Circuit Council Reform: A Boat Hook for Judges and Court Administrators

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In quiet and untroubled times it seems to every administrator that it is only by his efforts that the whole population under his rule is kept going, and in this consciousness of being indispensable every administrator finds the chief reward of his labor and efforts. While the sea of history remains calm the ruler-administrator in his frail bark, holding on a boat hook to the ship of the people and himself moving, naturally imagines that his efforts move the ship he is holding on to. But as soon as a storm arises and the sea begins to heave and the ship to move, such a delusion is no longer possible. The ship moves independently with its own enormous motion, the boat hook no longer reaches the moving vessel, and suddenly the administrator, instead of appearing a ruler and a source of power, becomes an insignificant, useless, feeble man.¹

Troubled waters surround the federal judicial vessel. For years, even in calmer seas, water has come dangerously close to washing over the gunwale of the craft. Too many passengers huddled aboard have caused the vessel to sink lower and lower.²

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² The views expressed herein are my own and do not necessarily represent the views of the House Committee on the Judiciary or of any Members of the United States Congress.

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Fortunately, the boat is watertight and its excellent buoyancy has kept it afloat.

The purpose of this Article is not to discuss the overall seaworthiness of the federal judiciary or the number of passengers it carries. The Article will, however, discuss several basic problems of judicial administration and place them in their historical context. It will then examine the administrative structure that has kept the craft on an even keel in the past. Finally, it will discuss a recently enacted statute, The Judicial Councils Reform & Judicial Conduct & Discipline Act of 1980 (Judicial Councils Reform Act)—a boat hook of sorts—that will provide federal judges and judicial administrators with a modest tool to keep abreast of their obligations. This tool will not save the judicial branch, but if used properly it will be a useful implement.

I. GENERAL PRINCIPLES AND PROBLEMS OF JUDICIAL ADMINISTRATION

A. Tension Created By The Separation of Powers

Ours is a constitutional government based on a separation of powers between the legislative, executive, and judicial branches. Article III of the Constitution—the judiciary's bea—


The Chairman of the House Committee on the Judiciary, Peter W. Rodino, Jr., has observed: “One of the most difficult and persistent problems facing the House Judiciary Committee is what to do about the ubiquitous overload in the federal courts—an overload so insidious that it threatens the very health of the entire federal judicial system.” Rodino, Magistrates' Reform—A Way to Aid Congested Federal Courts, 13 TRIAL 32 (Nov. 1977).

It should be recognized, however, that some now question the existence of a congestion crisis. See Cavanagh & Sarat, Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence, 14 L. & Soc. Rev. 371 (1980).


4. The principal purpose of the Judicial Councils Reform Act is to create a mechanism and procedure through which the judicial branch can consider and respond to complaints against federal judicial officers. Id. See H.R. REP. No. 96-1313, 96th Cong., 2d Sess. 1 (1980); S. REP. No. 96-362, 96th Cong., 1st Sess. 1 (1979), reprinted in [1980] U.S. CODE CONG. & AD. NEWS 7767, 7767. Equally important, the Act is designed to improve the overall functioning of the decentralized circuit councils, recipients of the bulk of the legislatively delegated judicial discipline and disability responsibility. H.R. REP. No. 96-1313, 96th Cong., 2d Sess. 1 (1980); S. REP. No. 96-304, 96th Cong., 1st Sess. 1, 3-5 (1979). By delaying the effective date of the legislation until October 1, 1981, the Congress gave the judicial branch adequate time to prepare for the Act's impact. Pub. L. No. 96-458, § 7, 94 Stat. 2035 (1980).

con—vests the independent judicial power of the United States "in one Supreme Court" and in "inferior" federal courts. However, it authorizes Congress to organize the Supreme Court and to establish inferior courts as it deems necessary. Since Congress is the creator of the structure and jurisdiction of the lower federal courts, there is little question that the legislative branch possesses the resultant mandate of overseeing the functioning of almost all the federal judicial system, including its management and administration. Congress also has the budgetary authority to do this. These responsibilities are important and should be taken seriously.

As befits a system of separation of powers with checks and balances, there is a counterweight to Congress' authority to oversee and legislate for the federal judiciary. The framers promoted the independence of the judiciary by providing lifetime tenure for judges, erecting a bar against diminution of judges' salary while in office, and equipping the federal judiciary with the power to review Congressional enactments. Indisputably, in American history "[a]n independent judiciary has been a great rock in stormy seas."

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Thompson, 103 U.S. 168, 191 (1881); The Federalist No. 47 (J. Madison).

6. U.S. Const. art. III, § 1. See J. Hurst, The Growth of American Law: The Law Makers 108-09 (1950). Professor Hurst relates that the decision to create and organize the inferior Federal courts had two implications. First, as compared to many state constitutions, it left room for future possibilities of flexible experimentation and adjustment. Second, it meant that in any test of strength between Congress and the inferior courts, Congress could prevail. Id. at 109.

7. U.S. Const. art. III, § 2. The Constitution grants the Supreme Court appellate jurisdiction "with such Exceptions and under such Regulations as the Congress shall make" over all cases within the judicial power of the United States. Id. at cl. 2. For further discussion, see Ratner, Congressional Power over the Appellate Jurisdiction of the Supreme Court, 109 U. Pa. L. Rev. 167 (1960).


9. The "oversight function" of Congress is relatively new. It was first authorized by the Legislative Reorganization Act of 1946, now codified at 2 U.S.C. § 190d(a) (1976).


12. Although not expressly conveyed in the Constitution, the power of the federal courts to test legislative enactments was soon found to be implicit. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

13. W. Douglas, The Court Years 1939-1975, at 195 (1980). The House Judiciary Committee has shown great respect for this proposition: "The Committee recognizes that it would venture onto very thin constitutional turf if it elected to erode the cherished value of judicial independence: which may be of more importance today than it was
A tension exists between the constitutional mandate to preserve and protect the independence of the judiciary and the congressional responsibility to equip the courts with a modern, flexible, rational and responsible administrative structure. Yet, both independence and efficiency are necessary components of our judicial system. An independent judiciary is an empty shell if citizens lack confidence in it. Constitutional rights are meaningless if there are no adequate procedures to vindicate them and if governmental institutions fail to act with integrity, honesty, consistency, and efficiency.

Throughout its history the judicial branch, with a modicum of congressional support, has shown a resilient ability to evolve new mechanisms and procedures to meet the constantly changing demands placed on it. In short, it is possible that out of this tension between the independence of the federal judiciary and congressional involvement in the administration of the federal courts can come understanding and satisfaction of both judicial independence and effective administration. A thoughtful federal judge, writing in this law review, aptly observed, "Out of conflict may come acceptable and even beneficial compromise. The inevitable conflict, the inherent tension, need not be disruptive of the work of doing justice."

Due to its national perspective and political responsibility, Congress paints in broad brush strokes when it specifies the parameters of federal jurisdiction and structure. However, be-

when the Constitution was written." H.R. REP. No. 96-1313, 96th Cong., 2d Sess. 19 (1980).

14. There are grounds to believe that this is occurring. In a recent public opinion poll, only 29% indicated a high degree of confidence in the federal courts; the more knowledgeable and experienced the individual, the more likely that he would have unfavorable feelings about the courts. Yankelovich, Skelly, & White, Inc., The Public Image of the Courts: Highlights of a National Survey of the General Public, Judges, Lawyers, and Community Leaders, in STATE COURTS: BLUEPRINT FOR THE FUTURE 5 (T. Fetter ed. 1978).


16. Cavanagh & Sarat, supra note 2, at 373.

17. See Wallace, Judicial Administration in a System of Independents: A Tribe with Only Chiefs, 1978 B.Y.U. L. REV. 39, 39. Judge Wallace was referring to a different, albeit similar, tension that exists within the judicial branch: that between judicial independence and effective internal administration.

18. See generally Hearings on the State of the Judiciary, supra note 2, at 3-4 (statement of Robert W. Kastenmeier); Kastenmeier & Remington, Court Reform and
cause of the nature of day-to-day judicial administration and management, Congress properly plays a more limited role in this area. It is unlikely that the federal judiciary could tolerate the burden of continuous tinkering required to cure every little outcropping of inefficiency. Congressional efforts to become intimately involved in the daily affairs of the judiciary by creating priorities for certain civil cases, special appeal routes, and mandatory appeals have for the most part proven to be failures. Further, the solution to many problems of judicial administration can and should be self-imposed by the judiciary itself, which generally is able to deal with them.

If Congress provides the structure to meet the constantly changing responsibilities given the courts, and if the judiciary is willing to impose some time-proven management techniques on itself, then more efficient administration of justice can be achieved. Let us now turn to an examination of judicial administration problems presently confronting the federal judiciary.

B. Basic Problems of Federal Judicial Administration

The most visible symptoms of the problems confronting the federal judicial system are the overburdened courts and high costs of litigation caused by the legalization and judicialization of American society on a massive scale. These problems, if not diagnosed and effectively treated within the near future, will have deleterious long-term effects. As the United States Department of Justice aptly observed, court congestion and rising costs are only two of the many signs of how skyrocketing caseloads are


19. At last count, there were at least sixty-two civil priorities, some applying to the trial level, some to the appellate level, and some to both. Those interested in improving judicial machinery have long been interested in abolishing all but the most necessary of these priorities. See, e.g., Report No. 109A to the House of Delegates of the American Bar Association by the Special Subcommittee on Coordination of Judicial Improvements 211 (Midyear Meeting 1977). It is interesting to note that the ABA Resolution endorses the principle that the circuit council of each court of appeals set calendar priorities for the circuit.


As relates to the need to abolish the mandatory jurisdiction of the Supreme Court, see Federal Judicial Center, Report of the Study Group on the Caseload of the Supreme Court 25-38 (1972); Needs of the Federal Courts, supra note 2, at 11-13.

