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Judicial Administration in a System of Independents: A Tribe with Only Chiefs

The Honorable J. Clifford Wallace*

A judge may select one of two themes for public discussion and ordinarily expect to receive a positive, perhaps even an enthusiastic, response. One: The independence of the federal judicial branch, and of each individual judge within it, must be preserved. The other: The work of the federal courts must be more effectively and efficiently administered. Judicial independence and effective judicial administration are both ideals with wide support. But, as not infrequently happens in our diverse system of free government, ideals collide. So it is with judicial independence and judicial administration—in important areas, the rigorous pursuit of these two ideals leads to conflict.

But—and this is one of the primary theses of this Article—out of the conflict may come acceptable and even beneficial compromise. The inevitable conflict, the inherent tension, need not be disruptive of the work of doing justice.

In an attempt to illuminate the problems posed by the collision of the polar ideals of judicial independence and effective judicial administration, this Article takes the following course: Section I contains a brief summary of the historical development and purposes of the doctrine of separation of powers and the corollary notion of an independent judiciary. Section II sets forth a review of the history of the judicial administration reform movement. This review encompasses already implemented as well as proposed systems for controlling the work of the judiciary. It will be proposed that the need for effective judicial administration is more acute today than ever in our history. Section III identifies several specific areas of the judicial independence-judicial administration conflict. In Section IV an attempt is made to formulate a theoretical framework for compromise. Section V examines ways in which compromises—although not always consciously recognized as such—have been effected and criticizes the wisdom of those means. The judicial conference of the circuit will be

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identified as a potentially valuable engine for achieving intelligent compromise.

I. INDEPENDENCE OF THE JUDICIARY

In our country, the belief in the value of an independent federal judiciary is pervasive, even sacrosanct. This belief, so ingrained in our present thinking, did not emerge from any single event but rather developed in an evolutionary process that had its genesis long prior to the drafting of the Constitution. The taproot of the idea extends to the basic doctrine of separation of powers. This too had its evolutionary formation. Abstract thinkers in the days of Aristotle identified and analyzed many of the functions of the state,¹ but the concept that the powers of state should be separate and distinct, thus giving rise to an independence between those powers, had a much later beginning.² In the eighteenth century, Montesquieu observed:

In every government there are three sorts of power: the legislative; the executive in things dependent on the law of nations; and the executive in regard to matters that depend on the civil law. By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or advocates those that have already been enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the others simply the executive powers of the state.³

Significantly, Montesquieu envisaged only two manifestations of governmental power: legislative and executive. The exercise of judicial power was viewed as an executive function, and even in that setting the power was considered unimportant. Montesquieu stated: "Of the three powers above mentioned, the judiciary is in some measure next to nothing."⁴

The revolution in England against the Stuart kings in 1688 provided a new basis for the separation of powers and an independent judiciary. The Magna Carta had provided that "we will appoint justices . . . only such as know the law and mean duly

². See generally A. UHLER, REVIEW OF ADMINISTRATIVE ACTS 3-4 (1942).
⁴. Id. at 167.
to observe it well." The Great Charter, however, failed to restrict the power retained by the King to remove from office judges with whom he did not agree. It was the Stuarts' abuse of this removal power that led to the provision in the 1701 Act of Settlement that "judges commissions [shall] be made [during good behavior] . . .; but upon the address of both houses of parliament it may be lawful to remove them." This, together with the provision that judges' compensation could not be diminished, firmly established the independence of the judiciary in England.

The benefits of judicial independence enjoyed by Englishmen, however, were not shared by their cousins in the American Colonies. Here the judiciary served at the pleasure of the King. Not surprisingly, when revolution came, the Declaration of Independence charged that King George III had "made judges dependent on his will alone for the tenure of their offices and the amount and payment of their salaries." Equally understandable was the interest of the Framers of the Constitution in establishing a judiciary with the independence earlier achieved in England. By following the lead of their English ancestors in granting judges both tenure "during good behavior" and an undiminishable salary, the Framers were the first to provide guarantees for the independence of the judiciary in a written constitution.

The concept of an independent federal judiciary was not immediately popular, however. Article III drew an inordinate share of attention in the ratification debates. The lack of immediate acceptance is perhaps understandable because the Colonies had already developed individual constitutions wherein they took differing approaches to the judicial branch. Some state legislatures had almost unlimited powers to select and remove judges. A number of legislatures were required to impeach judges for misconduct. Other colonies operated with variations on the same or different themes.

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5. MAGNA CARTA cl. 45.
6. The Act of Settlement, 1700, 12 & 13 Will. 3, c. 2, § 3; see Ervin, supra note 1, at 110-11.
8. Pittman, supra note 7, at 488.
Madison, Hamilton, and Jay responded to the opponents of ratification in *The Federalist*. Madison's writings stressed the need for the separation of powers and for effective checks on power.\(^\text{11}\) In No. 38 he referred to the impeachment power of the Senate, and in No. 39 he argued for judicial tenure during good behavior. Hamilton also wrote in favor of tenure during good behavior,\(^\text{12}\) and in No. 79 he contended that the independence of the judges required that removal occur only by the process of impeachment:

> They are liable to be impeached for malconduct by the House of Representatives and tried by the Senate; and, if convicted, may be dismissed from office and disqualified for holding any other. This is the only provision on the point, which is consistent with the necessary independence of the judicial character . . . .\(^\text{13}\)

Hamilton saw no other excuse for the removal of judges except insanity.\(^\text{14}\)

> It has accurately been said that the Framers “hoped to make the judges free from popular pressure and from legislative control. Their purpose was to create a truly independent judiciary limited only by the cumbersome process of impeachment.”\(^\text{15}\) Their ultimate goal was to create a judiciary sufficiently independent to resist the natural tendencies of individuals and groups in government to seek dominion once given an original grant of power.

