ORIGINS OF THE ELEMENTS OF FEDERAL COURT GOVERNANCE

Origins of the Elements of Federal Court Governance

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Author's Note

This paper was prepared for the May 1992 meeting of the Court Governance Subcommittee of the Court Administration and Case Management Committee of the Judicial Conference of the United States and has been revised since then. It benefited from comments by several colleagues in the Federal Judicial Center and the Administrative Office of the U.S. Courts. I am responsible for any errors of fact or analysis.

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Introduction

This paper briefly describes the factors involved in the creation of the major elements of federal court governance. *Elements* refers broadly to agencies, offices, organizations, positions (such as chief judge), and entities (such as a circuit). *Governance* refers to the processes for regulating behavior (other than substantive judicial decision making), for allocating federal judicial system resources (including judges, staff, and funds and physical resources to support both), for monitoring performance, and for seeking adjustments.

This paper treats these elements through

- an index
- a brief chronology of their evolution
- descriptions, chronologically by element, of the major factors involved in their creation
- a brief bibliography.

This paper might be read along with Russell R. Wheeler & Cynthia Harrison, Creating the Federal Judicial System (Federal Judicial Center 1989), a thirty-three-page pamphlet that analyzes the evolution of the federal courts' organization and jurisdiction from the 1789 Judiciary Act through the major twentieth-century changes. That pamphlet, however, says little about the elements of federal court governance. Both pamphlet and paper synthesize more extensive research and include bibliographic references.

Two caveats: First, describing the reasons that sponsors gave for the creation of these elements does not necessarily imply that those reasons were sound at the time of creation or that they are sound now. However, describing those reasons, along with other circumstances contributing to an element's creation, may help foster comparative analysis of alternatives. Second, institutional and structural analysis understates the influence of nonstructural phenomena on organizational behavior—for example, the influence on federal court governance of the federal courts' domination by highly independent professionals.

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A chronology of the evolution of governance elements

The governance elements of the federal judiciary evolved in three phases: 1789 to 1891, 1891 to 1948, and 1948 to the present.

Phase 1: 1789 to 1891

The First Judiciary Act establishes the basic court structure that will last for the next century. Court governance in the 1800s is a combination of district judge autonomy, executive branch administration, and ad hoc intervention by Supreme Court justices. The 1891 Circuit Court Act, by creating separate, intermediate courts of appeals, not only modifies the original structure but establishes a framework for the governance structures that Congress will create in the next fifty years.

1789 First Judiciary Act is passed. It

- organizes the Supreme Court;
- creates thirteen districts and district courts, and allocates them among three circuits; creates circuit courts but no separate circuit judges; sets district and circuit boundaries to follow state boundaries;
- creates the office of the clerk of court in each district court; and
- creates the offices of the U.S. attorney general and the U.S. marshal

1891 Circuit Court Act (also known as the Evarts Act) is passed. It is the culmination of a century's effort to create an acceptable appellate structure. It creates separate circuit courts of appeals in each of the nine circuits, which become the basis for current governance structures.

Phase 2: 1891 to 1948

Governance power gravitates to the newly created intermediate appellate courts, a situation that Congress, at the courts' request, formalizes through a series of statutes creating the basic elements of federal court governance. Congress

- 1922 Creates the forerunner of the Judicial Conference of the United States (comprising the chief judges of the circuit courts of appeals, called senior circuit judges).
- 1934 Vests rule-making authority in the judiciary.
- 1939 Creates, through one statute:
  - the Administrative Office of the U.S. Courts,
  - circuit judicial councils, and
  - circuit judicial conferences.
- 1948 Recodifies Title 28, which, among other things,
  - adopts the title *chief judge*;
  - renames the Judicial Conference of the United States and formally recognizes its legislative liaison role; and
  - broadens the mission of circuit judicial councils.

Phase 3: 1948 to the present

Congress and the courts refine the elements of court organization and governance that have evolved over the nation's first 160 years. Governance power emerges in the district courts. Congress

- 1957 Makes district judges members of the Judicial Conference.
- 1967 Creates the Federal Judicial Center.
- 1972 Authorizes circuit executives.
- 1980 Makes district judges members of the judicial councils and strengthens the councils' disciplinary authority.
- 1982 Limits the term of chief judges to seven years.
- 1984 Creates the U.S. Sentencing Commission.
- 1990 Changes council membership to provide equal numbers of district and circuit judges, with chief circuit judge as chair.

Factors leading to the creation of the various elements

Elements are listed chronologically. Immediately following each element's name are

- the year in which it or its predecessor organization was created;
- where relevant, the current U.S. Code reference; and
- where necessary, a brief description of the element in 1992, not necessarily as dictated by the code references cited.