20. The United States has far more lawyers per capital than any other country in the world. According to the American Bar Association, the number of practicing attorneys increased 83% between 1970 and 1980.
damaging our court system.

There are others. Courts are forced to add more clerks, more administrative personnel, to move cases faster and faster. They are losing time for conference on cases, time for reflection, time for the deliberate maturation of principles. We are, therefore, creating a workload that is even now changing the very nature of courts, threatening to convert them from deliberative institutions to processing institutions, from a judiciary to a bureaucracy. This development, dangerous to every citizen in our democracy, must be arrested and reversed. And it must be done in ways that will preserve the quality of justice in our federal courts.  

A respected federal judge seconded this diagnosis by warning that the federal courts have “too much work, too little time to do it, the necessity for delegation, inefficient management and, ultimately, the dilution of responsibility for decision-making.”

Caseload statistics show constant increases in the amount of adjudicative work courts are expected to do. Furthermore, cases filed in federal courts are becoming more complex and require more active participation by the trial judge not only to resolve the case on the merits but to formulate complex forms of

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23. Although it can be argued persuasively that “statistics never prove anything,” E. SCHUMACHER, SMALL IS BEAUTIFUL 20 (1973), and that case filings are a poor approximation of what really happens in court, Cavanagh & Sarat, supra note 2, at 386-87, they are the only measure that we have. Statistics show that in the eighteen-year period between 1960 and 1978, the number of cases docketed in the federal district courts doubled, the number of appeals taken to the circuit courts of appeals increased fivefold, and the number of cases filed in the Supreme Court doubled. (1960) DIRECTOR ADMINISTRATIVE OFFICE U.S. COURTS ANN. REP. 61-62; (1979) DIRECTOR ADMINISTRATIVE OFFICE U.S. COURTS ANN. REP. 2-7. During this same time period, United States magistrates (which did not even exist before 1968) disposed of several hundred thousand matters. See Diversity of Citizenship Jurisdiction/Magistrates Reform: Hearings on Diversity of Citizenship Jurisdiction/Magistrates Reform Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 86, 182 (1977) (statements of Joseph D. Tydings and Daniel Meador).

More work needs to be done in the area of statistical reporting. For example, there has never been an effort to factor in legislative improvements to judicial machinery. Although the district court filings have doubled, the amount of work per judge has not increased. In addition, weighted caseload reporting is still far behind the times. Clearly, more research needs to be done. See Hurst, The Functions of Courts in the United States, 1950-1980 (Working Paper 1980-1, Disputes Processing Research Program, Univ. of Wisconsin, Madison); Grossman, Kritzer, Bumiller, & McDougal, Measuring the Pace of Civil Litigation in Federal and State Trial Courts, 65 JUDICATURE 81, 113 (1981).
ongoing relief. Sometimes governmental activities are implicated, and often the relief granted affects persons not directly involved in the litigation. The remedy ordered may therefore require the trial judge's continuing participation in administration and implementation. This is often the situation in cases involving the rights of institutionalized persons, school desegregation, employment discrimination, environmental litigation, and antitrust.

The growth of the judicial workload, both in terms of numbers and complexity, shows no signs of abating. For example, the 96th Congress—not known as an activist Congress—created at least nine new federal causes of action. Even those recommending a slowdown in federal regulation and intrusion into the daily lives of citizens have put forward proposals that will increase the work of the federal courts.


Judge Henry J. Friendly put it succinctly by stating during a congressional hearing, "Being a Federal judge today... is an altogether different and infinitely more demanding business than when I went on the bench eighteen years ago." Diversity of Citizenship Jurisdiction/Magistrates Reform: Hearings on Diversity of Citizenship Jurisdiction/Magistrates Reform Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 210 (1977).

25. Chayes, note 24 supra. Professor Chayes concludes that the developing style of litigation has become a quasi-political process, with courts playing a role normally reserved for the legislature.

26. As examples of these types of cases, see Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972) (rights of mentally retarded persons who are institutionalized); Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976) (rights of prison inmates who are institutionalized).

For Congressional approval of this sort of public law dispute resolution, see Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 349 (1980).


28. See S. 111, 96th Cong., 1st Sess. (1979). This proposal, commonly referred to as the Bumpers Amendment, provides for a higher standard of judicial review for administrative agency rulemaking. This bill has taken amendment form on several occasions. See the Sept. 7, 1979 amendment of Senator Bumpers to Senate bill 1477, the Federal Courts Improvements Act, 125 Cong. Rec. S12,145 (daily ed. Sept. 7, 1979), and the Oct. 30,
Unfortunately, the increasing volume and complexity of cases is not the sole problem. Statistics concerning caseloads and the concomitant administrative responsibility to preside over a case until final disposition do not tell the entire story of the role played by the federal judiciary. These statistics merely measure the traditional aspect of what courts do: that is, resolve controversies in an adversary setting. When assessing the burdens on federal judges, it is important to recognize that courts now and in the past have engaged in a broad spectrum of nonadjudicative endeavors. These functions, which have also escalated with time, add substantial administrative problems. Their impact is certainly felt by an Article III judge during the normal workday.

These nonadjudicative responsibilities may conveniently be organized into four categories: legislative, executive, administrative, and ceremonial. In the legislative context, Congress generally has assigned the judiciary a significant rulemaking authority. At the trial level, court rules have been adopted by most district courts; similarly, every court of appeals has issued rules. Moreover, Congress specifically has given the courts responsibility for devising plans for the administration of the Criminal Justice Act, the Jury Selection and Service Act, and the Speedy Trial Act. These latter activities relate to the critically important—to Congress, at least—implementation of laws governing the judicial system. The courts also act as general supervisors of the legal profession.

As to the executive powers of the judicial branch, Congress has delegated responsibility to make appointments to judicial

and executive branch positions. Often this appointive power is structured with somewhat rigid statutory procedures and merit selection standards.

In the area of nonadjudicative administrative authority, Congress has given the courts the specific responsibility of issuing electronic eavesdropping orders, managing the grand jury, overseeing plea bargaining, and sentencing convicted criminals. To help the judiciary carry out these functions, Congress has created at least one special court and has authorized the creation of institutes and joint councils on sentencing.

As to ceremonial functions, federal judges continue to naturalize aliens and, on occasion, to conduct marriages. Further, judges often administer oaths to newly appointed or elected officials. Records usually have to be kept of these actions, imposing yet another burden on the courts.

In short, anyone who wants to discuss the administrative problems of the federal judiciary must recognize that federal judges are "charged with a large number of official responsibilities that do not fall within the adjudicatory role of dispute resolver." These nonadjudicative functions add altogether different responsibilities and problems to a judge's agenda. Because a

36. 28 U.S.C. § 546 (1976) provides that when the office of United States Attorney is vacant, the district court may make an interim appointment. However, the President still retains the authority to remove such a temporary U.S. attorney. 28 U.S.C. § 541(c) (1976).

In addition, pursuant to the Ethics in Government Act, the Chief Justice of the United States assigns three judges or justices to a special division of the District of Columbia Circuit for the purpose of appointing "special prosecutors." 28 U.S.C. §§ 49, 591-598 (Supp. III 1979).


41. At present, there is no general federal sentencing law. Criminal code proposals are all in agreement that there should be a comprehensive statutory statement on sentencing. See S. 1722, 96th Cong., 2d Sess. §§ 2001-2306 (1980); H.R. 6915, 96th Cong., 2d Sess. §§ 3101-3708 (1980).


45. This is done pursuant to local statute.

46. See, e.g., U.S. Const. art. II, § 1, cl. 7.

Judge’s time is finite, the effective handling of these obligations may conflict with what is perceived to be the principal task of lifetime-tenured judges—resolving disputes in an adversary setting.48

In response to the federal judiciary’s multiple responsibilities (some of which are imposed by legislation and others of which are created by the courts themselves), the court reformers’ constant hue and cry has been “Create more judgeships,” or, in the alternative, “Give the judges more support personnel.” Congress has acted again and again, passing omnibus judgeship bills, increasing the powers of subordinate judicial officers, and granting judges more staff support.49 Even taking into consideration the augmented number of judgeships, during the past twenty-five years the ratio of total judicial branch staff to judges (including retired judges) has increased over fifty percent.50

As the district and circuit courts’ judge and staff resources have increased, there has been an equal—if not greater—growth in the amount of administrative work imposed on these courts. And, ominously, the pending case backlog has actually risen. An apt analogy is the phenomenon that occurs when transportation experts act to alleviate downtown traffic congestion by building more parking lots. Often, the solution is only short-term, and over the long-run congestion worsens because more people drive their automobiles.61


But see *Hearings on the State of the Judiciary*, supra note 2, at 251 (Statement of Robert H. Bork): “[M]y belief is that the Federal judiciary is now too large as it stands.”

In its report on the omnibus judgeship bill, the House Committee on the judiciary found that the federal judiciary cannot be expanded interminably without endangering its high quality. H.R. Rep. No. 95-858, 95th Cong., 2d Sess. 2 (1978).

50. In 1954 the ratio of staff to judges was eleven to one; in 1980 it was seventeen to one. Rubin, *supra* note 22, at 651. These figures refer not only to in-chambers staff, but also to supporting personnel such as probation officers and the staffs of clerks’ offices. By an even greater proportion, Congress has increased the budget of the federal judiciary. In fiscal year 1961 the total budget, excluding the Supreme Court, was $48,325,700; the total for fiscal year 1980 was $578,859,000, a nearly twelvefold increase. [1960] DIRECTOR ADMINISTRATIVE OFFICE U.S. COURTS ANN. REP. 189; [1979] DIRECTOR ADMINISTRATIVE OFFICE U.S. COURTS ANN. REP. 36.