The evolutionary process leading to judicial independence did not end with the ratification of the Constitution, however. The era of Chief Justice John Marshall was particularly important in the further definition of an independent judiciary. For example, the power of judicial review exercised in *Marbury v. Madison*\(^\text{16}\) was of inestimable value in this developmental process. Likewise important was the acquittal of Justice Samuel Chase in 1805 in impeachment proceedings before the Senate. Although the margin was narrow, the acquittal constituted a signal precedent that impeachment and removal were to be reserved for “serious” offenses of misbehavior, not mere disagreement with a judge's opinions.\(^\text{17}\) And certainly the concept of judicial inde-

\(^{11}\) See *The Federalist* Nos. 46, 48 (J. Madison).

\(^{12}\) See id. No. 78 (A. Hamilton).

\(^{13}\) Id. No. 79, at 514 (Bicentennial ed. 1976).

\(^{14}\) Id.

\(^{15}\) Ziskind, supra note 10, at 153.

\(^{16}\) 5 U.S. (1 Cranch) 137 (1803).

pendence continues to receive form and meaning today. Indeed, the fact that judicial independence is not a static doctrine gives rise to the basic problem examined in this Article.

It is important to note at this point that much of what has been reviewed above supports only the independence of the judicial branch and not necessarily the independence of an individual judge within that branch. The independence necessary to check and balance legislative and executive power may be sufficiently provided without shielding the individual judge from intrabranch controls. In other words, establishing the major premise that the judicial branch must be independent does not necessarily require the conclusion that the individual judge must be free from coercion or control by his peers.

Nevertheless, our firmly established tradition is one of independent judges within an independent judicial branch. Justice Douglas expressed the tradition in these words:

An independent judiciary is one of this Nation's outstanding characteristics. Once a federal judge is confirmed by the Senate and takes his oath, he is independent of every other judge. He commonly works with other federal judges who are likewise sovereign. But neither one alone nor any number banded together can act as censor and place sanctions on him.18

Senator Ervin articulated a similar judgment when he noted that "[t]he separation of powers concept as understood by the founding fathers assumed the existence of a judicial system free from outside influence of whatever kind and from whatever source, and further assumed that each individual judge would be free from coercion even from his own brethren."19

Perhaps this tradition of independent judges is most graphically—if not extravagantly—portrayed by two stories, the first told by Judge Edward Lumbard, former chief and now senior judge of the Second Circuit Court of Appeals. Two district judges met after they had not seen each other for many months. The junior of the two summoned a smile and said, "How are you today, Judge?" After a long pause, the more senior replied, "It's none of your damn business, and I wouldn't tell you that much if

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19. Ervin, supra note 1, at 121 (emphasis added).
I hadn’t known you for thirty years.”20 The second story involves two members of the Supreme Court. Once Justice James C. McReynolds was late to conference. Chief Justice Hughes said, “Go tell him we’re waiting.” The testy McReynolds sent word back: “Go tell the CJ I don’t work for him.”21

The question, of course, is whether such autonomy and fierce independence can or ought to be invariably maintained in an ever-larger judiciary required to serve an increasingly complex society.

II. THE JUDICIAL ADMINISTRATION REFORM MOVEMENT

When the provisions of the Constitution’s article III were implemented by the Judiciary Act of 1789,22 the six Supreme Court justices and the widely scattered federal trial court judges hardly needed any kind of formal administrative structure to facilitate their work. In the early decades of the Republic, the federal trial court judges were administratively autonomous in a nearly absolute sense. Almost like feudal lords, they oversaw, and had direct control of, all aspects of their court’s work.

As the nation developed and society became more complex, however, the ability of the court system (state and federal) to serve that society failed to keep pace. Then in 1906, Roscoe Pound, a Nebraska lawyer and later dean of Harvard Law School, stimulated a movement for judicial reform and administrative control with an address before the American Bar Association.23 He charged that our court system was archaic and inefficient and urged the adoption of organizational reforms that would reduce the “causes of popular dissatisfaction with the administration of justice.”

Significant reforms in the administration of the federal courts began soon thereafter. In 1913, former President William Howard Taft, a man possessed of strong feelings about the importance of administrative machinery to improve the work of the courts, was appointed Chief Justice of the United States. As President, he had established a commission which studied methods of improving government. Immediately following his appoint-

22. An Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73 (1789).
ment to the bench he launched a crusade to do the same in the judiciary. Fortunately, Taft was in a unique position: he not only held the highest judicial office in the nation, he also wore the mantle of an ex-President. Because of his experience in the political arena, he knew full well the practical political implications of judicial reform. Although some of his ideas met with defeat, he was able to pave the way for creation of the Judicial Conference of Senior Circuit Judges (now known as the Judicial Conference of the United States).24 The Judicial Conference of the United States was created as an informal body to provide a means of improving communication within the judiciary and facilitating the assignment of judges to areas with particularly heavy case-loads.25

No additional judicial machinery was engineered for seventeen years. Then, in the Administrative Office Act of 1939, Congress created two new institutions to assist in judicial administration—the Administrative Office and the judicial councils of the circuits—and formalized a third—the judicial conferences of the circuits.27 Additionally, Congress increased the power of the Judicial Conference of the United States by granting it certain supervisory responsibilities over the newly created Administrative Office. The Administrative Office was directed by the Act to assume from the Justice Department the ministerial functions of administration within the courts, including the payment of salaries and the allocation of funds.28