Phase 1: 1789 to 1891

Federalism (1787)

The very idea of a federal court system in addition to the existing state courts—an arrangement authorized but not mandated by the Constitution—was a source of vigorous opposition to the Constitution's ratification. Creation of such a system was possible only because the First Judiciary Act (1789) made numerous concessions—most still in effect—to state interests in the structure as well as the jurisdiction of the first federal court system. The geographic boundaries of federal districts and circuits followed state boundaries (i.e., no district covered more than one state, and the circuits encompassed districts in toto). Furthermore, district court judges had to be residents of their districts. Making district judges subject to senatorial confirmation (not specified in the Act or the Constitution) bolstered the ties between state political and legal cultures and the federal judiciary. In the early nineteenth century, Congress rejected a last-gasp Federalist effort to create districts independent of state boundaries (e.g., a District of Champlain covering parts of New York and Vermont, and a District of Cumberland in western Maryland and Virginia). Today, with one minor exception, federal jurisdictional lines still do not cross state boundaries.

Chief Justice Taft in the 1920s and President Roosevelt in the 1930s tried, but failed, to persuade Congress to create "judges-at-large," judges appointed to no specific district and available as a "flying squadron" for

assignment throughout the country to relieve backlogs. Local interests were suspicious of the idea: "What," a senator asked, does an outside judge "know about the law in Wisconsin? What does he know about your people? What does he know about conditions there?"

Congress (1787)

Article III vests the federal judicial power in the "Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish." The legislative and judicial branches tend to read this provision with different emphases, although almost everyone agrees that it provides an important role for Congress in legislating changes in federal court structure, including governance structures. Almost all the elements in this paper are statutorily based, even though most owe their impetus to judicial suggestion and lobbying. The authority to legislate creates the authority to oversee, which Congress exercises with respect to the federal court system.

Supreme Court (1787)

A major difference between most state court governance structures and the federal system is the role of the jurisdiction's highest appellate court. Supreme courts dominate governance in most states. Other than the activities of the Chief Justice, however, the U.S. Supreme Court's only significant role in federal judicial governance is in approving procedural rules developed by the Judicial Conference and sending them to Congress for review (see 28 U.S.C. §§ 2072–2074). The associate justices, collectively and individually, have no other significant role in court governance, in part because of Chief Justice Hughes's reaction to the executive–judicial conflicts in the 1930s, and the difficulties that federal court administration had caused the Justice Department. Hughes wanted the Court free from contamination by bureaucratic infighting and inevitable charges of poor or even corrupt administration in faraway courts, about which the Supreme Court could know very little.

During the nineteenth century, the justices were in effect, but not in title, chief judges of the major federal trial courts—the circuit courts—and ad hoc supervisors of the district judges. District judges, with the circuit justices, composed the circuit court bench and were the sole judges

of the limited jurisdiction district courts. The circuit justices intervened occasionally in governance of trial courts with respect to such things as appointing supporting personnel or prodding the release of a long-delayed case. However, the Supreme Court workload seriously reduced the amount of time the justices could devote to their trial court duties.

The 1922 statute creating the Conference of Senior Circuit Judges recognized a governance role for the associate justices by directing the senior justice to convene the Conference if the Chief Justice was disabled (dropped in the 1948 recodification) and by authorizing their participation in the intercircuit assignment process if the senior circuit judge was unable to act. A rarely invoked legacy of the latter role persists in the current temporary assignment statutes.

The 1939 Administrative Office Act placed the Administrative Office of the U.S. Courts primarily under the jurisdiction of the Judicial Conference, although it required that the entire Supreme Court select the director and assistant director (later deputy director) of the Administrative Office. In 1990, the courts endorsed the recommendation of the Federal Courts Study Committee that the selections were properly those of the Chief Justice (with concurrence of the Judicial Conference). Congress revised the law accordingly.

A legacy of the justices' early circuit-based governance role persists in the current statutory directive to the Court to allot its members "as circuit justices," in which capacity they are usually the initial but not necessarily the final object of appeal for various emergency motions. Their participation in circuit judicial conference meetings consists mainly of reports of the Supreme Court's recent term and various ceremonial activities.

Chief Justice of the United States (1787) (28 U.S.C. § 1)

The Constitution mentions the Chief Justice only once: as the presiding officer when the Senate tries an impeached president. Nevertheless, the founding generation clearly anticipated that the Chief Justice would operate somewhat like the English lord chancellor, who, then as now, had an important role in judicial system maintenance. President Washington initially treated Chief Justice Jay as a member of his cabinet and received his observations about the operation of the federal courts and other matters. He turned to Attorney General Randolph, however, for

a full analysis and recommendations for changes in the new judicial system. Jay himself resisted, largely successfully, the early assumption that the Chief Justice or the Supreme Court generally was to be a source of legal advice to the executive branch.

