1995

The Federal Judicial Center and the Administration of Justice in the Federal Courts

William W. Schwarzer
UC Hastings College of the Law, schwarzw@uchastings.edu

Author: William W. Schwarzer

Source: University of California at Davis Law Review

Citation: 28 U.C. Davis L. Rev. 1129 (1995).

Title: *The Federal Judicial Center and the Administration of Justice in the Federal Courts*

The Federal Judicial Center and the Administration of Justice in the Federal Courts

*William W Schwarzer**

The state of the federal courts has been a source of concern since at least the period following the Civil War, when the American economy began to expand rapidly. This expansion brought with it commercial and regulatory activity, generating controversies that led to litigation. As a result, the courts' dockets grew, cases took longer and cost more to litigate, and courts never seemed to have enough judges to keep up with their work. This trend has continued; the crisis forecast by one generation becomes the reality with which the next generation copes and the good old days upon which the following generation looks back wistfully. Disaster in the last quarter of this century has been averted by increasing the courts' productivity; the output of today's judges would have seemed unthinkable fifty, even twenty-five years ago.[1] Among the great questions confronting our society is whether the trend will persist and whether the courts will be able to continue to increase their productivity while delivering an acceptable quality of justice. And that question compels us to direct our attention to the administration of justice in the federal courts.[2]

---

* Senior United States District Judge, Northern District of California; Director, The Federal Judicial Center, 1990-95. The author is indebted to Russell R. Wheeler, Deputy Director of the Center, for his substantial assistance. The views expressed, however, are the author's.

[1] *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, MANAGEMENT STATISTICS FOR UNITED STATES COURTS (1974); ADMINISTRATIVE OFFICE OF THE U.S. COURTS, NATIONAL STATISTICAL PROFILE (1993). To illustrate, district court terminations of civil and criminal cases per judgeship rose from 296 in 1967 to 399 in 1993. In the courts of appeals, terminations per judgeship rose from 92 in 1969 to 286 in 1993. *See generally* GORDON BERMANT ET AL., FEDERAL JUDICIAL CENTER, IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES: ANALYSIS OF ARGUMENTS AND IMPLICATIONS (1993).

[2] The state courts confront the same question. This paper is confined to the federal

This Article examines the role of the Federal Judicial Center, whose statutory responsibility is "to further the development and adoption of improved judicial administration in the courts of the United States."[3] Part I of this Article reviews the Center's creation and antecedents. Part II discusses its governance and its position in the judicial branch. Part III looks at its current structure and work. Part IV considers how the Center's mission might be assessed.

I. THE CENTER'S CREATION AND ITS ANTECEDENTS

The Federal Judicial Center came into existence on December 20, 1967, when President Lyndon B. Johnson signed Public Law No. 90-219. A special committee of the Judicial Conference had drafted legislation, largely in response to growing dockets of complex civil cases. At the urging of Chief Justice Earl Warren, the President included a bill in a package of crime legislation sent to Congress earlier that year. The presidential message accompanying the legislation, in language no doubt drafted within the judiciary, called for creation of the Center because:

> The mere addition of judges to the courts will not bring about the efficient administration of justice that simple justice demands. Better judicial administration requires better research, better training and continuing education programs. A Federal Judicial Center . . . will enable the courts to begin the kind of self-analysis, research and planning necessary for a more effective judicial system — and for better justice in America.[4]

The impetus for the legislation was a widely shared belief, in both the judiciary and Congress, that unless court administration were improved, rapidly rising caseloads would overwhelm the courts, resulting in intolerable delays. A brief look at the course of history that culminated in the creation of the Center is instructive.[5]

---

courts since the Center's mission is generally limited to federal courts. However, the Center cooperates with agencies which administer justice in the state courts to the extent its resources permit.

[3] 28 U.S.C. § 620(a) (1988).

[4] *The Administration of Justice in the Federal Court System, 1967: Hearings on S. 915 and H.R. 6111 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 38 (1967) [hereafter *Hearings*].