The judicial council of the circuit (sometimes referred to as the circuit council) is composed of the active circuit judges of each circuit. It is presided over by the chief judge of the circuit and is required to meet at least twice annually. Its duties are to consider the quarterly reports of the Administrative Office and to "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit."29 The district judges of the circuit are directed to "promptly carry into

24. For a review and analysis of Taft's role in judicial administration, see P. Fish, The Politics of Federal Judicial Administration 24-32 (1973); Fish, William Howard Taft and Charles Evans Hughes: Conservative Politicians as Chief Judicial Reformers, 1975 Sup. Ct. Rev. 123.
27. Following the lead of Chief Justice Parker of the Fourth Circuit, other circuits established informal conferences to improve judicial administration. The 1939 Act mandated the convening of these conferences. See notes 96-100 and accompanying text infra.
28. See Wallace, supra note 25, at 312.
29. 28 U.S.C. § 332(d) (1970); see Wallace, supra note 25, at 312.
effect all orders” of the circuit council.30 Except for a few specific provisions appearing elsewhere in the United States Code,31 the grant of power and responsibility in the Administrative Office Act provides the basis for all the council’s formal actions.32

As has been noted, the Administrative Office Act also formalized the judicial conference of the circuit (sometimes referred to as the circuit conference). The circuit conference, composed of all district and circuit judges of the circuit plus designated lawyers, is convened “for the purpose of considering the business of the courts and advising means of improving the administration of justice within [the] circuit.”33 Thus the conference has a statutory responsibility to give advice. The recipient of such advice should be the judicial council of the circuit, which possesses the power to act in response to it. If the particular advice also involves other circuits and is otherwise appropriate, the circuit council should forward the information to the Judicial Conference of the United States.

Following the reforms legislated in the 1939 Act, the next major change in judicial administration occurred in 1967 with the establishment of the Federal Judicial Center.34 The statutory purpose of the center is “to further the development and adoption of improved judicial administration in the courts of the United States.”35 The Center is directed to conduct research, make recommendations to the Judicial Conference of the United States, provide continuing education programs, and assist the Judicial Conference of the United States and its committees.36 The Center is governed by a Board of Directors made up of two active appellate judges and three active district court judges, together with


32. It should be observed that there has been disagreement concerning the nature of the circuit councils’ powers. Some view the councils as purely administrative bodies without any judicial powers whose role is to deal with the problems of administering the courts. Others see the councils as bodies with certain judicial prerogatives, including the power to determine the fitness of a judge to hear cases. The legislative history is subject to both interpretations, but it should be noted that the councils were created by an act designed to speed up the administration of justice. While the possibility of disciplining problem judges through the councils’ tools was considered, discipline was certainly not the Administrative Office Act’s primary purpose. Indeed, two bills aimed specifically at the makeup of the judiciary had been expressly rejected by Congress within the three years prior to its passage. This fact adds credence to the less expansive view of the scope of the circuit councils’ power, and it is a view that has received some judicial approval. See Wallace, supra note 25, at 313.


34. See P. Fish, supra note 24, at 369.


36. Id.
the Director of the Administrative Office. This Board of Directors is chaired by the Chief Justice of the United States.\textsuperscript{37}

Reforms in federal judicial administration have thus culminated in a basic administrative machinery with five component parts. At the top is the Judicial Conference of the United States—an organization which may be loosely analogized to a board of directors without the authority to enter orders.\textsuperscript{38} Its power as such comes from its membership (the Chief Justice of the United States together with the chief judge of each circuit and others) and its position at the apex of the judicial administration structure.

Next in line is the judicial council of the circuit. Made up of the active circuit judges of the circuit, it too possesses a certain amount of persuasive power because of its membership. But each council, as distinguished from the other components in the federal judicial administration system, may "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit."\textsuperscript{39} Although it is not clear as to how and under what circumstances such orders may be issued,\textsuperscript{40} strong and articulate voices have called for more action on the part of the circuit councils.\textsuperscript{41}

The third tier of the judicial administration structure is the judicial conference of the circuit. Its power is advisory only. The fourth and fifth components of the administrative structure, the Administrative Office of the United States Courts and the Federal Judicial Center, provide staff assistance for the other three tiers.

Close analysis of this administrative structure reveals an intent to decentralize. The power to order has been given solely to the circuit councils, and the focal point of action should be those councils. The total machinery provides correlation and, in some instances, establishes policy. However, any effort to nationalize and centralize judicial administration at the highest level would be at odds with the present statutory structure.\textsuperscript{42}

\textsuperscript{37} Id. § 621.


\textsuperscript{40} See Wallace, supra note 25, at 313; see also Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1970).


\textsuperscript{42} Chief Justice Hughes was a strong advocate of decentralization. See Fish, supra note 24, at 140-44; Lumbard, supra note 20, at 169. When a proposed bill giving all
Significantly, the five-component administrative structure outlined above is essentially intrabranch. The Constitution itself, of course, provides the one significant extrabranch control over the judiciary: impeachment and removal. Yet, despite the fact that any additional nonconstitutional extrabranch control raises serious questions involving the separation of powers doctrine and the independence of the judiciary, efforts have been made repeatedly to create such extrabranch controls.