President Jimmy Carter understood that creating more judgeships was only a partial remedy to the difficulties facing the federal judiciary. In a message to Congress he observed,

[U]nless we improve the system of justice itself, we may find that the additional judges have been swallowed up by outmoded procedures and by an ever-rising volume of cases. We must take prompt and effective steps to eliminate the remaining obstacles to efficiency in the justice system and to increase access to Federal courts by those with Federal claims.69

Already, this has proved to be true. The short-term solution of increasing the size of the federal judiciary by adding judges and staff has forced many judges, especially chief judges at the circuit and district level, to assume more and more administrative responsibility, thereby diminishing their abilities to adjudicate cases or, in the alternative, forcing them to delegate ministerial functions to subordinates.58

Delegation creates a whole new host of problems. It requires active management and quality control by the delegating authority. If not monitored properly and if not assigned to a qualified individual, delegation may not save time or contribute to responsible decisionmaking. Haphazard and ill-managed delegation has resulted in inconsistent treatment of similar administrative issues throughout the federal judicial system. The way in which delegation has occurred has also often concealed the identity of the decision-maker who should be held accountable if the system is not working properly.

Nonetheless, delegation of administrative responsibility under well-monitored and well-managed circumstances is clearly preferable to diminishing the role that tenured federal judges are so well equipped to fulfill:


For an excellent analysis of the problems posed by the creation of federal judgeships, see C. Baar, Judgeship Creation in the Federal Courts: Options for Reform (Federal Judicial Center 1981). The gist of Professor Baar's proposal is that if a few parking spaces were added on an annual basis when the need arose, it would not frustrate the ability of the public to shift from the automobile to alternatives. Opening the floodgates on a periodic basis, however, raises expectations to a high pitch and encourages more flooding.


adjudicating disputes in traditional Federal subject matter areas such as copyright, patents, trademarks, commerce, bankruptcy, antitrust, and admiralty; rendering speedy criminal justice for those accused of crimes; protecting the basic civil and constitutional liberties of all citizens; and resolving vital and often recently identified rights (and sometimes rights not yet identified by the legislative branch) which relate to welfare, occupational safety, the environment, consumerism, and privacy.\(^54\)

There is nothing in the constitutional debates or the two-hundred-year history of the federal judiciary to indicate that Article III judges, appointed by the President with the advice and consent of the Senate and equipped with judicial tenure, are to spend their working time making routine administrative decisions. What is clear is that from the beginning days of this country the revolutionary idea was that the judiciary was to protect the rights of citizens and to establish justice under law.\(^55\) Increasing administrative demands may prohibit the judges from having the time to carry out these traditional responsibilities.

Thus, the caseload explosion and the large increases in the number of court personnel have placed pressures on the federal judicial system never imagined by those who drafted the Constitution.\(^56\) As a result new burdens have been placed on the courts’ administrative structure, not a single element of which, with the exception of the office of the Chief Justice of the United States, existed at the beginning of the 20th century. These pressures imperil the judiciary’s ability to effectively perform the basic functions given it by the framers of the Constitution.

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55. Madison explained in the Federalist Papers: “Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit.” The Federalist No. 51, at 350-51 (J. Madison). See also The Federalist No. 78 (A. Hamilton).
56. Former Vice-President Mondale put it plainly:
We operate under a judicial structure largely unchanged from the one designed 200 years ago for a handful of new Americans in 13 small states on the eastern seaboard. We expect the same system, today, to meet the needs of 210 million very different kinds of people spread over 53 separate jurisdictions in the most modern and complex society ever seen on the face of the globe.
Address by W. Mondale to the Second Judicial Circuit Conference (Sept. 10, 1977), reprinted in Hearings on the State of the Judiciary, supra note 2, at 794.
II. HISTORICAL DEVELOPMENT OF THE ADMINISTRATIVE STRUCTURE OF THE FEDERAL COURTS

The growing adjudicative and administrative obligations of the federal judiciary should be placed in historical context; it is helpful to ponder past experiences before turning to present problems and before trying to formulate solutions for the future. Long ago Maitland observed, "To-day we study the day before yesterday, in order that yesterday may not paralyse to-day, and to-day may not paralyse to-morrow." To paraphrase Professor Bickel, a knowledge of the past can assist us to "remember the future."

A. Early Development

During the early days—indeed during the first one hundred years—of the federal judiciary, there was not much concern about judicial administration. The workload was relatively low and the numbers of judges and subordinates were well within manageable limits.

With the development of the modern industrial state, however, came new and unforeseen pressures on the courts and the legal profession. The last three decades of the 19th Century, in this and other countries, were a period of rapid social, economic, and technological change. The influence of the railroad, development of mass communication, expansion of the factory system and of commercial organizations, shifts in the social environment, and diversification of social consciousness all placed tremendous burdens on the legal system, whose job it was to direct and organize these changes.

In spite of the new problems that were fast being pressed on the courts, the need to improve judicial machinery was not immediately recognized. Ultimately, however, congressional perception that the judicial vessel was in danger of running aground was coupled with a consensus solution, and in 1891 Congress

57. 3 F. MAITLAND, COLLECTED PAPERS 439 (Fisher ed. 1911).
59. See L. FRIEDMAN, A HISTORY OF AMERICAN LAW 336-38 (1973); Frank, Justice Tom Clark and Judicial Administration, 46 Tex. L. Rev. 5, 8 (1967).
60. J. HURST, supra note 6, at 9. European countries were experiencing similar changes and their court systems were being subjected to the same stresses. By way of illustration, the caseload of the French Council of State tripled between 1878 and 1908. Le CONSEIL D'ÉTAT 676-77 (1974).
61. See J. HURST, supra note 6, at 15-19.
passed legislation that created nine intermediate courts of appeals and further defined the jurisdiction of the courts of the United States.62

In 1906 Roscoe Pound, in a classic address to the American Bar Association, charged that the American justice system was no longer meeting its assigned functions. He concluded that defects in our judicial system were high among the causes of citizen dissatisfaction with the administration of justice.63 The legal profession and the legislative branch were loath to accept Pound's challenge.64 In fact, there was a concerted effort to prevent the speech from ever being printed.65 Nonetheless, a seed had been planted and that seed reached maturity sixteen years later. Under the patient and watchful care of Chief Justice, and former President, William Howard Taft, legislation was passed in 1922. The legislation furthered two objectives supported by the Chief Justice.66 First, the legislation clothed the Chief Justice with the authority to take certain specific actions to meet the changing needs of the federal courts. For example, he was given authority to assign district court judges to serve anywhere in the country, provided there was a certificate of need from the circuit requesting assistance and a certificate of availability from the circuit providing the helping hand.67 The involvement of the circuits was noteworthy because it demonstrated an early congressional awareness of the politically significant factor of localism or decentralization.

Second, the 1922 Act established the Conference of Senior Circuit Judges (today known as the Judicial Conference of the United States).68 The conference was given general responsibil-

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64. Members of the organized bar were so outraged that they accused Pound of attempting "to destroy that which the wisdom of the centuries has built up." Wigmore, Roscoe Pound's St. Paul Address of 1906, 20 J. Am. Jud. Soc'y 176, 177 (1936) (quoting Mr. Spoonts of Texas). But, within one year, the ABA apparently agreed with Pound. This led to the appointment of a special committee which was assigned the task of examining existing evils in judicial administration and then proposing remedies to cure those evils. Pound was one of the committee's members. See 31 A.B.A. REP. 505 (1907); 34 A.B.A. REP. 578 (1909).
65. Wigmore, supra note 64, at 177.
68. Id. § 2. As part of a general recodification of title 28 of the United States Code, the Judicial Conference of the United States was renamed in 1948. Act of June 25, 1948,
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...ity to make a comprehensive survey of the condition of business in the federal courts, to prepare plans for the transfer and temporary assignment of judges to meet varying docket demands, and to submit to Congress suggestions concerning uniformity and the expedition of the federal courts' business. 69

Considered collectively, these two changes comprised the first statutory effort in this nation's history to treat the federal judicial system as a single entity. 70 Although it was a significant step forward, this initial reform quickly exposed a need for further congressional action. The Judicial Conference met only once a year and lacked an administrative staff. It was thus unable to effectively discharge its responsibilities. For example, without a comprehensive, reliable system of statistics, it was virtually impossible to identify and devise solutions to court problems.

As a consequence, seventeen years later—on joint resolution of the Attorney General and the Judicial Conference, with active support from Chief Justice Charles Evans Hughes—Congress acted again, 71 passing the Administrative Office Act of 1939, probably the greatest judicial administrative package ever passed in this nation's history. 72

B. The Administrative Office Act of 1939

By enacting the Administrative Office Act of 1939, Congress achieved at least three major objectives. First, an entirely new institution—the Administrative Office of the United States Courts—was created to assume the responsibility of adminis-

ch. 646, 62 Stat. 902.


70. J. HURST, supra note 6, at 114.


For an excellent history of this legislation, see P. FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 125-65 (1973). See also Administration of United States Courts: Hearings on H.R. 2973 Before the House Comm. on the Judiciary, 76th Cong., 1st Sess. (1939) [hereinafter cited as House Hearings on Administration of U.S. Courts].

72. The House Report recognized this by stating, "(I) t is believed by many of the bench, bar, and laity that the pending bill is the most important ever presented to Congress for the improvement of Federal judicature." H. R. REP. No. 702, 76th Cong., 1st Sess. 4 (1939). An illustrious court reformer understated while testifying on the proposed legislation: "This bill seems very general and very gentle . . ., but I think it has teeth in it that are longer and will cut deeper, if necessary, than you would suspect at first reading." House Hearings on Administration of U.S. Courts, supra note 71, at 27 (statement of Arthur T. Vanderbilt).
ing the federal courts, including the preparation of the judiciary’s budget. The Administrative Office was also given the responsibility for gathering statistics about the federal courts’ workload. The Director of the Administrative Office was asked to report these statistics annually to both the Congress and the Judicial Conference. In addition, the Judicial Conference’s own authority was augmented by giving it supervisory authority over the Administrative Office.