[5] For a detailed discussion and analysis, see Russell R. Wheeler, *Empirical Research and*

The first serious effort to view the federal courts as a national court system with common problems came in 1922, when Congress created the Conference of Senior Circuit Judges at the urging of Chief Justice Taft.[6] The Conference was an advisory body composed of what today are called the chief judges of the courts of appeals and chaired by the Chief Justice. The judges met annually to review the docket conditions in the district courts throughout the various circuits, prepare plans for intercircuit assignments to provide temporary relief, and submit suggestions to the courts to promote "uniformity and expedition of business."[7] Chief Justice Taft saw the Conference as an incipient policy-making institution and a vehicle for centralized supervision of the dispersed district courts.[8]

The development of a structure for federal judicial administration continued with the passage of the Rules Enabling Act[9] in 1934, authorizing the Supreme Court to promulgate rules of procedure for the federal courts. In 1939, Congress transferred the responsibility for administering the federal courts from the Justice Department to the newly created Administrative Office of the United States Courts, which was to operate under the Conference's supervision.[10] The 1948 recodification of Title 28 gave the Conference its current name (the Judicial Conference of the United States). Then a series of statutes broadened Conference membership, starting in 1957 with the addition of one district judge per circuit to serve along with the chief circuit judges.[11]

---

the Politics of Judicial Administration: Creating the Federal Judicial Center, 51 LAW & CONTEMP. PROBS., Summer 1988, at 31 [hereafter *Empirical Research*].

[6] Act of Sept. 14, 1922, ch. 306, § 2, 42 Stat. 837, 838.

[7] *Id.*

[8] *See* Peter G. Fish, *William Howard Taft and Charles Evan Hughes, Conservative Politicians as Chief Judicial Reformers*, 1975 SUP. CT. REV. 123, 136.

[9] Ch. 651, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (1988 & Supp. V 1993)); *Empirical Research*, *supra* note 5, at 36 n.32.

[10] Act of Aug. 7, 1939, ch. 501, 53 Stat. 1223 (codified as amended at 28 U.S.C. §§ 331, 604 (1988 & Supp. V 1993)). The same act also established the judicial councils of the circuits. *Id.* (codified as amended at 28 U.S.C. § 332 (1988 & Supp. V 1993)). *See* RUSSELL R. WHEELER, FEDERAL JUDICIAL CENTER, ORIGINS OF THE ELEMENTS OF FEDERAL COURT GOVERNANCE 13-15, 16-17 (1992).

[11] Act of Aug. 28, 1957, Pub. L. No. 85-202, 71 Stat. 476 (codified as amended at 28 U.S.C. § 331).

As the volume and complexity of federal court litigation increased in the 1950s — along with an increase in the number of federal judges — the Judicial Conference undertook various research and education projects dealing with pretrial procedures in protracted cases, training of probation officers, and orientation for newly appointed judges. The judicial leadership, according to Seventh Circuit Chief Judge John Hastings, held the view that "[w]e shall never solve the pressing problems relating to delay and congestion in the Federal Courts merely by appointing additional judges."[12] All the federal appellate and chief district judges would agree, he continued, "that we could have and desperately need more efficient administration of our courts."[13] Staff support and funding for research and education projects, however, were sparse and episodic. Congress was unwilling to increase the Administrative Office appropriation to fund studies and training, and the Administrative Office was fully occupied with its growing administrative responsibilities. Efforts to secure private or foundation support were largely unavailing, and a plan for establishing a judicial institute as a part of a university failed.[14]

Given this lack of support for research and education, and the perceived need for an entity dedicated to those functions, the Judicial Conference in 1966 decided to seek legislative authorization for a broad program of continuing education, training, research, and administration.[15] Chief Justice Warren and Warren Olney III, the Director of the Administrative Office, were the driving force behind this effort. In a speech delivered at Harvard University the next year, the Chief Justice said that "the answer [to the federal courts' problems] does not lie in creating additional judge power," but rather in attention to the practical problems of the administration of justice.[16] He cited one federal judge's expression of alarm that, unless the basic administrative problems of the justice system were mastered, the

---

[12] *Hearings, supra* note 4, at 11 (statement of Hon. John S. Hastings).

[13] *Id.*

[14] *See Empirical Research, supra* note 5, at 37-38.

[15] REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 37 (Sept. 22-23, 1966).