A recent example involved the congressional formulation of the code of judicial ethics. In 1924 the American Bar Association, in cooperation with the judiciary, approved the Canons of Judicial Ethics. Subsequently, there was additional pressure to renew or revise the canons to control more directly the activities of the judges. As a result, the Judicial Conference of the United States, on June 10, 1969, adopted regulations forbidding the acceptance of income from nonjudicial sources without prior approval of the judicial council of the circuit. This action was subsequently suspended to await the formulation by the American Bar Association of a new Code of Judicial Conduct. When the Code appeared, it was adopted by the Judicial Conference of the United States. Congress, however, was not satisfied with the judiciary's efforts to establish its own rules and therefore passed a statute, which in some ways conflicted with the standards adopted by the Judicial Conference of the United States.

administrative authority to one national administrative office came to his attention, he responded in these terms:

I think the difficulty in this present bill lies in an undue centralization . . . My thought is that there should be a greater attention to local authority and local responsibility . . . My thought is that in each circuit there should be an organization which will have direct and immediate responsibility with regard to the judicial work in that circuit. My suggestion for your consideration is that there should be in each circuit a judicial council . . .


44. Id.


48. Compare AMERICAN BAR ASSOCIATION, CODE OF JUDICIAL CONDUCT, canon 3C (1972)
A more significant and threatening example of nonjudicial efforts to control the judiciary has been the rather constant agitation for some type of machinery which could remove federal judges without the lengthy process of impeachment. Such a legislative effort was initiated in the late 1930's, primarily due to the efforts of Congressman Hatton Sumners. A more recent attempt was made in 1966 by Senator Joseph Tydings, then chairman of the Subcommittee on Improvements of Judicial Machinery. The most recent effort to provide a means for circumventing the impeachment process was made by Senator Nunn in 1975. I have discussed the Nunn bill elsewhere, arguing that it is unwise and unneeded.

Each year new legislation aimed at controlling the functioning of the judiciary in one fashion or another is presented to Congress. Pending before the federal legislature are two bills that would require full financial disclosure annually by each federal judge and a bill to establish a judicial tenure council to deal with, among other things, removal of federal judges for improper conduct. In recent years, bills have been introduced that would strike the grandfather clause from the statute that forbids a chief judge from serving past the age of 70, and that would provide for the review of the behavior of individual justices and judges by a three-judge panel. In addition, Congress had before it both a proposed constitutional amendment requiring reconfirmation of Supreme Court Justices every eight years and lower court judges every six years, and proposed articles of impeachment aimed at the forty-four federal judges who brought a lawsuit against the United States contending that their compensation had been unconstitutionally diminished.

  49. See Wallace, supra note 25, at 303.
  50. See id. at 303-04.
  51. See id. at 297, 302-11.
  52. Id. at 297.
No action has yet been taken on these bills.
  55. S. 1130, 94th Cong., 1st Sess. (1975). The grandfather clause provides that the retirement provision is inapplicable to any district with two judges where the chief judge continues to act in his capacity as chief judge. Id. § 3.
  57. S. J. Res. 175, 94th Cong., 2d Sess.
This Article later argues that the need for controls to facilitate effective judicial administration has never been greater.\textsuperscript{59} At this point, however, it is necessary to state emphatically that the extrabranch controls of the sort just reviewed are not what the nation, or the judiciary, needs. In the first place, extrabranch controls by their very nature create a serious risk of violating the fundamental doctrine of separation of powers. As Justice Sutherland stated: “The sound application of [that doctrine] that makes one master in his own house precludes him from imposing his control in the house of another who is master there.”\textsuperscript{60} Also, the purpose of many of the proposed extrabranch controls is to regulate judges whose personal conduct is deemed aberrational. Yet even the most ardent advocates of extrabranch controls admit that it is only the personal conduct of a very few that is open to question. Senator Tydings referred to the “tiny handful” of judges who harm the efficient administration of justice and then stated that “it is not our intention to conduct an exposé on the federal judiciary. Such an exposé would, indeed, find little to expose.”\textsuperscript{61} The independence of the judiciary should not be compromised by a system of controls prompted by the improprieties of a very few. Finally, the judiciary itself has both the administrative structure, if properly used, and the ability necessary to implement reforms that will successfully meet many of the challenges that make effective judicial administration imperative.

While the quality of the federal judiciary is high, the need for effective administration in the federal courts is not seriously contested. The root cause of that need is, of course, the massive increase in the workload of the federal courts at all levels. At the district court level, the number of new cases filed each year since 1970 has increased 42\%, to an average of about 450 cases per judgeship.\textsuperscript{62} Particular types of cases have increased dramatically. In 1976, for example, 85\% more environmental cases were filed than in 1973.\textsuperscript{63} In 1970 there was a disconcerting backlog of 114,000 cases awaiting disposal. By 1975 that number had risen to 142,000,\textsuperscript{64} despite the fact that in the five years from 1970 to

\textsuperscript{59} See notes 62-69 and accompanying text infra.
\textsuperscript{60} Humphrey's Ex'r. v. United States, 295 U.S. 602, 630 (1935).
\textsuperscript{63} Reports of the Proceedings of the Judicial Conference of the United States 197 (1976).
\textsuperscript{64} See Burger, supra note 62, at 189.
1975 district court judges improved their productivity—measured in terms of cases disposed of—by 27%.\textsuperscript{65} The growth in the workload of federal appellate courts has been even more dramatic. Appellate filings increased at the rate of 113\% between 1968 and 1976; during this same period, the backlog of undecided cases grew by 83\%.\textsuperscript{66}

