation to:

Appointing

- appoint a **bankruptcy clerk** after certifying to the circuit council and the Director of the Administrative Office that the number of pending cases and proceedings warrants the appointment [28 U.S.C. § 156(b) (refers to "bankruptcy judges" as the entity authorized to appoint)].

Rule Making

- promulgate rules for the division of business among the bankruptcy judges to the extent that the rules of the district court do not so provide [28 U.S.C. § 154(a)].

The **Chief Judge of the Bankruptcy Court** has statutory authority or a statutory obligation to:

Court and Case Management Procedures

- "ensure that the rules of the bankruptcy court and of the district court are observed and that the business of the bankruptcy court is handled effectively and expeditiously" [28 U.S.C. § 154(b)].

The **Clerk of a Bankruptcy Court** has statutory authority or a statutory obligation to:

Appointing

- appoint and remove deputies [28 U.S.C. § 156(b) (with the approval of the bankruptcy judges)].

The **Judicial Panel on Multidistrict Litigation** has statutory authority or a statutory obligation to:

Assigning Judges

- assign cases to a judge or judges of a district court for coordinated or consolidated pretrial proceedings, with the consent of the transferee district court [28 U.S.C. § 1407(b)].

Rule Making

- prescribe rules for the conduct of its business not inconsistent with the Acts of Congress and the Federal Rules of Civil Procedure [28 U.S.C. § 1407(f)].