[16] Earl Warren, The Administration of the Courts, Address at the Sesquicentennial Banquet of Harvard Law School (Sept. 23, 1967), *in* 51 JUDICATURE 196, 198 (1968).

system would disappear. The Chief Justice, however, expressed the "hope that in the near future we will have a Federal Judicial Center to assist us in meeting [these] . . . problems."[17] The objective of the Center would be to bring about the "dispensation of justice with maximum effectiveness and minimum waste by means of thorough scientific study of judicial administration and through programs of continuing education for judges and the training of court personnel."[18]

A special Judicial Conference committee, chaired by retired Justice Stanley Reed, began drafting a proposed bill. Warren persuaded President Lyndon Johnson to endorse such legislation, which he did in his crime message to Congress in February 1967.[19] Bills were promptly introduced in both the Senate and the House. The Senate Judiciary Committee's Subcommittee on Improvements in Judicial Machinery, chaired by Senator Joseph Tydings, held hearings in April. After minor differences in the bills were resolved, the two Houses passed the legislation in November and December, and President Johnson signed it on December 20, en route to South Vietnam.[20]

The legislative history of the Federal Judicial Center Act reflects the then prevailing grave concern over judicial administration in the federal courts. While Congress was creating the Federal Judicial Center, it also created the Judicial Panel on Multidistrict Litigation,[21] enacted the Jury Selection and Service Act of 1968[22] and the Federal Magistrates Act,[23] and held hearings on legislation to enhance means for dealing with judicial unfitness.[24]

---

[17] *Id.*

[18] *Id.*

[19] According to one contemporary observer, the Chief Justice may have sought President Johnson's endorsement of the legislation as a quid pro quo for his having served as chairman of the commission that investigated the Kennedy assassination. *Empirical Research, supra* note 5, at 40.

[20] *See* Act of Dec. 20, 1967, Pub. L. No. 90-219, 81 Stat. 664 (codified as amended at 28 U.S.C. §§ 620-629 (1988 & Supp. V 1993)); *Empirical Research, supra* note 5, at 40-41.

[21] Multidistrict Litigation Act, Pub. L. No. 90-296, 82 Stat. 109 (1968) (codified as amended at 28 U.S.C. § 1407 (1988)).

[22] Pub. L. No. 90-274, 82 Stat. 53 (codified as amended at 28 U.S.C. §§ 1861-1878 (1988 & Supp. V 1993)).

[23] Pub. L. No. 90-578, 82 Stat. 1107 (1968) (codified as amended at 28 U.S.C. §§ 631-639 (1988 & Supp. V 1993)).

[24] *The Judicial Reform Act, and Other Measures to Improve Judicial Administration in the*

The lengthy Senate Report on the Federal Judicial Center bill stated that "congestion and delay in many courts of the United States have reached crisis proportions," but that "the problems of the present are dwarfed by the prospect of impending catastrophe."[25]

> Congestion and delay, untrained supporting personnel, inadequate facilities, uneven distribution of caseloads, and the general absence of administrative expertise are some of the difficulties that must be overcome if the Federal judicial system is to realize its potential. . . . [T]here is great need for study of Federal court operations, for the development of programs to increase court efficiency, for training and continuing education of court officers and supporting personnel, for making available adequate staff assistance to the committees of the Judicial Conference, and for a permanent institutional framework in which to carry on such activities.[26]

To respond to this ambitious agenda, the Federal Judicial Center was created.

II. THE CENTER'S GOVERNANCE AND PLACEMENT IN THE JUDICIAL BRANCH

The Center's creators rightly believed that its governance and placement within the organization of the judicial branch would be relevant to its ability to attain their objectives. But they had no precedent to guide them. Although state court systems had begun to conduct some research and education activities, there had been no agency like the Center. Its position within the judicial branch and its governance received much attention during the legislative process. Two important principles emerged as the bedrock of the legislative scheme:

- The Center should be independent within the judicial branch; and
- The Center should be governed by judges.

Courts of the United States: Hearings on S. 3050, S. 3060, S. 3061, S. 3062 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 90th Cong., 2d Sess. (1968).

[25] S. REP. NO. 781, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U.S.C.C.A.N. 2402, 2404.

[26] *Id.* at 2405.