It is not just the sheer number of cases, however, but also the types of cases which are being handled by the federal courts that intensify the problem. Environmental and consumer litigation, for example, tend to "require judicial energy output far beyond the average case."\textsuperscript{67} A related problem is exemplified by the recently enacted Speedy Trial Act.\textsuperscript{68} That legislation, while not directly increasing the judiciary's workload per se, will cause immense problems of caseload management because it severely compresses the disposition time permitted in criminal cases.\textsuperscript{69}

The result of this ever-mounting number of increasingly complex cases is delay and congestion in the federal courts. That delay has now reached such proportions that society is no longer being properly served by its judicial system. In response to the problem, a wide variety of solutions have been proposed. Despite their diversity of source and content, all these proposals have one common characteristic: they will necessarily entail, either directly or indirectly, some incremental increase in control over federal judges and their work.\textsuperscript{70} Indeed, any solution that entirely avoids increased control seems incapable of formulation. Accordingly, if the problem is to be solved to any measurable degree, the solution will to some extent reduce the independence of individual judges and the independence of the judicial branch.

III. THEORETICAL AND ACTUAL CONFLICTS

Conflict between the ideals of judicial independence and effective judicial administration is pervasive on a theoretical level. This is due primarily to the difficulty of defining the ideals

\textsuperscript{65} Id.
\textsuperscript{66} See id.
\textsuperscript{70} One possible exception to this statement might be proposals that would simply increase the number of federal judges. See, e.g., H.R. 7843, 95th Cong., 1st Sess. (1977).
in any terms short of absolute. Judicial independence may most readily be defined as a freedom, possessed by the individual judge, to dispose of all business brought before him, to manage the personnel attached to his court and its physical aspects, and to conduct his personal affairs as he sees fit and without limitations in the form of externally imposed formal controls. In the same vein, judicial administration in its broadest sense may be defined as any formal system or structure that places coercive authority in any individual, group of individuals, or institution which is or can be exercised to determine how or when business before the individual judge will be handled, how court facilities and personnel will be managed, or what course the judge's personal conduct will or will not take.  

On a practical level, the scope of actual conflict is narrow—at least in comparison to the scope of conflict theoretically possible. This is due in part to tradition. For example, appellate review of a trial court's factual and legal conclusions in a particular case is not deemed an encroachment on judicial independence, although that review certainly operates to control the work of the trial judge. In addition, congressionally designed limitations on the jurisdiction of the federal courts likewise constitute a significant external control, but because that control is generally considered to be constitutionally based it rarely is viewed as an assault on the citadel of judicial autonomy. Then too, uniform rules of procedure present theoretical but generally no practical conflicts. All of these examples may be viewed as the products of old compromises, although perhaps not recognized as such at the time of their making.

The actual conflicts, that is, the conflicts which are presently perceived as such, arise out of the attempted use of new forms of control. Thus, the first order of a circuit council prohibiting the future assignment of cases to a district judge was litigated to the Supreme Court where it was expressly recognized that the ultimate issue was whether that action constituted "permissible intervention consistent with the constitutional requirement of judicial independence." Other relatively new forms of control already discussed, such as limits on and reports concerning extraju-

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71. This definition of judicial administration is used only to show the theoretical extent of the judicial independence-judicial administration conflict. It is not the definition of judicial administration that I would adopt for all purposes. For a discussion of various definitions of judicial administration, see D. Nelson, Cases and Materials on Judicial Administration and the Administration of Justice xxv-xxvi (1974).

72. See P. Bator, supra note 9, at 309-438.

dicial compensation, are also considered by some judges as inconsistent with their independence. 74

A striking example of the perceived conflict which arises when new controls are introduced was revealed in comments made by members of the judiciary at the time of the establishment of the Administrative Office of the United States Courts. For example, one judge stated:

A word of warning is appropriate. It is inevitable that a director [of the Administrative Office] will come to feel that he has something to direct. As long as he confines his direction to the staff under him, he is performing his duty, but when he interferes with the work of the judges he should promptly and emphatically be rebuffed. 75

Another judge warned that the “judicial reform movement is tending too far in the direction of subordinating the administrative authority of the trial judge.” 76 Now, however, the transfer of most of a judge’s logistical and general housekeeping duties to the Administrative Office is, as to those chores, infrequently viewed as a check on judicial independence. Although a few judges view that office as a threatening bureaucratic giant, most are gladly relieved of minor ministerial tasks. They may well share the sentiments of Judge Learned Hand: “I utterly loathe . . . and thoroughly despise [administrative tasks], as ‘work for the learned pig’ as John Grey used to say of conveyancing.” 77 However, if the Administrative Office begins to assert added control, above and beyond minor housekeeping responsibilities, the specter of conflict would again arise.

Another form of administrative control which has drawn some criticism as it has extended itself into new areas is the office of chief judge. Within each circuit court, and within each district court which has more than two district judges, the judge who is most senior in service and has not yet reached the age of 70 is designated the chief judge, unless he declines to act. 78 The chief judge exercises supervisory powers in many areas. Although these responsibilities are administrative in nature, a strong chief

74. See, e.g., id. at 138-41 (Douglas, J., dissenting).
75. J. Covington, supra note 42, at 5 (quoting comments of then Senior Circuit Judge Curtis D. Wilbur).
77. Letter from Learned Hand to D. Lawrence Groner (Apr. 5, 1944), reprinted in P. Fish, supra note 24, at 405.
judge—because of his centralized administrative powers, the respect which is held for his office, and, in some cases, his personality—exercises a significant degree of control over his brother and sister judges. As a result, the chief judge is often able to work informally to solve problems, and do so as effectively and sometimes more effectively than administrators working through the formal administrative machinery established by Congress. Nevertheless, the role of the chief judge, when maintained within traditional boundaries, is probably universally accepted by judges. Criticism surfaces only when the chief judge assumes new functions. If one commentator is correct, a new area of conflict is on the horizon. He predicted that

Within the judicial segment, the individual judges will probably encounter a growing shift of power to the chief (or presiding) judge and to his court administrator, both of whom will increasingly employ technology to standardize the quantity and directions of case decisions. . . . [This] initial sharing of administrative power will lead, by accretion, to the dominance of court administrators (staff personnel) over the chief judges (the line superiors) because of the greater expertise possessed by the former.