Some nineteenth-century Chief Justices intervened in court governance on an ad hoc basis and pressed legislation on Congress. Since Chief Justice Taft's appointment in 1921, the Chief Justice's role in court governance and legislative affairs has become routine, partly because of the precedent Taft set and partly because statutes enacted during his tenure and later have required at least a minimum level of participation by the Chief Justice in court governance. For example, the Chief Justice chairs the Judicial Conference and the Federal Judicial Center Board and appoints the director and deputy director of the Administrative Office. The statutory obligations create additional expectations that Chief Justices have honored in various ways. How much authority to place in the Chief Justice has been the subject of occasional debate, as shown in the opposition to proposals in the 1920s and 1930s for "judges-at-large" to be assigned by the Chief Justice, and in the 1930s for a "proctor" for the federal courts, appointed by the Chief Justice and Supreme Court (see Judicial Conference of the United States on page 13).

Justice Department
(1789, Office of the Attorney General; 1870, Justice Department)
(28 U.S.C. §§ 501, 503)

The Justice Department and, before its creation, the Office of the Attorney General (created by the 1789 Judiciary Act and part of the original cabinet) have had an interest in federal court operations and management. From 1870 to 1939, the federal judicial system got its administrative support from the department. Appropriations for the courts, for example, were part of the Justice Department appropriation statute. The department's various divisions tended to the courts' needs through its agent on the scene, the U.S. marshal. Tensions between the courts and the department were pervasive, involving both the quality of the service and fear of executive control of the judicial branch. Most of the department's court administration functions transferred to the Administrative Office upon its creation in 1939, although the last remnants of the department's federal court administration did not transfer to the courts until the 1970s.

Because the Justice Department is the most frequent litigator in federal courts, it has an obvious interest in how those courts are structured and how they operate, and it has created various subunits to refine that interest and give it practical expression. Because the department is the major litigator, and because of its large influence in the selection of Article III judges, however, there have always been tensions as to how much responsibility, informal as well as formal, it should have for influencing the structure and procedures of the federal courts.

No Justice Department unit is statutorily charged with advising on federal court governance, although various attorneys general have created offices with an interest in federal judicial administration, and department officials serve on Judicial Conference rules committees.

Circuit and District (1789) (28 U.S.C. §§ 41, 43, 81-132)

Through the first half of federal judicial history, the circuit was mainly a device for allocating Supreme Court justices to service as judges of the system's major trial courts, the circuit courts. The circuit became a governance concept after 1891, although justices exercised some informal administrative authority over district judges before then. The district has always been a basic element of federal court governance. Authority at both levels evolved gradually.

The circuit is an English concept, transported to America in the colonial period. It allowed efficient use of judges by having them "ride circuit" by traveling to several locations to hold court when no single location had enough judicial business to justify the appointment of a full-time judge for that court. The 1789 Judiciary Act created eastern, middle, and southern circuits, and created the circuit court as the system's major trial court.

The Act also created two or more judicial districts within each circuit. Each of the eleven states then in the Republic was a separate district (North Carolina and Vermont had not yet ratified), as were the territories of Maine and Kentucky. Each district had a district court, a trial court with much more limited trial jurisdiction than the circuit court, to which appeals in some cases could be taken. District boundaries that do not cross state boundaries were a major concession to the states; this tradition has influenced federal court governance ever since.

The circuit courts convened in statutorily designated sites within the circuit; their judges at any particular site were the district judge serving that site and two of the six Supreme Court justices "riding circuit." Congress soon doubled the number of circuits to six and limited the justices to one circuit per justice. It then gradually expanded the size of the Supreme Court to match the growing number of circuits required for the expanding nation. By 1863, there were ten circuits and ten Supreme Court justices, but both numbers fell to nine by 1869, and the Supreme Court has not been larger since then.

Supreme Court justices engaged in occasional and ad hoc trial court governance when meeting their circuit responsibilities, occasionally advising district judges on appointments or urging them to decide old cases. However, the Supreme Court's workload, especially since the Civil War, forced the justices to abandon their circuit court duties, making district judges the sole trial judges and removing any intermediate appellate filter between the trial courts and the Supreme Court. District judges were geographically isolated and administratively autonomous, masters of their single-judge district courts and, for practical purposes, the judges and administrators of the circuit courts as well. The district judges were governed mainly by the limits created by the Justice Department-administered budget, occasional circuit justice oversight, and the largely unrealistic threat of impeachment.