The statutory means to these ends — some from the Conference's proposal, others added by legislators — were: (1) the Center's creation as a separate agency "within the judicial branch,"[27] rather than as part of or reporting to another component of the judiciary; (2) a separate Center Board to establish policies for the Center, make recommendations to others, and, perhaps most important, select the Center Director;[28] (3) a Board membership composed of judges, along with the Administrative Office Director serving ex officio; and (4) a bar against members of the Judicial Conference serving simultaneously on the Board.[29]

Although the Conference and the Congress wanted a separate and independent Judicial Center, they fully intended that it would work cooperatively with the established institutions of the judiciary. That intention is also built into the legislative design. For example, although the judge members of the Board cannot be Conference members, they are elected by the Conference. Congress thus hoped that "the Board will enjoy the trust and confidence of the Conference while exercising the fullest measure of independence [from]. . . that body in its day-to-day operations."[30] And, although the Center is separate from the Administrative Office, the latter's Director is an ex officio Board member. Thus, the Center was not to be a lone rider, operating apart from the Conference and the Administrative Office. Rather, each was to perform different functions directed at a common goal of improved judicial administration: the Conference would supervise the Administrative Office in the exercise of its operational responsibilities, and the Center would undertake research and education apart from the operational demands of day-to-day administration.

How the structure and functions created by this legislative scheme evolved over time tell us much about the operation of a research and education agency within a court system.

---

[27] 28 U.S.C. § 620(a).

[28] *See* 28 U.S.C. § 621 (1988) (establishing Board and its composition); 28 U.S.C. § 623 (1988) (prescribing Board's duties and powers).

[29] 28 U.S.C. § 621(a)(2) (1988).

[30] *See* S. REP. NO. 781, *supra* note 25, at 2413.

A. The Board of the Center

As noted, control of the Center by judges, in the form of a Board, is a bedrock principle of the Center's governance. The Reed Committee said that it had "been careful to recommend an organization which could be controlled and operated by judges."[31] However, the role the Board would play was not so clear. In hearings before the Senate Judiciary Committee, some witnesses stated that they expected it to be a hands-on Board. Professor Maurice Rosenberg thought the members should have "furloughs for some period of time and [be] on detached service from their adjudicative duties," so they could "think consecutively and work consecutively at the important duties that they are going to have as a directorate."[32] Administrative Office Director Olney seemed to anticipate that the Board would take as active a role as did the committees of judges that had mapped the case management strategy to handle the electrical equipment cases in 1962.[33] The Senate Report, on the other hand, anticipated a less active role, commenting that the "actual participation of Board members in the implementation of [the Center's] policies and administration of these programs would be highly desirable, but, as a practical matter, executive direction of the Center will ordinarily be solely the responsibility of the Director."[34]

The Senate Report's prediction has proved much closer to the mark, as one would expect based on the experience of corporate boards.[35] But this does not diminish the considerable

---

[31] *Hearings*, *supra* note 4, at 38.

[32] *Id.* at 277 (statement of Maurice Rosenberg).

[33] *Id.* at 363-64 (statement of Warren Olney).

[34] S. REP. NO. 781, *supra* note 25, at 2415. The Report expresses the "hope . . . [for] a dynamic and progressive administrator with a background of demonstrated achievement in the management of a large and multifaceted research and development enterprise, or with comparable administrative experience in a professional school, law firm, or other institution . . . . [It] is essential that he be a recognized leader in his chosen profession . . . . [He] will undoubtedly serve as the Center's ambassador-at-large to the academic, professional and business communities." *Id.* at 2416-17. With one notable exception, however, the Center's seven directors have been judges, and prevailing opinion in the judiciary appears to favor having the director chosen from among federal judges (preferably with trial experience), able to serve primarily as ambassador-at-large to the judicial community.

[35] *See, e.g.*, MYLES L. MACE, DIRECTORS: MYTH AND REALITY (1971) (based on research

value of the Board to the Center's work. The Board has provided policy direction, served as a sounding board and support for the Center Director, and been a source of ideas to guide the Center's work. The judges are able to bring to their task extensive experience on the bench and familiarity with the education and research needs of the judiciary.[36] The stature of the judges appointed has also helped the Center gain greater visibility.

By statute, the Conference elects the judicial Board members. In practice, however, the Conference essentially ratifies selections proposed by the Chief Justice, and the Conference has not tried to influence how Board members perform their duties. The Board is chaired by the Chief Justice and composed of two appellate judges, three district judges, and, since the late 1970s, a bankruptcy judge. The Administrative Office Director serves as an ex officio member.

B. The Judicial Conference and the Administrative Office

1. The Judicial Conference of the United States and Its Committees

The Judicial Conference has evolved into the major policy-making body with respect to judicial administration in the federal courts. Although the Conference lacks general statutory authority to make orders,[37] it has substantial practical authority deriving from its responsibility to supervise and direct the Administrative Office in the administration of the judicial branch's resources and performance of its other statutory duties. Moreover, the Conference's statute makes it the judiciary's official

---

published first in the *Harvard Business Review*). Note especially chapter IX. *Id.* at 178-206.