In light of the above discussion, it appears that new forms of administrative control—whether designed from whole cloth or developed in evolutionary fashion from traditional forms—are almost inevitable. As the federal judiciary becomes larger, as its workload continues to burgeon, and as the type of work it does becomes more complex, the judiciary or some external institution like Congress will modify the judiciary's structure and methods of operation to accommodate these changes. If history is a sound guide, and it probably is in this area, these new controls will create conflict by pitting the ideal of judicial independence against the ideal of effective judicial administration. That conflict need not be disruptive, however. Beneficial compromises are possible, although not assured.

IV. A Conceptual Framework for Compromise

Two insights into the fundamental nature of the judicial

80. See Wallace, supra note 25, at 324-25.
independence-judicial administration conflict permit development of a conceptual framework for compromise. The first insight, developed by Professor Covington, is that judicial independence is divisible into separate, although related, components. Covington identifies these as "logistical or housekeeping autonomy," "decision autonomy," and "trial practice and personal conduct autonomy." The second insight is surprisingly simple although continually overlooked: Both ideals of judicial independence and effective judicial administration are not ends in themselves but merely means of achieving a more fundamental goal, which may be called, for want of a better term, the doing of justice.

In Covington's analysis, logistical or housekeeping autonomy involves the judge's control over such activities as personnel selection, recordkeeping, reporting of data on the court's work, and operation of the court's budget. Decision autonomy is the power of the judge to make decisions in the cases before him. Trial practice autonomy consists of the judge's power to determine what his conduct shall be on the bench and how the activities in his courtroom shall be regulated. Personal conduct autonomy is the power of the judge to determine the course of his off-the-bench conduct.

Administrative innovations that can fairly be said to implicate only logistical autonomy generally are not viewed as inimical to judicial independence. Housekeeping chores for the most part have been shifted already to the Administrative Office. This transfer of responsibilities was, in part, a response to the massive amount of detail work necessary for the functioning of a large and complex judicial system. As has been noted, the shift in responsibility for these chores has not been a major source of irritation.

The difficulty, of course, is to identify innovations which implicate only logistical autonomy. This difficulty is illustrated by the Justice Department's 1932 attempt to eliminate the position of messenger of the federal judge. In response, the Judicial Conference of the Fourth Circuit passed a resolution stating that such action would decrease the performance of the district judges and would delay and interfere with prompt handling of judicial business. Is access to a messenger purely an incident of logistical

82. J. Covington, supra note 42.
83. Id. at 2-3.
84. Id. at 3.
85. See text accompanying notes 76-77 supra.
86. See P. Fish, supra note 24, at 150-51.
autonomy or does it involve decision autonomy? True the messenger would not make decisions, but if he would preserve valuable time and allow a judge to carry out his decisionmaking processes more adequately and promptly, it can reasonably be argued that elimination of the messenger would be an incursion into judicial independence.

While logistical autonomy may be reduced without impairing judicial independence, complete preservation of decision autonomy is fundamental. Even the most ardent proponents of increased administrative control voice support for the sovereignty of the individual judge in this area. The following observation of Professor Covington conveys the view of most observers regarding decision autonomy, a view that is fully supported by the history of judicial independence outlined in Section I:

[I]t is incumbent upon the judges themselves to fight back if efficiency programs become overzealous and interfere with "total and absolute independence of judges in deciding cases or in any phase of the decisional function." An independent judiciary is not a luxury. The country can afford some inefficient judges if the price of efficiency is damage to decision autonomy.87

The tensions and conflicts between judicial administration and judicial independence most frequently manifest themselves in the area of trial practice and personal conduct autonomy. This conflict surfaced in *Chandler v. Judicial Council of the Tenth Circuit*88 when a circuit council prohibited the assignment of any new cases to a district judge. Writing for the majority, Chief Justice Burger intimated that in this area autonomy is a diminishable commodity.

There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function. But it is quite another matter to say that each judge in a complex system shall be the absolute ruler of his manner of conducting judicial business. The question is whether Congress can vest in the Judicial Council power to enforce reasonable standards as to when and where court shall be held, how long a case may be delayed in decision, whether a given case is to be tried, and many other routine matters. As to these things—and indeed an almost infinite variety of others of an administrative na-

...ture—can each judge be an absolute monarch and yet have a complex judicial system function efficiently?\textsuperscript{89}

In dissent, Justices Black and Douglas forcefully argued against any encroachment on trial practice and personal conduct autonomy by any means other than impeachment and removal.\textsuperscript{90} This sharp conflict of opinions is representative of the tensions inherent in this area.