Second, by what has been characterized as a “magic touch of decentralization,” the Act created another new institution: the judicial council of the circuits, or circuit councils. Composed of the active circuit judges of each circuit, the circuit councils were asked to work for the effective and expeditious transaction of the business of the circuit’s various courts. The Act further directed the circuit’s district judges to promptly carry into effect all orders of the circuit council and increased the circuit’s chief judge’s responsibility by requiring him to preside over the council’s semi-annual meeting.

Third, the legislation provided that there be a judicial conference in each circuit made up of all the circuit’s district and circuit judges, together with designated members of the bar. The conference was given the broad mandate of reviewing the circuit’s business and studying how the administration of justice therein might be improved. The conference’s actions were to be communicated to the circuit council, which was empowered to respond accordingly.

73. This was previously the responsibility of the Justice Department.
75. Id. § 305 (codified at 28 U.S.C. § 604(a) (1976)).
76. M. PUSEY, CHARLES EVANS HUGHES 687 (1951).
78. Id.
79. Id. Until the Judicial Councils Reform Act was passed in 1980, the original 1939 provision (codified at 28 U.S.C. § 332 (1976)) essentially remained unchanged. Only two amendments of note occurred. The first was in 1948, as part of a general recodification of title 28. The most important language change was adoption of the phrase that “[e]ach judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within the circuit.” 28 U.S.C. § 332(d) (1976). The Reviser’s Note indicated that this was just a change in “phraseology.” H.R. REP. No. 308, 80th Cong., 1st Sess. A46 (1947). The second change was in 1971, with enactment of the Circuit Executive Act. See notes 85-87 and accompanying text infra.
C. Recent Reforms and Present Structure

After the enactment of the Administrative Office Act of 1939, nearly three decades went by before passage of the next major reform. In 1967 the Federal Judicial Center was created.81 Established as a separate entity within the judicial branch, the Center was given responsibilities over research, judicial training, and system development.82 The legislation provided that the Center would be the source of recommendations to Congress, to the Judicial Conference, and to the legal community in general.83 The Act also created a Federal Judicial Center governing board, chaired by the Chief Justice, and composed of the Director of the Administrative Office and five judges elected by the Judicial Conference.84

Shortly thereafter, in 1971, another judicial administration reform occurred with the enactment of the Circuit Executive Act.85 The Act provided the chief judge of the circuit and the circuit council with a court executive authorized to exercise various administrative responsibilities.86 The enacted legislation specifically envisioned that the new court officer—the circuit executive—would act as an arm of the circuit council. It further anticipated that this court administrator would assist the court of appeals in improving its internal management and organization.87

The present administrative structure of the federal judiciary

84. Id. § 621.

For more information about circuit executives, see J. McDermott & S. Flanders, THE IMPACT OF THE CIRCUIT EXECUTIVE ACT (Federal Judicial Center 1979).
has developed as described in this brief history. Its general characteristics are as follows. First, it is a total ecosystem covering the entire federal judicial system; a change in one part of the structure creates aftershocks felt throughout. Second, it exists within the judicial branch of government and it is judge-controlled. It is therefore consistent with constitutional dictates of separation of powers because it promotes and protects the independence of the judiciary. Third, it is a decentralized system with significant elements of localism and personalism. Fourth, its formal organization is pyramidal. At the apex is the Judicial Conference of the United States and its chairman, the Chief Justice of the United States. The twelve circuit councils, chaired by the chief judges of the circuits, are midway down the pyramid. The circuit executives and the judicial conferences of the circuit accompany the circuits' chief judges at this midway level. The district judges, for the most part lacking system-wide administrative authority (except to the extent that they participate in circuit and Judicial Conference affairs), are of course at the base of the pyramid. The Administrative Office of the United States Courts provides centralized staff assistance to the entire structure. And the Federal Judicial Center provides a critically needed education, development, and research component.

It is within this framework that future attempts to improve judicial administration will be brought before the Congress.

III. THE JUDICIAL COUNCILS REFORM ACT OF 1980

The federal circuit council, a relatively unknown judicial institution, has already been subjected to insightful analysis. Nonetheless, the reasons for the initial 1939 legislation creating the judicial councils need to be emphasized and some of the intervening problems identified in order to provide a basis for dis-

88. In spite of dramatic changes in the number of judges and court personnel, caseload (both in terms of numbers and complexity), and jurisdiction, the administrative structure of the federal judiciary has remained remarkably stable. Meador, *The Federal Judiciary and its Future Administration*, 65 Va. L. Rev. 1031 (1979).

cussing the recently enacted Judicial Councils Reform Act.

A. The Creation and Development of Circuit Councils

The circuit councils were the handiwork of Chief Justice Hughes, who had the active support of the powerful Chairman of the House Judiciary Committee, Congressman Hatton Sumners. Chairman Sumners had been a manager for the House in the lengthy impeachment trial of Judge Halstead Ritter. From that experience Sumners concluded that there was a need for a better mechanism to discipline federal judges. Chief Justice Hughes, for his part, was deeply committed to improving the overall administration of the business of the courts. Both men thought that a decentralized institution could be created—one that paid great attention to local authority and responsibility.

At the 1938 session of the Judicial Conference, Hughes proposed the creation of a mechanism that would concentrate responsibility in the circuits. The new entity would be assigned immediate responsibility for the work of the courts within the circuit. It would have the power and authority to do what was necessary to ensure competence in the work of the various districts within the circuit.

The Judicial Conference approved the Chief Justice’s proposal in principle and asked a committee to prepare a legislative proposal “embracing a provision looking toward the establishment of judicial councils or some other like method within the several circuits and the District of Columbia for the control and improvement of the administration of justice therein.”

The bill was prepared, introduced, and ultimately enacted. The section relating to circuit councils was enacted precisely as it was proposed by the Judicial Conference.

90. Fish, supra note 89, at 206.

It is noteworthy that the Halsted Ritter impeachment was the last successful removal of a federal judge from the bench. See Staff of Impeachment Inquiry House Comm. on the Judiciary, 93rd Cong., 2d Sess., Report on Constitutional Grounds for Presidential Impeachment (1974).

then a member and later Chairman of the House Judiciary Committee, observed several years later:

The language of title 28, United States Code, section 332 was recommended to the Congress in 1939 by the judges themselves and was deliberately worded in broad terms in order to confer broad responsibility and authority on the judicial councils. It was the considered judgment of the Congress that the judicial councils were by their very nature the proper agents for supervisory management and administration of the Federal courts. The councils are close to all the courts of the circuit and know their needs better than anyone else and, by placing responsibility and authority in the councils of the circuits, administrative power in the judicial branch was decentralized, as it ought to be, and in each circuit kept in the hands of judges of the circuit.94

The legislative history of section 332 clearly indicates that delegation of substantial management power to the decentralized circuit councils was thought to be needed and was broadly granted.95 The 1939 legislation gave the councils authority to make corrective orders for the effective and expeditious administration of the business of the courts within the circuit. The district judges were directed to carry out all such orders. This was significant because the power to issue orders has never been granted to any other administrative entity in the federal judiciary.96

By the late 1950’s the effectiveness of the councils began to be seriously questioned. Then Circuit Judge Burger charged that the “Judicial Councils have not fully lived up to the expectation of the sponsors.”97 One noted scholar described the councils as


95. The following colloquy between Chief Judge John J. Parker and Congressman Celler illustrates the intent to give the councils broad powers. Congressman Celler questioned: “Do you put any restraint on the council at all?” Judge Parker answered: “I do not think this bill does.” House Hearings on Administration of U.S. Courts, supra note 71, at 22.

Another federal judge thought that the legislation conferred upon the councils authority to examine a problem and to take “such action as may be necessary to correct such a situation.” Id. at 11 (statement of D. Lawrence Groner).


“pillars of passivity.” A United States Senator accused the councils of being relatively impotent in meeting their obligations.

When a case involving the authority of a circuit council finally reached the Supreme Court, the Court found existing language concerning the circuit councils’ powers to be ambiguous. In *Chandler v. Judicial Council*, the Supreme Court upheld two orders of the circuit council of the Tenth Circuit, the first finding a district judge unable or unwilling to discharge his duties efficiently and directing him to refrain from sitting on any further cases, and the second superseding the first and authorizing the judge to sit only on cases assigned to him before a certain date.

In upholding the orders the Court avoided the serious issue of whether the council’s orders were administrative in nature and therefore not subject to judicial review. However, the Court did discuss in dicta the delicate balance that must be achieved between the need for judicial independence and the exigency for judicial administration. The author of the majority opinion, Chief Justice Burger, asked the rhetorical question, “[C]an each judge be an absolute monarch and yet have a complex judicial system function efficiently?” In an unequivocal and compelling response, the Chief Justice answered negatively.

In an important footnote, again in dicta, the Chief Justice administration of the business of the United States courts. STAFF OF SENATE COMM. ON APPROPRIATIONS, 86th CONG., 2d SESS., FIELD STUDY OF THE OPERATIONS OF THE UNITED STATES COURTS 33-36 (Comm. Print 1959).

98. P. Fish, supra note 71, at 404.


101. Id. at 89.

102. Id. at 85.

103. Id. Chief Justice Burger concluded: “[I]f one judge in any system refuses to abide by such reasonable procedures it can hardly be that the extraordinary machinery of impeachment is the only recourse.” Id. For further discussion of whether impeachment is the exclusive constitutional method for disciplining and removing federal judges, see Judicial Discipline and Tenure: Hearings on S. 295, S. 522, and S. 678 Before the Subcommittees on Judicial Machinery and Constitution of the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. 100-17 (1979) (statement of Eugene Gressman) [herein-after cited as Senate Hearings on Judicial Discipline and Tenure].
criticized the drafting of section 332.