[36] The degree to which the Board has been actively involved in program and administrative decisions, as opposed to policy issues, has varied, according to the incumbent Chief Justice's preference; in recent years, that involvement has been minimal.

[37] In light of common references to the Judicial Conference as the major policy-making body for the federal courts, judges and others are often surprised to find that its statute gives it only limited authority to issue orders or enforce policy. The eight paragraphs of its organic statute, 28 U.S.C. § 331, authorize it only to issue orders in connection with judicial discipline proceedings and to modify or abrogate local rules of the courts of appeals and special courts. Authority to "make all necessary and appropriate orders for the effective and expeditious administration of justice within . . . circuit[s]" resides in the judicial councils of the circuits. *See* 28 U.S.C. § 332(d)(1) (1988).

voice on matters of policy, particularly those relating to legislative proposals. The Conference's responsibilities have grown with the increase in the complexity of the environment in which the courts operate. Tighter budgets, greater demands on the courts, deeper congressional intrusion into the management and operation of the courts, and the sheer increase in the numbers of people and of facilities comprising the judicial branch have added to this complexity. Thus, whether the Conference sought it or not, circumstances required that it assert and exercise power.

The exercise of that power is, as a practical matter, largely in the hands of some twenty-five committees, all appointed by the Chief Justice. The committees are composed almost entirely of judges, and are staffed by the Administrative Office. These committees, though they report to the Conference, for the most part determine their own agendas. They exercise considerable influence over the operation of court administration in the areas assigned to them, such as budget, personnel, facilities, court administration, criminal law, and rulemaking. Their reports and recommendations form the basis for Conference action. In this way, the Conference has over time evolved from being largely a coordinating agency to a governance body.[38]

According to the Senate Report, "[p]erhaps the most important relationship between the Center and existing institutions" was that between the Center and the various committees of the Judicial Conference. The Center's statute directs it "insofar as may be consistent with the performance of . . . [its] other functions . . . to provide staff, research, and planning assistance to the Judicial Conference of the United States and its committees . . . ."[39] The practice in the 1960s, as described in the Senate Report, was for members of the Judicial Conference to rely principally on their law clerks for research support, with some limited additional assistance from the Administrative Office. Creation of the Center was to put an end to these "make-

---

[38] *See generally* RUSSELL R. WHEELER & GORDON BERMANT, FEDERAL JUDICIAL CENTER, FEDERAL COURT GOVERNANCE: WHY CONGRESS SHOULD — AND WHY CONGRESS SHOULD NOT — CREATE A FULL-TIME EXECUTIVE JUDGE, ABOLISH THE JUDICIAL CONFERENCE, AND REMOVE CIRCUIT JUDGES FROM DISTRICT COURT GOVERNANCE (1994) [hereafter FEDERAL COURT GOVERNANCE].

[39] 28 U.S.C. § 620(b)(4) (Supp. V 1993).

shift arrangements," although Congress contemplated that "as the Center undertakes to study and report on certain aspects of court administration, the need for staff, research, and planning assistance by particular Judicial Conference Committees ought to diminish."

In predicting how relations would evolve, Congress also recognized the extensive administrative responsibilities of the Director of the Administrative Office,[40] which the 1967 Senate Report even then described broadly as "directing the work of the clerical and administrative personnel of the courts, . . . recommending improvements, determining the courts' need of assistance, and working for improvements in the transaction of the general business of the courts."[41] Because, as the report itself stated, "[t]he Conference has broad supervisory power over the Director," as these administrative duties and functions of the Director expanded, so did the work of Conference committees charged with supervision over them. This inevitably led to expanding demands for staff support. Since the work of the committees mirrors the administrative and operational responsibilities assigned by statute to the Administrative Office,[42] it was logical for that Office, rather than the Center, to become the source of staff support for the Judicial Conference. Moreover, the Senate Report contemplated that the committees would "exist for the purposes of monitoring the various areas of . . . [their responsibilities], handling routine problems as they arise. . . . The Center, in contrast, will concentrate on long-range problems and solutions. . . ."[43]

---

[40] *See* 28 U.S.C. § 604. "The Director shall be the administrative officer of the courts, and under the supervision and direction of the Judicial Conference of the United States, shall . . . " perform the extensive duties enumerated in 28 U.S.C. §§ 604, 605, 612 (1988 & Supp. V 1993). *Id.* Those duties have expanded over the years as Congress assigned additional responsibilities to the Director and now include budget, personnel, payroll, buildings and facilities, statistical record keeping, and substantially all other administrative functions of the courts. Although much of the administration occurs at the level of the various courts, and has over the years been decentralized, the Administrative Office exercises substantial oversight and control.