In 1891, Congress effectively relieved the Supreme Court justices of circuit duties by creating separate circuit courts of appeals, one for each of the nine circuits and each with its own judges. Congress made the district courts the major trial courts. In the 1948 recodification, the "circuit court of appeal" became the "court of appeals for the circuit," consisting of "circuit judges."

The creation of intermediate appellate courts, separate from the trial courts, posed the question of who would be responsible for the administration of the district courts. Officially, Congress decided the question in favor of the circuit judges in 1922, when it created the Conference of Senior Circuit Judges, the forerunner of the Judicial Conference of the United States. That decision—to vest oversight responsibility in the appellate judges—was bolstered by the 1939 creation of circuit judicial councils. Partly as a result of the circuit judge governance of district court

business provided by those statutes, the statutory responsibilities of the district courts for their own governance were slow to develop. The districts have grown since the 1930s from primarily single-judge courts to multi-judge courts, including large metropolitan courts. Their governance structures and authorities have grown as well, although the circuit council retains oversight authority in various areas.

Clerk of Court (1789)
(28 U.S.C. §§ 711 (court of appeals), 751 (district), 156(b) (bankruptcy)
(In effect, the chief administrative officer in almost all district and bankruptcy courts; in courts of appeals, mainly responsible for case-flow management support and being custodian of court records)

The First Judiciary Act authorized the Supreme Court and each district court to appoint a clerk, who was "to discharge the duties of his office, and seasonably to record the decrees, judgments, and determinations of the court for which he is clerk." Congress subsequently authorized appointment of clerks for the circuit courts and then for the circuit courts of appeals.

Phase 2: 1891 to 1948

Chief Judge (1891)
(28 U.S.C. §§ 45 (circuit), 136 (district), 154 (bankruptcy))

The 1891 statute creating the circuit courts of appeals provided that the circuit judges would preside at court sessions "in order of the seniority of their respective commissions." The provision gave rise to the concept of the senior circuit judge as the judicial, and gradually the administrative, head of the court and the circuit, albeit with ill-defined administrative responsibilities. The term *senior district judge* came into use, even though few district courts had more than one judge. By using seniority to determine precedence among the judges, the statute's drafters rejected the Supreme Court example of separate presidential appointment of the chief judge.

The senior circuit judge or senior district judge was generally expected to exercise whatever administrative authority or power was necessary, however vaguely it might be defined. The extent of formal administrative

authority was never great. During the time that the title *senior judge* carried an administrative implication, its most prominent usage was in the 1922 statute creating the Conference of Senior Circuit Judges (now the Judicial Conference of the United States), which recognized the duty of a senior circuit judge to inquire into the state of district court dockets, and the duty of senior district judges to supply information about them.

When it recodified Title 28 in 1948, Congress dropped *senior circuit judge* and *senior district judge* in favor of *chief judge* of the circuit and district courts. The drafters of the recodification and others involved in the process described the position of chief judge in grander terms than its authority justified. Although they referred to "the great increase of administrative duties of such judges," there was not then, and is not today, any standard view, and certainly no comprehensive statutory direction, as to a chief judge's administrative role. The term *chief district judge* was inapplicable in almost half the district courts because they had only one judgeship apiece.

Neither Congress nor the Judicial Conference has ever formally charged chief judges with overall administrative responsibilities. Chief circuit judges gain authority through and by virtue of their statutory roles: chairing the circuit council, convening the circuit judicial conference, and being ex officio member of the Judicial Conference of the United States, as well as various specific duties, including seeking or agreeing to intracircuit and intercircuit assignments. The chief district judge's roles are even more ambiguous. The Federal Judicial Center has identified eighteen statutory duties (not including some assignment duties with respect to civil priority cases) and seven duties assigned by the Judicial Conference. Most of these duties, though, are relatively minor and give rise to no clear concept of the office.

Provisions governing the chief judge's appointment and term of office have also evolved slowly. In 1948, the chief judge was the judge "senior in commission," with no age limit. A 1958 statute provided that a chief judge would succeed to office when the current chief turned seventy. In 1975, the Commission on Revision of the Federal Court Appellate System's preliminary draft report recommended that chief judges serve five-year renewable terms and that the Chief Justice (with the other justices' concurrence) select chief circuit judges, who in turn would select

chief district judges (with the active circuit judges' concurrence). That proposal drew so much criticism that the commission withdrew it in favor of more modest change, which Congress basically adopted in 1982. Under the 1982 statute, when the chief judge turns seventy, or (regardless of age) has been chief judge for seven years, or otherwise relinquishes the office, the position passes to the judge with the greatest seniority who has not yet turned sixty-five. Congress's goal with this scheme was to promote effective governance by having chief judges serve a five- to seven-year term and thus avoid the extremes of very long or very short tenure. It is not clear how often chief judges serve their full eligibility.