Standing alone, § 332 is not a model of clarity in terms of the scope of the judicial councils' powers or the procedures to give effect to the final sentence of § 332. Legislative clarification of enforcement provisions of this statute and definition of review of Council orders are called for.\(^{104}\)

In a second meaty footnote, the Chief Justice supported the concept of granting the councils, as administrative bodies, broad authority to promote the effective and expeditious administration of court business.\(^{105}\) This confirmed the 1939 legislation's original thesis that the circuit councils would become active participants in the management of judicial business within the circuit similar to a board of directors.\(^{106}\)

The Supreme Court's call for congressional clarification of 28 U.S.C. § 332 went unheard or unheeded for several years.\(^{107}\) Meanwhile, the councils continued to be involved in a wide variety of judicial affairs. Congress continued to give the circuit councils a wide panoply of administrative responsibilities, viewing them as empty receptacles into which more authority could be poured.

**B. Authority of the Circuit Councils**

The statutory authority possessed by the circuit councils is of four distinct kinds: (1) the administration of the business of the courts; (2) the retirement, discipline, and appointment of certain judicial officers; (3) criminal justice administration; and (4) the implementation of legislation. These powers are not always oft exercised; nor are they extremely time consuming when exercised.

1. **Authority to Administer the Business of the Courts**

In the area of administering the courts' business, congressional grants of authority to the circuit councils reflect a desire

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\(^{104}\) 398 U.S. at 85 n.6.

\(^{105}\) Id. at 86 n.7. This footnote is also dicta.

\(^{106}\) Id. For further discussion of Chandler, see Note, *The Chandler Incident and Problems of Judicial Removal*, 19 STAN. L. REV. 448 (1967).

\(^{107}\) In the meantime, at least one circuit court held that section 332 passed constitutional muster. *In re Imperial “400” National, Inc.*, 481 F.2d 41, 45 (3d Cir.), *cert. denied*, 414 U.S. 880 (1973). *See also* Hilbert *v. Dooling*, 476 F.2d 355 (2d Cir. 1973), which broadly construed the councils' authority to reduce court delay.
to make the day-to-day work of the district courts more efficient, to provide a reviewing body for certain district court administrative decisions, and to allow circuit council intercession when there is an inability to agree at the district level on various administrative matters. Statutory illustrations are numerous. Circuit councils review district court plans for the random selection of grand and petit jurors. Councils must consent to a district court decision to preterm the holding of any regular session of court. When district judges are unable to agree upon the adoption of rules or orders dividing the business of the court, the circuit council must intercede and make the necessary orders. The circuit council can even get involved in deciding where a district judge lives. The council may, by appropriate order, designate the residence of a district judge at or near a particular place within the district if the public interest and the nature of the district court's business so require. If the district judges are unable to decide among themselves who shall live in the designated place, the circuit council may make this decision.

In a similar vein, the council may designate the depository for the courts' records. The council also may get involved in decisions relating to court quarters and accommodations. In addition, the council shares authority with the chief judge of the circuit to designate and assign a retired circuit or district judge to perform such additional duties within the circuit as he is willing and able to undertake. Finally, when the chief judge of any district court requests additional court reporters, the circuit council may notify the Director of the Administrative Office, who arranges for additional reporters on a contract basis.

2. Authority to Retire, Discipline, and Appoint Judicial Officers

Congress has provided the circuit councils with extensive

statutory authority with respect to the retirement, discipline, and appointment of judicial officers. For example, the councils have a great deal of authority over the United States magistrates system. The councils advise the Judicial Conference about the numbers, locations, and salaries of these important judicial officers.\textsuperscript{116} Although a district court may, by a concurrence of a majority of the district judges, remove a magistrate for cause, when the vote to remove is tied the magistrate may be removed by the circuit council.\textsuperscript{117} Further, pursuant to the Federal Magistrate Act of 1979,\textsuperscript{118} which set forth merit selection standards and procedures for the appointment of magistrates, the circuit councils were authorized to conduct certification inquiries for previously appointed magistrates to determine whether these magistrates are qualified to exercise the expanded trial jurisdiction conferred by the Act.\textsuperscript{119}

The circuit councils also possess authority over other judicial officers. Until April 1, 1984,\textsuperscript{120} the councils will continue to advise the Director of the Administrative Office as to the number of bankruptcy judges.\textsuperscript{121} If a district court is unable to decide on the removal of a bankruptcy judge, the council may intercede and order removal.\textsuperscript{122} After April 1, 1984, removal of a bankruptcy judge will be by a majority of the judges on the circuit council of the circuit in which the bankruptcy judge serves.\textsuperscript{123} Before an order of removal can occur, a full specification of the charges must be provided to the judge, who must then be accorded the right to be heard by the council.\textsuperscript{124}

The circuit councils also have statutory authority to appoint a circuit executive, to delegate such administrative powers to the

\textsuperscript{117} 28 U.S.C. § 631(i) (Supp. III 1979). Pursuant to section three of the Judicial Councils Reform Act, a complaint against a magistrate can be reported to the circuit council, which has the power to investigate and order various remedial actions, except that removal must be in accordance with 28 U.S.C. § 631. Pub. L. No. 96-458, § 3, 94 Stat. 2035 (1980).
\textsuperscript{118} Pub. L. No. 96-82, 93 Stat. 643.
\textsuperscript{119} Id. § 3(f).
\textsuperscript{120} This is the effective date of the Bankruptcy Reform Act, Pub. L. No. 95-598, §§ 402, 404, 92 Stat. 2549 (1978).
\textsuperscript{122} Id. § 62(b).
\textsuperscript{123} See 28 U.S.C. § 153(b) (Supp. III 1979). Pursuant to the Judicial Councils Reform Act, a complaint against a bankruptcy judge can be reported to the circuit council, which can investigate and order remedial action, with the exception that removal must be in accordance with 28 U.S.C. § 153. Pub. L. No. 96-458, § 3, 94 Stat. 2035 (1980).
executive as is deemed advisable, and to approve necessary employees hired by the circuit executive. The circuit executive serves at the pleasure of the circuit council.  

Finally, upon receiving a certificate of physical or mental disability signed by a majority of the members of the circuit council, the President, with the advice and consent of the Senate, may appoint an additional judge to replace any judge in the circuit who is eligible, but refuses, to retire.

3. Authority to Administer Criminal Justice

The councils play an important role in the administration of the Criminal Justice Act and the Speedy Trial Act. Under the former, the councils are statutorily required to approve the district courts' plans to furnish representation to individuals financially unable to secure adequate legal counsel. Additionally, the councils, after considering suggestions from the district courts, appoint federal public defenders and determine the rate of compensation and the number of employees hired by these public defenders.

Pursuant to the express language of the Speedy Trial Act, the councils—assisted by at least one judge from the district court whose plan is being reviewed—must approve plans prepared to achieve the prompt disposition of criminal cases. If a district court is unable to comply with the time limits prescribed by the Speedy Trial Act, the district's chief judge may apply to the council for a temporary suspension of these limits. In deciding whether to grant a suspension request, "[t]he judicial council of the circuit shall evaluate the capabilities of the district, the availability of visiting judges from within and without the circuit, and make any recommendations it deems appropriate to alleviate calendar congestion resulting from the lack of

130. Id. § 3006A(h)(2)(A).
131. Id. The circuit council also may remove a public defender for incompetency, misconduct in office, or neglect of duty. Id.
4. Authority to Implement Legislation

Increasingly, Congress has asked judges to become intimately involved in the administrative implementation of legislation. In part because they serve as links between the trial and appellate courts and in part because of their power to issue orders, the circuit councils "occupy an ideal position for supervising implementation of legislation."134

The Jury Selection and Service Act of 1968,135 which established the goal of eliminating discrimination in the selection and service of jurors,136 requires every district court to formulate a written plan that ensures randomness in the compilation of names of prospective jurors. The councils are assigned the managerial role of monitoring and reviewing the plans, with ultimate authority lodged in the Judicial Conference.137 Similar implementation responsibility is delegated to the councils in the Criminal Justice Act138 and the Speedy Trial Act.139

5. Nonstatutory Authority

In addition to the responsibilities statutorily assigned to the circuit councils, the Judicial Conference has delegated additional duties to the councils, relying on both its own broad implementing authority and the councils' elastic statutory mandate to promote the effective and expeditious administration of the business of the courts within the circuit. For example, the conference has asked the councils to develop plans for limiting publication of judicial opinions.140 In addition, the Conference considers the circuit council's recommendation when it evaluates the need for new judgeships.141 Moreover, all bills creating or changing a stat-

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133. Id.
141. See, e.g., REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE
utory place of holding court or creating or changing a district or a division within a district must first be considered by the circuit council for its recommendation. 142

The most significant grant of authority by the Judicial Conference to the circuit councils occurred in March of 1979 in the challenging and emotional area of creating a mechanism within the federal judiciary to consider complaints against misbehaving or disabled judges. 143 After having thoroughly studied the issue and taken the unprecedented step of extending its scheduled meeting by an extra day in order to thoroughly study the issue, the Conference expressed its approval of the following principles: (1) "The primary responsibility for dealing with a complaint against a United States judge should rest initially with the chief judge of the circuit as presiding judge of the Judicial Council . . .," 144 who has power to dismiss a complaint; (2) any complaint not dismissed by a chief judge should be referred to a committee appointed by the chief judge, the committee's findings and recommendations being reported to the circuit council; and (3) the circuit council should then order "such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit," including referral of a complaint to the Judicial Conference. 145 The Conference further resolved that the circuit councils should "consider the formulation and promulgation of rules of procedure for the receipt and processing of complaints against judges." 146

This latter resolution was an unmistakable signal to the


Further responsibilities delegated to the circuit councils by the Judicial Conference include deciding whether senior judges are entitled to supporting staff. Reports of the Proceedings of the Judicial Conference of the U.S. 21-22 (Sept. 1950).

143. See Reports of the Proceedings of the Judicial Conference of the U.S. 4-6 (March 1979). This resolution is reprinted and discussed at length in Hearings on Judicial Tenure, supra note 15, at 53-106 (testimony of Elmo B. Hunter, James R. Browning, and J. Clifford Wallace).