That tension is aggravated because the opposing factions tend to view their respective causes—either judicial independence or effective judicial administration—as a final goal, an ultimate and inviolable ideal. The historic evolution of the concept of judicial independence and the judicial administration reform movement outlined in the first two sections of this Article effectively refutes those extreme views. Both ideals have a purpose beyond their own self-perpetuation, namely the meaningful dispensation of justice. Neither judicial independence nor judicial efficiency is of value unless it contributes to that ultimate goal, and it is against that goal that proposed administrative reforms should be measured. Any innovation that furthers the ubiquitous trend toward standardization and uniformity merely for the sake of the appearance of efficiency should be rejected. By the same token, if an innovation realistically promises to make the dispensation of justice swifter and surer, and hence more meaningful, no judge could in good conscience oppose that reform unless it constituted an unwarranted infringement on judicial independence and therefore a long term threat to the personal liberties of all citizens. What is required, in short, is an evaluative and balancing process.

An important observation should be made about the evaluative aspect of that process. It would be a serious mistake to attack all present inefficiencies in the judicial system as inappropriate. Chief Judge David Bazelon has reminded us that

\begin{quote}
the heart of the judicial process is by its very nature inefficient. The way towards “efficiency” in the courts is not to shortcut judicial procedures in order to dispose of more cases in less time. Such a solution is equivalent to a surgeon’s omitting time-consuming diagnostic procedures and simply operating at random . . . .\textsuperscript{91}
\end{quote}

\textsuperscript{89} Id. at 84-85.

\textsuperscript{90} Id. at 129-43 (Black & Douglas, JJ., dissenting).

Joseph Ebersole of the Federal Judicial Center has reached a similar conclusion. In discussing the unique problems of formulating a design process for computer application in a court system, he observed that the judicial system is, to some extent, a nonsystem.

Supposedly, people in an organization all work to further one general objective and although there are opposing forces in existence, these are normally not intended to operate at cross purposes. Business organizations, for example, strive for efficiency and attempt to systematize as many activities as possible to further this goal. But the administration of justice is, in some respects, inherently inefficient. The due process model is a purposeful obstacle course and its inefficiency and, what some might consider its irrationality, provide major protection to individuals.92

When judges, in the name of judicial autonomy, defend these necessary inefficiencies and demonstrate a reluctance to change, the reluctance should not be viewed as mere obstreperousness. The reluctance is motivated rather by the basic belief, held by most judges, that the system can work effectively to provide justice only so long as judges are free and independent in their ultimate decisionmaking process.

V. COMPROMISES AND THE POTENTIAL OF THE JUDICIAL CONFERENCES OF THE CIRCUITS

As new forms of administrative controls have created new judicial independence-judicial administration tensions, accommodations and compromises have occurred. Unfortunately, these compromises have all too often been products of default and inaction rather than of an open process of evaluation and balancing.

An example of this sort of compromise may be seen in the conduct of the circuit councils. The discussion in Section II makes it clear that the circuit councils have authority to issue orders which could interfere with the trial practice autonomy of district judges as well as their personal conduct.93 Yet, in many instances, the circuit councils have been reluctant to enter into this arena.94 This reticence cannot be ascribed wholly to roadblocks which might be inferred from dicta in Chandler v. Judicial...

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93. See generally J. Covington, supra note 42, at 27-35.
94. See P. Fish, supra note 24, at 404-09.
Rather it appears that a compromise between judicial independence and effective judicial administration has been made in the actual practice of the circuit councils. Although Congress initially struck the compromise in one fashion, the circuit councils, by silent practice, have made another compromise, tilting the final result more towards judicial independence. While that result may be wise, the process used to reach it is certainly vulnerable to criticism.

A similar phenomenon is visible in the workings of the judicial conference of the circuit. Although the conference has great potential for ameliorating the conflict between judicial independence and judicial administration, it has not realized its potential. This failure seems to reflect the same sort of subterranean process of compromise that has defined the role of the circuit councils. As originally conceived, the circuit conference was to be an engine for the administrative reform of the federal courts. Patterned on the informal conferences organized by Chief Judge Parker of the Fourth Circuit in the early 1930’s, circuit conferences were initially appreciated as being an exceptional tool for improving judicial administration in a decentralized organizational structure. “A Circuit Conference,” stressed a 1932 report to the then Judicial Conference of Senior Circuit Judges, “serves to bring together all the Federal Judges of the circuit and thus to give opportunity for the consideration of problems with which they are confronted in seeking to eliminate obstructions to the prompt and efficient administration of justice in the several districts.” These early conferences provided a forum for discussing docket backlogs, unnecessary disparity in sentences, customs, rules and regulations in the district courts, and the other myriad administrative problems of the judiciary. In some circuit conferences, this interchange breached the wall of isolation surrounding many district courts. Moreover, the conferences were natural sources of information for the Judicial Conference of the United States. It was the hope of Chief Justice Hughes that the circuits, with the aid of the circuit conferences, might act as foci of federal action affecting the judicial branch, much as the states were foci of administration with regard to the state problems.

The Administrative Office Act of 1939, which mandated the
convening of the circuit conferences,\textsuperscript{100} was intended to further this work. The five entities of judicial administration discussed in Section II were intended to gear their efforts to improving the administration of justice by permitting the federal courts, operating within a decentralized structure, to set their own houses in order.\textsuperscript{101} It was Congress' judgment that, in order for the courts to deal with basic problems of court administration within each circuit, the deliberative and advisory role of the circuit conference was essential.