[41] S. REP. NO. 781, *supra* note 25, at 2408.

[42] *See* FEDERAL COURT GOVERNANCE, *supra* note 38, at tbl. 1 (entitled "Conference Committees and Parallel AO Units").

[43] S. REP. NO. 781, *supra* note 25, at 2409.

The divergence of the Center's functions concerning the Conference from what was originally contemplated was also influenced by the Center's intended status as an independent agency for research and education. The Center was to be insulated from the pressures and loyalties that operate in the work of the Conference and its committees. This has led to a somewhat complex relationship between the Center and the Conference and its committees. The complexity was foreshadowed in the Senate Report which, while it spoke of the Center's "ultimate responsibility . . . to the Judicial Conference" (which elects its Board and receives an annual report from the Center), also stated that the work prescribed by the Center Board would be given precedence over that requested by the committees.[44] The Center conducts extensive research and some education and training at the request or suggestion of the Conference. It does not do so under Conference direction, however, and its agenda, particularly in education and training, responds to much more than Conference requests.[45] It reserves control over the selection of projects to undertake and how to conduct them, and its findings, conclusions, and recommendation are not subject to Conference approval.

Center independence, the value of which is generally accepted, is tempered, however, by the necessity of maintaining a productive working relationship with the Conference and its committees. The Center recognizes the importance of such a relationship: first, because the Conference is, in effect, the Center's client; and second, in the interest of self-preservation. Were it to be perceived as a rogue elephant, even a small one, asserting its independence irresponsibly in ways that might frustrate the Conference's policies, no degree of statutory autonomy would prevent the Center from becoming marginalized. The Center has no statutory obligation to perform research requested by the Conference, a fact that may have contributed to an occasional perception by a few within the judiciary that it frequently declines such requests. A 1991 special committee ap-

---

[44] S. REP. NO. 781, *supra* note 25, at 2413.

[45] Program decisions are informed by input from various Center advisory committees as well as by the extensive and ongoing contacts between Center staff, judges, and court personnel throughout the system.

pointed by the Chief Justice to study the Center-Administrative Office relationship found, however, based on a review of the record, that "there have in fact been only a very few instances of [conference committee] assignments being declined by the FJC."[46]

The Center can serve the Conference well even if, from time to time, it differs with the Conference or the Administrative Office on the desirability or effectiveness of a requested research or education project or reaches conclusions that differ from Conference policy or from the policy preferences of some of its members or other judges. Indeed, it serves the judiciary well when it provides a different point of view, reached through responsible research free from entanglement in day-to-day operational needs. Thus, the Chief Justice's special committee concluded that "[i]n matters relating to research and the formulation of conclusions, the FJC should have complete independence to explore ideas and proposals and to make evaluations, whether or not their findings comport generally with the findings of the Administrative Office or the Judicial Conference."[47]

Two recent examples illustrate the point. One involves nonbinding court-annexed mandatory arbitration. Congress asked the Center to study congressionally authorized arbitration programs in twenty pilot districts. The Center was then to recommend, based on the study, whether Congress should authorize the voluntary extension of such programs.[48] Based on favorable findings, the Center's Board recommended that Congress authorize any district wishing to do so to adopt a mandatory nonbinding arbitration program.[49] Partly due to the Center's study and recommendation, the chair of the relevant House

---

[46] Report of the Ad Hoc Committee to Study the Relationship between the Federal Judicial Center and the Administrative Office of the United States Courts 7 (Sept. 24, 1991) (on file with the Federal Judicial Center). So far as the author knows, such declinations have been by mutual consent.

[47] *Id.* at 14.

[48] Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642, 4659 (1988). This study was published as BARBARA S. MEIERHOEFER, FEDERAL JUDICIAL CENTER, COURT ANNEXED ARBITRATION IN TEN DISTRICT COURTS (1990).