144. Reports of the Proceedings of the Judicial Conference of the U.S. 4-6 (March 1979).

145. Id.

146. Id.
councils that they were responsible for handling complaints alleging judicial misbehavior and disability. In response to this resolution, every circuit council adopted formal rules of procedure for the receipt and processing of complaints against federal judges.

C. The Need for Reform—Reasons Behind the Judicial Councils Reform Act

In light of the dynamic developments discussed above, why was further legislation concerning judicial discipline still sought, found to be necessary, and ultimately enacted by a busy Congress? It should not be forgotten that the Judicial Conference’s action, as well as the circuit council responses, did not occur in an intellectual vacuum. The judiciary was under substantial external pressure to improve its own internal operating procedures. The United States Senate, on two occasions, had passed legislation that created mechanisms generally opposed by members of the federal judicial branch. Further, in the post-Water-


148. The circuit rules for the receipt and processing of complaints against judicial officers are reprinted in Hearings on Judicial Tenure, supra note 15, at 70-72, 373-456. At least one circuit has been publishing its circuit orders in the Federal Reports. See, e.g., In re Charge of Judicial Misconduct, 613 F.2d 768 (9th Cir. 1980); In re Charge of Judicial Misconduct, 595 F.2d 517 (9th Cir. 1979); In re Charge of Judicial Misconduct, 593 F.2d 879 (9th Cir. 1979).

149. Although the Senate had toiled on judicial discipline legislation since the 1930's, it did not pass a bill until 1978. See S. 1423, 95th Cong., 2d Sess. (1978); 124 CONG. REC. S14,745-49 (daily ed. Sept. 7, 1978). That bill, passed during the waning days of the 95th Congress, died a quiet death in the House of Representatives. At the advent of the 96th Congress, identical legislation was introduced in the Senate. See S. 295, 96th Cong., 1st Sess. (1979). This bill, along with two other proposals (S. 522, 96th Cong., 1st Sess. (1979) and S. 678, 96th Cong., 1st Sess. (1979)) were considered during comprehensive hearings by a joint session of two subcommittees. Senate Hearings on Judicial Discipline and Tenure, note 103 supra. These proposals were hotly debated and were finally subjected to the congressional amendment process. A compromise bill, reported from the Senate Judiciary Committee (see S. REP. No. 96-362, 96th Cong., 1st Sess. (1979), reprinted in [1980] U.S. CODE CONG. & AD. NEWS 7767, incorporated the best features of the three bills. Ultimately, this new bill was passed by the Senate. See 125 CONG. REC. S15,435 (daily ed. Oct. 30, 1979).

The Senate-passed legislation accepted for the first time the proposition that complaints alleging disability or misbehavior by federal judges ought to be filed with the circuit councils. The councils were granted specific statutory authority to dismiss or resolve complaints, except that removal from office was expressly forbidden. A new Court on Judicial Conduct and Disability was to review the council orders. This court, com-
gate era, the American public was demanding a higher standard of integrity and accountability of all its governmental institutions. The judiciary did not escape these demands. As former Attorney General Griffin Bell observed during Senate hearings, “We are living in a time when our public institutions are under examination and the courts are not exempt.”

As a consequence, even after the judiciary had acted, there was substantial political mistrust. A representative of the administration testified that, although the circuit rules concerning judicial discipline were a definite improvement, they were “not a satisfactory substitute for congressional action.” The judicial branch did not contest this. Judge James Browning stated during House hearings, “I believe, nonetheless, that legislation would still be appropriate in this area.”

Once it was clear that there was a substantial consensus that legislation with respect to judicial discipline was needed, other reasons for congressional action became apparent. Legislative clarification of the powers of the circuit councils was thought to be of paramount importance. It was also hoped that a congressional enactment would increase public knowledge of the circuit councils’ decision-making authority. In addition, it was

posed of five sitting article III judges appointed by the Chief Justice, was also granted broad authority to dismiss the complaint, or affirm, modify, reverse, or remand any action taken by a council. See S. 1873, 96th Cong., 1st Sess. (1979). See also 125 Cong. Rec. S15,379, S15,419 (daily ed. Oct. 30, 1979) (remarks of Sen. DeConcini and Sen. Nunn).

Despite the consensus approach adopted by the Senate sponsors, a vigorous floor battle still occurred before the bill passed by a roll call vote of 56 to 33. In opposition, Senator Charles McC. Mathias, Jr. forcefully argued that the bill was of “dubious constitutionality, . . . unnecessary and . . . unwise as a matter of public policy.” 125 Cong. Rec. § 15,389-90 (daily ed. Oct. 30, 1979) (remarks of Sen. Mathias).


153. A Federal Judicial Center report recommended that “awareness of council powers should be increased.” S. FLANDERS & J. MCDERMOTT, supra note 89, at 33. This observation was echoed during congressional hearings: “[(there is a)] need for more precise statutory guidelines for the circuits, so that there would be some uniformity and also some public attention would be focused on the mechanism.” *Hearings on Judicial Tenure, supra* note 15, at 174 (remarks of Robert W. Kastenmeier).
felt that in matters of important national concern, such as judicial discipline, it was desirable for Congress to study and, if possible, resolve the policy questions. Congressional involvement encourages citizen input on the issue, and allows it to be resolved by democratically elected representatives of the people. Finally, legislation was attractive because it ensured a certain level of consistency throughout this diverse country. These needs of clarity, public awareness and participation, and nationwide consistency did not necessarily conflict with the earlier desire for flexibility and decentralization, upon which the 1939 circuit council legislation was based. If drafted properly it was possible that legislation could accommodate all of these objectives.

D. Substantive Content of The Judicial Councils Reform Act

When it became evident that legislative sentiment favored a statutory solution to the thorny judicial discipline issue, it became necessary to find a consensus formula that could achieve final passage by the 96th Congress. It bears repeating that passing court reform legislation is an arduous political endeavor. It certainly is "no sport for the short-winded." An organized, vocal, and well-financed constituency is lacking, there is a general resistance to change in our judicial institutions, and the slightest opposition often is able to paralyze congressional progress.

At the outset, therefore, it was of paramount importance that a moderate approach be used—one that was built on compromise rather than confrontation and one that would satisfy constitutional, policy, and budget considerations. Like a long-

154. One congressman complained that the councils' rules lacked uniformity and noted that this was one of the reasons for the legislation. 126 Cong. Rec. H8766 (daily ed. Sept. 15, 1980) (remarks of Tom Railsback).


156. This is Judge Vanderbilt's famous phrase. A. VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION xix (1949).

157. See H. FRIENDLY, supra note 2, at 198.

158. This was exactly the approach taken to enact the Judicial Councils Reform Act. With successful passage of judicial discipline bills by the Senate during the 95th and 96th Congresses (see note 149 supra), a growing number of diverse proposals were introduced in the House of Representatives. For an excellent analysis of all of these bills, see AMERICAN ENTERPRISE INSTITUTE, JUDICIAL DISCIPLINE AND TENURE PROPOSALS, 96TH CONG., 1ST SESS. (1979), reprinted in Judicial Tenure and Discipline: Hearings on Judicial Tenure and Discipline 1979-80 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice, 96th Cong., 1st & 2d Sess. 507 (1979-1980). The bills were referred to the House Judiciary Committee, which further referred them to its Subcommittee on Courts, Civil Liberties, and the Administration of Justice, chaired by Robert
awaited addition to a solidly constructed but too small house, the Judicial Councils Reform Act accomplished this by using preexisting columns, walls, and foundation. The Act relies upon chief judges of the circuits, circuit councils, and the Judicial Conference of the United States. The breadth and flexibility of the 1939 statute creating the circuit councils are preserved. At the same time, improvements are made in five critical areas.

First, the Judicial Councils Reform Act consolidates, and if anything slightly enlarges, the original grant of authority to the circuit councils. It accomplishes this by providing that the councils have power to "make all necessary and appropriate orders for the effective administration of justice within [their] circuit[s]." The new phrase "administration of justice" is inserted in lieu of "administration of the business of the courts." Although it is arguable that both phrases mean the same thing, use of fresh language adds clout and breadth to

W. Kastenmeier.

The subcommittee commenced hearings on the pending proposals during the summer of 1979. See Hearings on Judicial Tenure, note 15 supra. During the hearings, Judge Elmo B. Hunter—in a significant clarification of the position of the Judicial Conference of the United States—expressed opposition to the creation of any new court or commission. After recommending that Congress rely more heavily on the chief judges of the circuits and the circuit councils, he asked the subcommittee to carefully analyze the need for legislation and then to formulate an appropriate response. Id. at 59-68.

On May 14, 1980, after the House hearing record had been closed, the subcommittee held an informal caucus. It was determined that legislation was necessary, that a draft bill ought to be prepared, and that the bill should contain various features: specific legislative clarification of the circuit councils' powers, a means to get a difficult complaint before the Judicial Conference, a requirement that there be some uniformity in council rules, district judge representation on the councils, and a certain degree of flexibility in the entire scheme.

The draft bill was then circulated to every member of the subcommittee. Suggestions were received and changes made. Finally, with cosponsorship by every subcommittee member, H.R. 7974 was introduced. See H.R. 7974, 96th Cong., 2d Sess. (1980). The bill moved through Committee and the full House without amendment. See H.R. Rep. No. 96-1313, 96th Cong., 2d Sess. 7 (1980); 126 Cong. Rec. H8783-88 (daily ed. Sept. 15, 1980).

Differences between the House and Senate bills were then worked out on an informal basis. Compromise changes were incorporated in a DeConcini amendment to the House bill. The amended bill unanimously passed the Senate by voice vote on September 30, 1980. 126 Cong. Rec. S13,854-66 (daily ed. Sept. 30, 1980). Finally, on October 1, 1980, the House accepted the Senate amendment and sent the bill on its way to the White House. 126 Cong. Rec. H10,188 (daily ed. Oct. 1, 1980).