The term *senior judge* reappeared in 1957 to describe judges retired from active service but still available for judicial service.

Judicial Conference of the United States (1922)
(28 U.S.C. § 331)
(national administrative policy-making body of the federal judiciary, comprising the Chief Justice as chair, the thirteen chief judges of the circuits, twelve district judges elected by the Article III judges of each circuit, and the chief judge of the Court of International Trade)

Despite some judges' strong fears of overcentralization, Congress in 1922 created what became known as the Conference of Senior Circuit Judges to monitor the business of the federal courts, encourage temporary assignment of judges, and make suggestions for procedural changes. Congress acted at the request of Chief Justice Taft, who referred to the Conference as a "federal judicial council," evoking the strong effort within the states, starting with a 1921 Massachusetts statute, to create judicial councils of judges and, sometimes, lawyers or legislators to study the operation of the courts and recommend alternative approaches. Taft, a conservative reformer of the Progressive era, sought to bring order and administrative direction to the judiciary, particularly with respect to his complaint that "each district judge has had to paddle his own canoe and has done as much business as he thought proper."

The 1922 statute created four major responsibilities for the Conference of Senior Circuit Judges: Individually, each judge was to "advise as to the needs of his circuit and as to any matters with respect to which the administration of justice in the courts of the United States may be

improved" and to place before the Conference reports from the district judges, "setting forth the condition of business in said district court, including the number of cases and character of cases on the docket, the business in arrears, and cases disposed of and such other facts pertinent to the business dispatched and pending as said district judges may deem proper together with recommendations as to the need of additional judicial assistance for the disposal of business for the year ensuing"—along with recommendations of the senior circuit judge. Collectively, the Conference was to "make a comprehensive survey of the conditions of business in the courts of the United States and prepare plans for assignment and transfer of judges to or from circuits or districts where the state or condition of business dictates the need therefor," and to "submit such suggestions to various courts as may seem in the interest of uniformity and expedition of business."

To give effect to the temporary judgeship needs so revealed, the statute also strengthened the system's authority to assign judges temporarily to other courts to clear up dockets. An 1850 statute had authorized the transfer of judges from contiguous circuits to help disabled judges, and a 1907 statute broadened that authority to all circuits. Taft had pressed for the creation of what he called a "flying squadron of judges," judges-at-large available to travel to courts requesting temporary support, but that plan died in the face of fears that national judges would not respect local needs and conditions and that such authority was too great to vest in the Chief Justice. "Gentlemen have suggested," Taft complained in the era of the Volstead Act, "that I would send dry judges to wet territory and wet judges to dry territory." The 1922 statute authorized no judges-at-large but did broaden the basis for transferring judges temporarily: to relieve backlogs, not just to help disabled judges. Senior circuit judges (or the circuit justice) could approve temporary intracircuit transfers, and the Chief Justice could approve intercircuit transfers at the request of the senior circuit judge or circuit justice. The Conference has never systematically implemented its original statutory duty of preparing "plans" for intercircuit assignments, although this duty is repeated almost verbatim in the current law.

The 1922 Conference immediately authorized committees, which were ad hoc at first and appointed by the Chief Justice. By now, the

Conference's current committee structure is a major vehicle for Conference business.

The early Conference quickly assumed roles in legislative liaison and promotion, although the statute did not recognize such activity until the 1948 recodification. The Conference also investigated internal and informal reports of judicial unfitness and admonished judges so reported. This task was gradually assumed by the circuit courts and formally lodged with them with the 1939 creation of judicial councils, although a Conference appellate role was added later. A 1958 statute specifically vested the Conference with a major role in procedural rule development, which had been vested exclusively in the Supreme Court in 1934.

The Conference's governance power was bolstered in 1939, when the creation of the Administrative Office provided the Conference with a support staff within the judiciary rather than the executive branch. In fact, current statutes vest many specific federal court governance duties, such as budget formulation, not in the Judicial Conference, but in the director of the Administrative Office. However, the statutes mandate that the director carry out these duties under the supervision of the Conference. The broad range of the Administrative Office director's duties thus creates a formidable governance role for the Conference.

The 1948 recodification changed the name of the Conference to its current title, the Judicial Conference of the United States, and various statutes have altered its membership. Most important, a 1957 law gave each circuit a district judge representative (although district judges had served on Conference committees for 20 years).

Judicial Rule Making (1934) (28 U.S.C. §§ 2071–2077)

A pervasive theoretical question of judicial administration is whether procedural rule making is a legislative or judicial responsibility, and answers to that question turn in part on whether the rules at issue are perceived to be substantive or procedural.