In addition, the circuit conferences are interrelated with the circuit councils. To perform their distinctive function, the circuit councils require the current, firsthand experience of the federal trial courts, the basic unit of the federal justice system. Often this experience is not forthcoming through informal channels or is only imperfectly communicated. In response to this problem, Congress designed the judicial conference of the circuit to serve both as a forum where that experience can be expressed and as a conduit to convey the information. The power of the circuit conference therefore consists of its membership—the district and circuit court judges and representative lawyers who practice before them. These individuals, who have the most accurate information and the most pertinent recommendations regarding the problems of prompt and efficient administration of justice can use the circuit conference to coordinate, concentrate and communicate that information to the circuit council and, through the chief judge of the circuit, to the Judicial Conference of the United States.\textsuperscript{102}

The circuit conference thus has a distinctive role in judicial administration. Significantly, however, it is without the power to give orders or specific direction to district court judges. Accordingly, judges generally do not, and certainly should not, view it as a direct threat to their independence. Nevertheless, the conferences have not met with the success that might be anticipated. Chief Justice Burger has stated:

\begin{quote}
This provision (Section 333) like Section 332, has been fully used and applied by only a minority, at least, of the Circuits in the sense clearly contemplated by Congress in its express language and plainly indicated by the legislative history. . . . Less than a majority of the circuits have consistently held
\end{quote}

\textsuperscript{100} Id. § 307 (codified at 28 U.S.C. § 333 (1970)).
meaningful conferences and in some places the conferences which are held fall far short of what Congress intended.\textsuperscript{103}

This inactivity of the circuit conferences may stem from the judges' belief that full compliance with the mandate of Congress will result in further interference with their independence. The basis of this belief merits examination. The first part of the statutory mandate directs the conference to meet together to consider the business of the courts.\textsuperscript{104} This directive in and of itself should not give rise to any fear that judicial autonomy will be imperiled. Indeed, most judges feel that discussion of common problems has a beneficial effect in assisting them in their official capacity. If in fact judicial reticence to a fully implemented circuit conference is due to a fear that it may result in further administrative controls, that reticence must be based on the second part of the legislative directive: The conferences are to recommend "means of improving the administration of justice within such circuit."\textsuperscript{105}

This advice of the circuit conference is undoubtedly to be directed to the circuit council, which possesses the statutory authority to make "all necessary orders for the effective and expeditious administration of the business of the courts within its circuit."\textsuperscript{106} Some judges may believe that the advice-giving role of the conference gives it an appreciable measure of indirect administrative power, a power capable ultimately of further reducing the autonomy of the individual judge. If this conjecture is correct, the relative inactivity of the circuit conferences is simply a camouflaged compromise. By defaulting in their advice-giving role under the statute, the judges may well be responding to the inevi-

\textsuperscript{103} Burger, \textit{supra} note 38, at 741.
\textsuperscript{104} The statutory language is as follows:

\textit{The chief judge of each circuit shall summon annually the circuit and district judges of the circuit, in active service, to a conference at a time and place that he designates, for the purpose of considering the business of the courts and advising means of improving the administration of justice within such circuit. He shall preside at such conference, which shall be known as the Judicial Conference of the circuit. The judges of the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands shall also be summoned annually to the conferences of their respective circuits.}

\textit{Every judge summonsed shall attend, and unless excused by the chief judge, shall remain throughout the conference.}

\textit{The court of appeals for each circuit shall provide by its rules for representation and active participation at such conference by members of the bar of such circuit.}


\textsuperscript{105} \textit{Id.}
\textsuperscript{106} \textit{Id.} § 332(d).
table tension between the need for system controls and their own independence.

To the extent that such a compromise has been reached, it is an unfortunate one. In the first place, a nonproductive circuit conference is disruptive of the integrated administrative machinery of the federal judiciary, a "machinery, created by Congress, to provide means whereby the work of the courts could be regulated and kept up to date, and provide a better and more prompt administration of justice."107 Because the elements of this administrative machinery are interrelated and interdependent, an active and effective circuit conference is necessary to the success of the system as a whole. Moreover, a circuit conference not performing its proper role must inevitably undercut support for decentralization. Paradoxically, by refusing to use the circuit conference for fear of diminishing his own independence, a judge renders less effective a structure purposely decentralized in order to give individual judges a greater influence in the administrative decisionmaking process.108 The tragic consequence of this is that when the need for controls becomes sufficiently acute, the circuit councils, in order to obviate possible extrajudicial intervention, may well assert their latent authority to control the course of judicial administration. Hopefully that action will be based upon the advice and assistance of the district court judges and lawyers rendered at the circuit conferences. But this can occur only if the conferences are functioning properly.109 Accordingly, by diminishing the vigor of the circuit conference, its judicial members may well be facilitating the promulgation of administrative controls by the circuit council or by a national governmental authority which may severely threaten judicial independence.

VI. CONCLUSION

It is time to recognize that decisions made in judicial administration are compromises between the conflicting needs for judicial independence on the one hand and systems control on the other. Too often, advocates have asserted their positions in a vacuum, oblivious of the need to consider the legitimate concerns of the opposing position. Only by recognizing those legitimate

108. See note 42 and accompanying text supra; see also Fish, supra note 24, at 140-44.
109. For what one circuit conference has done, see Final Report of Committee on Reorganization of the Ninth Circuit Conference and Conference Committees, 75 F.R.D. 553 (1976).
concerns and the inevitability of compromise in appropriate areas can intelligent decisions be made. What is needed, therefore, is an open evaluative and balancing process.

Chief Justice Burger has identified the need for change in the system, contending that we now use cracker-barrel-grocery methods in a supermarket age.\textsuperscript{110} While the cracker barrel must go, its replacement must not unduly interfere with the independence of the grocer. Here lies the judicial administration challenge of the future.