161. The 1961 Judicial Conference Report on the Powers and Responsibilities of the Judicial Councils, presented to the House Committee on the Judiciary by Chairman
the statutory text. The House Report confirms this by stating that the new council powers are broad enough to cover such problems as the loss of public esteem and confidence in the court system.162 In short, the phrase "administration of justice" includes the institutional appearance of justice, whereas the "business of the courts" language reflects concern only with the courts’ technical and internal administrative workings.

Second, the Act gives effect to the broadened mandate by adding to the circuit councils’ statutory power. "Each council is authorized to hold hearings, to take sworn testimony, and to issue subpoenas and subpoenas duces tecum."163 A procedure is set forth for the issuance of the subpoenas.164 Although circuit councils have had more success taking informal action,166 granting them formal hearing and subpoena power provides them with a versatile arsenal to meet the difficult case, which in all likelihood will arise in the context of judicial discipline.166 Since

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Emanuel Celler, similarly concluded:

The responsibility of the Councils "for the effective and expeditious administration of the business of the courts within its circuit" extends not merely to the business of the courts in its technical sense (judicial administration), such as the handling and dispatching of cases, but also to the business of the judiciary in its institutional sense (administration of justice), such as the avoiding of any stigma, disrepute, or other element of loss of public esteem and confidence in respect to the court system, from the actions of a judge or other person attached to the courts.

Reports of the Proceedings of the Judicial Conference of the U.S. 51 (March 1961) (emphasis added). For an excellent textbook on judicial administration and for further analysis of this terminology, see R. Wheeler & H. Whitcomb, Judicial Administration (1977).

162. In this regard, the council powers are specifically enlarged to include judicial discipline and disability. For further discussion of the need for clarity in this area, see Judicial Tenure Act: Hearings on S. 1110 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess. 75-77 (1976) (discussion between Robert A. Ainsworth, Jr., and Roman Hruska).


166. During Senate hearings on judicial discipline a federal judge noted that the lack of subpoena authority had created "difficulty in some instances in getting information which ordinarily is not available." Hearings on Judicial Fitness Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary,
it often is difficult to obtain information from the legal profession without the power to compel testimony, the subpoena power is a significant new weapon for the councils. However, by not requiring resort to subpoenas and hearings, the legislation gives the councils the requisite flexibility to solve a matter as they think best, either informally or by formal hearing with compelled evidence.

Third, the Judicial Councils Reform Act provides that “[a]ll judicial officers and employees of the circuit shall promptly carry into effect all orders of the judicial council.” Preceding it, district judges were the only ones specifically importuned to respect the councils’ orders. While it was regarded as implicit that circuit judges also had to carry out council orders, it is desirable to clarify exactly who falls under the councils’ order umbrella. In this context, by specifically stating that all judicial officers and employees are covered, the Act avoids unnecessary ambiguity. As a result, it becomes patently clear that the councils’ authority extends to everyone who works for the federal judicial system at the circuit and district court levels, be they tenured judges, bankruptcy judges, magistrates, circuit executives, clerks of court, public defenders, court reporters, secretaries, bailiffs, or law clerks. Again, clarity in the statutory text may help to avoid a particularly thorny matter that might arise in the future.

Fourth, in an important caveat, the legislation states that “[u]nless an impediment to the administration of justice is involved, regular business of the courts need not be referred to the [circuit] council.” As the House Report explained, “[t]his language creates a presumption that the council should not be used as an alternative or back-up appeal route, or as an administra-

169. In one of the few judicial decisions to discuss the powers of the circuit councils, the Judicial Council of the Third Circuit ordered a Pennsylvania court reporter to file a written report with the Department of Justice and the Administrative Office on aspects of his unauthorized court reporting practice. The reporter voluntarily complied and did not test the ambit of the then-statutory scheme—that only district judges had to follow council orders. In re Rodebaugh, 10 F.R.D. 207 (Jud. Council of 3d Cir. 1950).
tive grievance mechanism."\textsuperscript{171} What this amounts to—and it is significant in its import—is that the circuit councils are administrative, as opposed to adjudicative, entities. Again, the House Report made this very clear:

\[ \text{[T]he legislation creates much more of an "inquisitorial-administrative" model than an "accusatorial-adversary" one. In this regard, the judicial council is not to be thought of as a passive and impartial referee; rather, the council can become the active gatherer of evidence and can control the objectives and nature of the inquiry.}\textsuperscript{172} \]

In short, the circuit council model envisioned by the recently enacted legislation continues to be that of an administrative body acting as a “board of directors” for the circuit.\textsuperscript{172} This body, divorced from direct involvement in the courts' case-by-case disposition of cases and controversies, has authority to monitor the general administration of justice within those courts.

It goes almost without saying that the circuit councils must act fairly. Their general mandate to promote the “effective and expeditious administration of justice” requires this.\textsuperscript{174} Yet, as relates to the judicial disability and discipline issue, fears have been expressed about the possibility of one group of judges “ganging up” or “hazing” one of their brethren.\textsuperscript{175} In response to

\textsuperscript{172} Id. at 14. In a footnote, the House Report continued: “The ‘Inquisitorial’ type procedure has worked well in many of the European court systems and there is little reason to doubt its adaptability to the proposed legislation.” Id. at 14 n.33.

Individuals trained exclusively in the adversary system should not close their minds to civil law techniques, making the grievous error of using the word “inquisitorial” as an epithet. “It is one of the misfortunes of the law that ideas become encysted in the phrases and thereafter for a long time cease to provoke further analysis.” Hyde v. United States, 225 U.S. 347, 391 (1911) (Holmes, J., dissenting). See Schaefer, Is the Adversary System Working in Optimal Fashion, in POUND CONFERENCE, supra note 2, at 171. A highly respected federal judge agrees with this:

\text{Whoever first characterized the continental European system as “inquisitorial” did a profound disservice to constructive legal thought. Substitute “inquiring" and the bad becomes the good. The adversary system is not the only way to the truth; indeed, it has too often been a game in which both sides vie in their efforts to obscure the truth. Hopefully, by the year 2000, we will have learned where to preserve the adversary system and where to substitute something else.}


\textsuperscript{175} See Chandler v. Judicial Council, 398 U.S. 74, 140 (1970) (Douglas, J., dissent-
these fears, the Act clothes the councils' increased discipline powers with several protective robes. There is a screening procedure for the processing of complaints—first to the circuit's chief judge and then, if not resolved, to a special committee appointed by the chief judge. The goal of this process is to ferret out frivolous complaints related to the merits of a judicial decision. If a complaint is well-grounded enough to proceed past the screening stage, then basic due process rights must be accorded a judge or judicial employee who is the subject of the allegations. The Act expressly provides that the individual complained about must be give notice of the charges, as well as the rights to appear (in person or by counsel) to present oral and documentary evidence, to compel the attendance of witnesses, and to cross-examine witnesses.\textsuperscript{176}

Moreover, for those matters not resolved at the early stages, an appeal to the Judicial Conference of the United States may be available.\textsuperscript{177} In this manner, the authority of the Conference to monitor the functioning of the circuit councils with respect to judicial discipline is augmented. For the first time in its history, but only in the limited area of judicial discipline and disability, the Conference (or a standing committee thereof) is given the power to make necessary and appropriate orders in the exercise of its authority. In addition, the Act provides the Conference or a standing committee thereof with discretion to hold hearings, take sworn testimony, and issue subpoenas or subpoenas duces tecum. Last, the Conference may proscribe rules for the exercise of authority under the Act.\textsuperscript{178} The augmented power of the Judicial Conference, if used widely and sparingly, should deter any potential "hazing" of individualistic federal judges. Combined with the enlarged authority of the circuit councils, it may actually increase the independence of the federal judicial branch.

The fifth critical area which the Judicial Councils Reform Act deals with is the composition of the circuit councils. The recently enacted statute requires district judge representation on


\textsuperscript{177} See Judicial Councils Reform Act, Pub. L. No. 96-458, § 3(a), 94 Stat. 2035 (1980) (to be codified as 28 U.S.C. § 372(c)(10)).

\textsuperscript{178} Id. § 4 (to be codified as 28 U.S.C. § 331).
the councils. This change, debated for almost forty years, was made to ensure participation in council affairs by lower court judges who, it is safe to say, possess a greater degree of experience in the operation of trial courts. Their knowledge and perspective are essential to fair and evenhanded council decisionmaking, not only on disciplinary matters but also on all judicial administration subjects. A highly respected circuit judge observed, "[D]istrict judges have concerns and insights which would make their presence in the circuit council particularly advantageous." In addition, by expanding the participation base of an important decisionmaking entity, the Act heightens the democratic credence accorded the decisionmaker. The primary recipient of council orders has been the district court. Because the Act calls for the input of district judges in the decisionmaking process, the credibility these judges accord to final decisions is likely to rise.