Before 1934, federal courts developed proposed rules only in discrete areas, like bankruptcy or equity, through special Supreme Court committees. The 1872 Conformity Act required that civil procedure for district courts follow that of the respective state courts. In 1934, Congress vested general authority to propose rules in the Supreme Court. Congress

has gradually modified this rules-enabling statute, especially in a 1958 delegation to the Supreme Court and in more recent amendments, to recognize the judiciary's authority to develop rules and rule amendments. But Congress has insisted, concomitantly, on public notice and participation and reserved to itself the final authority to approve amendments to national rules.

Administrative Office of the U.S. Courts (1939)
(28 U.S.C. §§ 604–612)
(multi-faceted national judicial support agency; under direction of Judicial Conference, administers federal court budget, personnel, procurement, and other support services; conducts legislative liaison; staffs Judicial Conference committees)

Congress established the Administrative Office in 1939, at the request of the judiciary, to create an "administrative officer of the United States courts . . . under the supervision and direction" of the judicial branch rather than the executive branch. The statute authorized an Administrative Office director ("the administrative officer") and assistant director, to be appointed by the Supreme Court, and directed them to perform their statutory duties under the direction of the Conference of Senior Circuit Judges and do whatever else the Conference and the Supreme Court requested. Chief Justice Hughes wanted the Administrative Office attached to the Conference rather than the Supreme Court so that improprieties in faraway courts would not reflect on the Court.

The American Bar Association and some chief circuit judges had proposed an administrative office as early as 1936, but judges opposed it, fearing centralized power. The proposal seemed mild, however, after President Roosevelt included in his 1937 "court packing bill" a call for judges-at-large, available for assignment by the Chief Justice, and a "proctor" for the federal courts, to be appointed by the Supreme Court and to act under its direction.

The Administrative Office's duties today extend well beyond those assigned in 1939, although the early duties are still basic: supervising administrative matters; gathering caseload statistics; procuring supplies and space; and preparing and administering the budget, with all the attendant financial management duties. As with any organization, the budget is a major governance tool; over the last several years, the

Conference and the Administrative Office have been delegating to the courts themselves the authority to exercise some of the director's statutory budget execution responsibilities.

The creation of the Administrative Office made the federal courts one of the first United States court systems to shift its administrative support unit from the executive branch to the judicial branch. The states followed suit over the next several decades.

Circuit Judicial Council (1939) (28 U.S.C. § 332)
(the chief circuit judge and equal numbers of circuit and district judges with responsibility for overseeing the administration of justice in the circuit, for considering complaints of judicial unfitness and taking necessary action, and for reviewing numerous administrative measures and plans)

Congress authorized circuit judicial councils (appellate judges only) and circuit conferences (bench and bar) at the request of the judicial leadership and in the same statute that created the Administrative Office. Both conferences and councils had been operating informally prior to the statute.

Congress created circuit councils "[t]o the end that the work of the district courts shall be effectively and expeditiously transacted." The statute directed all the judges of the courts of appeals to meet at least twice a year as administrative superintendents of the district courts, not as appellate judges in the strict sense. Their task: to review the district court caseload statistics collected by the Administrative Office director and conveyed to them through the senior circuit judge, and to take "such action . . . as may be necessary." The statute created a "duty of the district judges promptly to carry out the directions of the council." There was no reference to acting on circuit court business, because the council was the circuit court—and evidently in need of no statutory admonition to administer itself.

Five factors underlay the judicial leadership's preference for the councils:

1. Councils reflected the view, which was strong even before the statute was enacted, that circuit judges bore responsibility for ensuring effective district court administration. There were various instances, before 1939, of senior circuit judges or other circuit judges prodding district judges

to dispose of delayed cases. The statute gave the circuit judges a specific legal authority to direct the district judges to take action.

2. Like the creation of circuit conferences and the Administrative Office's duty to report to the Judicial Conference, the councils reflected Chief Justice Hughes's goal of decentralizing federal judicial administration and separating the Supreme Court from responsibility for misadministration in courts around the country. The 1930s were an era of executive–judicial conflicts, as seen in the court-packing episode and growing complaints over Justice Department administration of the federal courts. Pointing to Roosevelt administration proposals (as part of the court-packing bill) for a federal court "proctor," who would report to the Chief Justice and the Supreme Court, Hughes argued that "[i]nstead of centering immediately and directly the whole responsibility for efficiency upon the Chief Justice and the Supreme Court, I think there ought to be a mechanism through which there would be a concentration of responsibility in the various circuits."

3. The councils embodied Hughes's view that the "[c]ircuit judges know the work of the district judges by their records that they are constantly examining . . . [and they] know the judges personally in their district; they know their capacities."

4. Placing authority in a group of judges was preferable to placing it in a single judge. District judges, said Hughes, "would not feel that they were dependent upon a single individual . . . and they would feel their requests had consideration of the organization of the circuit."

5. By creating an agency with what the Eighth Circuit senior judge called "disciplinary powers," Congress sought to spare itself more of the disruption recently experienced in the 1936 impeachment investigation of District Judge Halsted Ritter.

There have been several significant changes in the councils since 1939, broadening their focus beyond the district courts only. First, their membership has broadened, from exclusively circuit judges in 1939, to inclusion of district judges in 1980, to equal numbers of circuit judges and district judges (plus the chief judge as chair) in 1990. Second, their mission is broader. In 1948, Congress replaced "the end that the work of the district courts shall be effectively and expeditiously transacted" with

the goal of "effective and expeditious administration of the business of the courts within [the] circuit," and it directed the district judges to carry out the councils' "orders," rather than their "directions." In 1980, Congress replaced "the business of the courts" with "justice," thus charging each council to "make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit." The 1980 statute also provided the councils with more instruments, including subpoena power and authority to seek contempt citations for judges or court employees who fail to heed the statutory admonition to "promptly carry into effect all [council] orders." Congress also broadened the councils' responsibilities through a procedurally elaborate system for considering and acting on complaints of judicial unfitness.

Both Congress and the Judicial Conference have vested numerous district court oversight responsibilities in the circuit councils, including review and abrogation of local rules; approval of district court requests for legislation to authorize additional judgeships; creation of bankruptcy appellate panels; and approval of district court plans for administering juries, implementing the Speedy Trial Act, and other functions.

Councils are not the only circuit-wide bodies vested with district court oversight. The court of appeals, for example, appoints bankruptcy judges and federal defenders. Furthermore, the 1990 Civil Justice Reform Act provides for review within the circuit of each district's Civil Justice Expense and Delay Reduction Plan by a circuit committee composed of the chief circuit judge and all chief district judges.

Circuit Judicial Conference (1939) (28 U.S.C. § 333)
(annual or biennial mandatory gathering of a circuit's judges, plus lawyers from the circuit)

While the circuit judicial councils have authority to govern other judges, the circuit judicial conferences were and are purely advisory bodies. The statute mainly gave statutory legitimacy to the practice of circuit bench–bar gatherings, which had been taking place for at least fourteen years in some circuits. Senior Circuit Judge John Parker of the Fourth Circuit called them "schools of jurisprudence." In various circuits, conferences addressed inconsistent local rules, sentencing, and the new civil procedural rules proposed in 1936. The conferences' statutory assignment—"consid-

ering the business of the courts and advising means of improving the administration of justice in such circuit"—is essentially unchanged today and comports with the spirit of the statute. It reflected the view, prominent at the time, that a promising means of court improvement was collective deliberation. (Deliberation was easier when even the largest circuit, the Second, had only thirty active circuit and district judges.)

During the 1950s to the 1970s, many conferences became pro forma exercises in statutory compliance or primarily social gatherings. Starting in the 1970s, however, most circuits made a determined effort to broaden the participation or representation of all federal practitioners and to redirect the conferences to their statutory purpose.

Phase 3: 1948 to the present

Federal Judicial Center (1967) (28 U.S.C. §§ 620–629)

Congress created the Federal Judicial Center at the request of the Judicial Conference because Chief Justice Earl Warren, along with his close friend Administrative Office Director Warren Olney, believed the federal courts needed a separate agency for research and education. The Center has a separate appropriation and its policies are determined by an eight-member board composed of the Chief Justice, who is chair, six judges, who are selected by the Judicial Conference, and the director of the Administrative Office. The Center thus assumed responsibility for ad hoc research and education that Conference committees had been doing. The Center's role now extends well beyond education and research, although they remain its basic missions.

Judicial Panel on Multi-District Litigation (1968) (28 U.S.C. § 1407)

The Judicial Panel on Multi-District Litigation has authority to transfer, for pretrial, actions that are pending in different districts but involve common questions of fact. The panel's creation thus reflects the same goals of efficient use of judicial resources that motivated the creation of the Judicial Conference.

Circuit Executive (1972) (28 U.S.C. § 332)

Congress authorized the circuit councils to appoint circuit executives as part of the response to the appellate caseload crisis perceived in the 1960s. Chief Justice Hughes had advocated administrative officers for the councils in 1938. Retired Administrative Office Deputy Director Will Shafroth, in a 1968 survey of the appellate courts commissioned by the Judicial Conference and the Administrative Office, recommended that a few circuits' chief judges be authorized to hire assistants to help devise case and court management innovations. That recommendation evolved into a proposal for authorizing all circuits to hire executives for this purpose. The original statutory requirement that the circuits select these executives from a list of candidates "certified" by an administrative board in Washington, D.C., was deleted in 1988.