With certain provisos, the legislation delegates to the circuits the authority to specify the size and nature of the councils, as well as the method to be followed in selecting its members. The chief judge of the circuit is the presiding officer. He must call a meeting of council at least twice a year. The number of circuit judges on the council is fixed by majority vote of all circuit judges in regular active service. The number of district judges is also established by majority vote of the circuit judges in regular active service, except that on councils with fewer than six circuit judges, there must be at least two district judges, and on councils with six or more circuit judges, there must be at least three district judges. In both instances, district and cir-

179. Id. § 2(a) (to be codified as 28 U.S.C. § 332(a)).
180. This is manifested in a letter from Chief Justice Hughes to Judge D. Lawrence Groner, reprinted in the House Report on the Administrative Office Act: "If at any time it is desired to expand the council in the circuits by providing for a representation of district judges, this can be done by simple amendment without departing from the principle of the provision." H.R. Rpt. No. 702, 76th Cong., 1st Sess. 5 (1939).
circuit judge representation can be equal.\textsuperscript{184}

The Judicial Councils Reform Act thus gives the circuit councils increased ability to meet the problems they have faced in the past. However, the burdens and pressures imposed on the councils will be far greater than they were when the councils were created in 1939. For one thing, Congress will be watching. As Senator Dennis DeConcini warned, “[a]s part of a vigorous oversight responsibility, I plan to monitor implementation of the Judicial Conduct and Disability Act.”\textsuperscript{185} During debate on the judicial discipline issue in the House, Congressman Caldwell Butler agreed: “I would like to impress on my colleagues the importance of conducting congressional oversight in this most sensitive area.”\textsuperscript{186}

To facilitate this congressional oversight, the legislation contains a report-back provision. The Director of the Administrative Office must include in his annual report a summary of judicial discipline and disability complaints, “indicating the general nature of such complaints and the disposition of those complaints in which action has been taken.”\textsuperscript{187} Similarly, the circuit councils and the Judicial Conference (or a standing committee thereof) must make available to the public every order issued to implement a remedial or sanctioning action.\textsuperscript{188} In short, rather than entering into a period of hibernation, the councils can expect to have their new authority and broadened powers more carefully scrutinized by the public, press, bar, and Congress.\textsuperscript{189}

With the new set of measures provided by the Judicial Councils Reform Act, the circuit councils should be ready to commence the decade that will celebrate the two hundredth birthday of the United States Constitution. Hopefully, in response to the accompanying augmented public and political scrutiny, the councils will succeed in satisfying their new

\textsuperscript{184} See, e.g., 9th Cir. Rule Governing the Restructuring of the Judicial Council 2 (1981).


\textsuperscript{188} Id. § 3 (to be codified as 28 U.S.C. § 372(c)(15)). In all other instances rights to confidentiality are preserved, unless the material is needed for an impeachment or a written waiver is obtained. Id. (to be codified as 28 U.S.C. § 372(c)(14)).

\textsuperscript{189} For an example of how the press scrutinizes the circuit councils, see Hearings on Judicial Tenure, supra note 15, at 106 (testimony of Clark Mollenhoff and Greg Rushford).
mandate.

**E. Objectives of Judicial Administration Emphasized by the Judicial Councils Reform Act**

The Judicial Councils Reform Act lends new emphasis to several desirable objectives of judicial administration. These include (1) decentralization of administrative authority in the circuit councils, (2) unification of the court system, (3) increased responsibility through clearer delegation of authority to the councils, (4) maintenance of flexibility, rather than adherence to detailed rules, in controlling the work of the councils, and (5) preservation of a rational relationship between basic governmental theory and the day-to-day administrative workings of the judicial system.

1. **Decentralization of Authority**

Since the early days of this nation, judicial administration machinery has been constructed on the solid principle of regional and individual decentralization of authority. By selecting the twelve circuit councils as recipients of the judicial discipline authority, by rejecting the creation of a centrally located (undoubtedly somewhere near the Potomac River) court or commission, and by adding district court representation to the councils, Congress has once again given its approval to a significant amount of localism in the administration of the federal judiciary.

Of all the issues in the recently passed legislation, this was the one about which the judges themselves were most concerned. In arguing that creation of a national office was fraught with long-term dangers, Judge Elmo Hunter concluded, “An institutionalized office—any such office—be it a bureau in an executive agency, a subcommittee of Congress, or an administrative unit in the court system—has a natural tendency to perpetuate its own existence.”

190. Id. at 65 (statement of Elmo B. Hunter). Judge Hunter continued his argument by stating:

If you create an office specifically designed only to investigate judicial misbehavior and authorize it to exercise extensive powers, how long will it be before that office feels compelled to demonstrate its worth by establishing impressive precedents? I do not wish to overemphasize that concern, because it may be a peripheral one; I can, however, assure you that it is extensively shared by many judges.
eral judiciary remains decentralized, hierarchical (in the sense of courts and not judges), and pyramidal. Total centralization of function is the exception rather than the rule.191

2. Unification

Carefully structured decentralization of specific responsibilities does not conflict with the overall requirement of court unification, also stressed in the reform. “A unified court system is one that is organized according to uniform and simple divisions of jurisdiction and operates under a common administrative authority.”192 The Judicial Councils Reform Act does not prevent court unification by creating totally autonomous circuit councils. By also increasing the Judicial Conference’s authority to oversee the councils, the Act actually reinforces the existence of a common administrative authority in the federal judicial family. In addition, by continuing to rely on the Administrative Office of the United States Courts for staff and budgetary support, on the Federal Judicial Center for research assistance, and on the Chief Justice of the United States and the chief judges of the circuits for leadership, the Act treats the federal judiciary as a unified entity.

Unification in the administration of the federal courts is also accomplished by management structure and techniques that are consistent and clear.193 Consistency should be achieved by the Act’s conferral of clearer authority upon the circuit councils and by increased public scrutiny and more vigorous congressional oversight, both of which should minimize the uncertainty and inconsistency which have resulted from the ambiguity that previously characterized the circuit councils’ responsibilities.

3. Increased Responsibility

A third objective of the reform is responsibility. Good administration implies that someone or some entity must stand out as the decisionmaker to be held accountable if the system is

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Id. (emphasis in original).

191. Judge Clifford Wallace emphasized this factor during his congressional testimony: “[T]he entire structure is built upon the principle of decentralization of authority.” Id. at 76 (testimony of J. Clifford Wallace).


In a structure as hierarchical and loosely organized as the federal court system, total uniformity does not have to be the paramount goal.

193. Id. at 12.
not working properly or if it is not functioning as efficiently as it might. Responsibility depends on a clear statement of authority, an adequate grant of tools to make and enforce decisions, confidence and willingness to use the given tools, and credibility and acceptability by those who must abide by the decision.

The Judicial Councils Reform Act specifically upgrades and defines the authority of the chief judges of the circuits. It clearly identifies the circuit council as the decisionmaker for a wide variety of issues, including complaints against disabled and misbehaving federal judges. At the same time, it provides the councils with a concise statement of their authority and powers. It also allows, in the context of judicial discipline and disability, the Judicial Conference to act through a standing committee appointed by the Chief Justice of the United States. Last, when an order is entered against a misbehaving or disabled judge, the Act requires that it be made available to the public. Each such order must be accompanied by written reasons therefor unless contrary to the interests of justice.

4. Flexibility

The legislation also stresses the theme of flexibility. Indisputably, our justice system is a product of competing and constantly changing societal, economic, political, and geographical factors. Law is a bit like an armistice, a provisional peace in which diverse and conflicting social forces consent temporarily to suspend open warfare on the basis of a cease fire agreement that each will maintain the positions conquered. Justice systems therefore seek to achieve, for a time at least, peace and balance between competing forces. To succeed in this, courts and judges need a generous amount of flexibility to meet the ebb and flow of societal pressures before them.

The circuit council reform nourishes flexibility in judicial administration by improving an existing institution and by broadening its mandate, while not being unduly specific or detailed. It delegates a large dose of discretion to sitting judges. It respects the need to provide substantial protection for judges who are the subject of complaints without so exaggerating the desire for due process rights as to make the procedure ineffectual. Finally, it affords the public adequate protection from the occasional corrupt judge without creating open season on judi-
cial officers. A mechanism to screen out frivolous complaints is set forth; a diverse arsenal of decisional weapons is provided; an inquisitive administrative process is encouraged; non-judicial branch personnel are not added to the new councils; a new court or commission is not created; there is no centralized bureaucracy; and ironclad adversary procedures are not mandated.

5. Rationality

Finally, the Judicial Councils Reform Act seeks to meet the theoretical test of rationality. "Theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house." Rationality requires the identification of a present problem, the formulation of a policy goal, and a finding that the proposed action will solve the desired goal without undue disruption. A look at the legislative history of the Act reveals that this test was followed and met.

At the outset, Congress was importuned to "measure the need for the legislation and then to draft a logical, economical and fair solution to the problem." Accordingly, a problem—of less scope than some had argued, but greater in magnitude than some had hoped—was first identified. Next, the policy objective was formulated: "To improve judicial accountability and ethics, to promote respect for the principle that the appearance of justice is an integral element of this country's system of justice, and, at the same time, to maintain the independence and autonomy of the judicial branch of government." Finally, with the cooperation of all three branches of government, a finding was made that a compromise-consensus piece of legislation was appropriate to meet the desired goals. In short, Congress—with input from the judicial and executive branches—found that the principle of judicial independence is not mutually exclusive with the effective and expeditious administration of justice.

Related to rationality is the proposition that the benefits of court reform should not just flow to judges, lawyers, or court administrators, but to those most affected by the legal process—the litigants. "By all means let us reform that process, let us make it more swift, more efficient, and less expensive, but above all let us make it more just." The quality of justice can be improved by increasing judicial accountability and by improving judicial administration while respecting judicial independence. The beneficiaries of such changes are not only judges, lawyers, and court administrators, but also litigants—the consumers of this country's justice system.

IV. CONCLUSION

The maintenance of an effective and efficiently administered federal judiciary requires periodic reevaluation of the system currently responsible for ensuring that the courts' work is being done well. The most recent evaluation was done by Congress during the consideration and passage of the Judicial Councils Reform Act of 1980. The Act is not a panacea for all judicial administration problems. It is, however, more than mere tinker- ing. It provides the federal judiciary with an implement—a boat hook, if you will—to reach and hold tightly to the constantly moving and heaving ship of the people. It provides judges and court administrators with a means of accomplishing the very difficult task that the Constitution and Congress have assigned to them—administering justice in an equal, fair, impartial, expeditious, and inexpensive manner in ever-changing conditions.

199. Higginbotham, The Priority of Human Rights in Court Reform, in POUND CONFERENCE, supra note 2, at 87, 110. In this regard, the needs of the poor, weak, powerless, and under-represented should receive special consideration.

200. Reflecting on the need for men and machinery to work together, Pound aptly observed: "Things are done by the combined working of men and machinery. In that machinery is no negligible item. The right men will do much no matter what machinery is given them to work with. But our ideal must be the right men with the right machinery." R. POUND, ORGANIZATION OF COURTS 293 (1940).