Administrative Assistant to the Chief Justice (1972)
(28 U.S.C. § 677)

Although Chief Justice Vinson had appointed an administrative assistant in 1946 without benefit of statute—a precedent that did not hold after his tenure—Chief Justice Burger asked Congress to authorize this office to provide him with assistance in various judicial administration tasks that he wished to pursue during his tenure as Chief Justice. According to the statute, the administrative assistant to the Chief Justice "performs such duties" as the Chief Justice may assign. The four assistants and two acting assistants appointed since 1972 have generally helped the Chief Justice in his relations with Congress, the Judicial Conference, the Administrative Office, and the Federal Judicial Center, and with internal Supreme Court management. The office's impact on court governance is determined largely by the wishes of the Chief Justice.

District Court Executive (1981)

At the suggestion of Chief Justice Burger, among others, several federal courts employed district court executives as counterparts to the then recently authorized circuit executives. The position has explicit funding from the appropriations committee but no authorizing legislation. Several years ago, the number of district courts served by executives reached six. That number has since declined.

U.S. Sentencing Commission (1984) (28 U.S.C. § 991)

Congress created the Sentencing Commission and directed it to promulgate sentencing guidelines and policy statements and, more broadly, to "establish sentencing policies and practices for the Federal criminal justice system."

Abbreviated bibliography

Other than constitutional and statutory provisions, most of the information in this paper came from or can be found in the following publications. Professor Fish's works are especially helpful.

Books

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

Steven Flanders & John T. McDermott, Operation of the Federal Judicial Councils (Federal Judicial Center 1978).

Russell R. Wheeler, Judicial Administration—Its Relation to Judicial Independence (1988).

Russell R. Wheeler & Cynthia Harrison, Creating the Federal Judicial System (Federal Judicial Center 1989).

Articles

Henry Chandler, *Some Major Advances in the Federal Judicial System, 1922–47,* 31 F.R.D. 307 (1963).

Wilfred Feinberg, *The Office of Chief Judge of a Federal Court of Appeals,* 53 Fordham L. Rev. 369 (1984).

Peter G. Fish, *Guarding the Judicial Ramparts: John J. Parker and the Administration of Federal Justice,* 3 Just. Sys. J. 105 (1977).

Peter G. Fish, *The Office of Chief Justice of the United States: Into the Federal Judiciary's Bicentennial Decade,* in White Burkett Miller Center of Public Affairs at the University of Virginia, The Office of Chief Justice 1 (1984).

Peter G. Fish, *Politics Rides the Circuits: State and National Itineracy,* 5 Just. Sys. J. 115 (1979).

Peter G. Fish, *William Howard Taft and Charles Evans Hughes: Conservative Politicians as Chief Judicial Reformers,* 1975 Sup. Ct. Rev. 123.

Michael J. Remington, *Circuit Council Reform: A Boat Hook for Judges and Court Administrators,* 1981 B.Y.U. L. Rev. 695.

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

Russell R. Wheeler, *Extrajudicial Activities of the Early Supreme Court,* 1973 Sup. Ct. Rev. 123.

About the Federal Judicial Center

The Center is the research and education arm of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and six judges elected by the Judicial Conference.

The Court Education Division provides educational programs and services for non-judicial court personnel such as those in clerks' offices and probation and pretrial services offices.

The Judicial Education Division provides educational programs and services for judges. These include orientation seminars and special continuing education workshops.

The Planning & Technology Division supports the Center's education and research activities by developing, maintaining, and testing information processing and communications technology. The division also supports long-range planning activity in the Judicial Conference and the courts with research, including analysis of emerging technologies, and other services as requested.

The Publications & Media Division develops and produces educational audio and video programs and edits and coordinates the production of all Center publications, including research reports and studies, educational and training publications, reference manuals, and periodicals. The Center's Information Services Office, which maintains a specialized collection of materials on judicial administration, is located within this division.

The Research Division undertakes empirical and exploratory research on federal judicial processes, court management, and sentencing and its consequences, often at the request of the Judicial Conference and its committees, the courts themselves, or other groups in the federal system.

The Center's Federal Judicial History Office develops programs relating to the history of the judicial branch and assists courts with their own judicial history programs.

The Interjudicial Affairs Office serves as clearinghouse for the Center's work with state–federal judicial councils and coordinates programs for foreign judiciaries, including the Foreign Judicial Fellows Program.

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