[49] The resolution of the Center Board may be found in *The Court Arbitration Authorization Act: Hearing on H.R. 1102 Before the Subcomm. on Courts and Admin. Practice, Senate Comm. on the Judiciary*, 103d Cong., 1st Sess. 74-75 (1993) (prepared statement of Hon. William W Schwarzer).

Judiciary Subcommittee introduced legislation that would have authorized any district court to elect to adopt such a program. When this bill came before the Judicial Conference on a conference committee recommendation to endorse it, the Conference twice rejected the recommendation.[50] Shortly thereafter, the Center's Director was asked to testify before a congressional subcommittee on the Center's arbitration study and report. The Center's Board debated whether the Conference position on the legislation should control his testimony. The Board concluded that, at least where the Center's study and recommendations were made pursuant to a legislative mandate, the Center is bound to present the results of its study and recommendations, even if contrary to Conference policy.[51] This position remains mildly controversial, and some associated with the Conference believe that the judiciary should "speak with one voice," at least officially. The prevalent view within the judiciary and outside, however, appears to attach greater importance to the benefits of having an independent research agency. Such an agency, located within the judicial branch and with access to the judiciary, will further informed discussion of issues important to the administration of justice if it will report its research-supported findings.[52]

---

[50] *See* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 12 (Mar. 16, 1993); REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 45 (Sept. 20, 1993).

[51] Minutes of the Meeting of the Board of the Federal Judicial Center 2 (Sept. 24, 1993) (on file with the Federal Judicial Center).

[52] A similar situation arose after the Center reported on its Conference-requested evaluation of the Conference's pilot project on electronic news media reporting of civil proceedings in selected trial and appellate courts. The Center's study found almost no negative impact from the presence of cameras and, at the request of the Conference committee with responsibility for the pilot project, recommended national implementation. The Center's report and recommendations, and other considerations led the Committee to recommend that all federal courts have the option to allow news coverage of civil proceedings. The Judicial Conference, however, voted to maintain in place a Conference policy, to which all judges have voluntarily adhered, barring such coverage. The Center's report is published as M. JOHNSON, FEDERAL JUDICIAL CENTER, ELECTRONIC MEDIA COVERAGE OF FEDERAL CIVIL PROCEEDINGS, AN EVALUATION OF THE PILOT PROGRAM IN SIX DISTRICT COURTS AND TWO COURTS OF APPEALS (1994). The official report of the proceedings of the September 1994 Conference session has not yet been released, but see *Conference Acts on Courtroom Cameras*, THE THIRD BRANCH, Oct. 1994, at 1. Should there be legislative consideration of this policy, the Center may again be asked to testify about the research and its conclusions.

The most recent example of the Center's independence at work is in connection with the federal courts' development of their first long-range plan, undertaken on the recommendation of the Federal Courts Study Committee.[53] The Center provided extensive research and other staff support to the Judicial Conference Committee on Long-Range Planning. In addition, to stimulate and inform discussion of issues critical to the long-range planning process within the committee and the judiciary generally, and by interested members of the public, the Center prepared a series of issues papers. These papers, most in a dialectic format, analyze and discuss the strengths and weaknesses of (1) proposals to cap permanently the size of the federal judiciary,[54] (2) opposition to the so-called "federalization" of the administration of criminal and civil justice,[55] (3) major structural changes in the federal court governance system,[56] and (4) proposals to authorize federal courts to create mandatory alternative dispute resolution mechanisms.[57] An additional paper on options for federal criminal justice policy is in preparation.[58]

In each paper, the Center subjects established policies and prevailing preferences, and their underlying assumptions, to critical analysis. Although this exercise may have caused some discomfort, it has met with general approval. Whatever weaknesses some may find in these necessarily controversial papers, they provide evidence that those who deliberated on the Judiciary's Long-Range Plan had before them considered statements of alternatives. What lends strength to these papers is that they were written by authors inside and familiar with federal judicial administration. These individuals are better able than persons outside the judiciary to identify and evaluate relevant considerations.

---

[53] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 146 (1990).

[54] *See* BERMANT ET AL., *supra* note 1.

[55] WILLIAM W SCHWARZER & RUSSELL R. WHEELER, FEDERAL JUDICIAL CENTER, ON THE FEDERALIZATION OF THE ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE (1994), *reprinted in* 23 STETSON L. REV. 651 (1994).

[56] *See* FEDERAL COURT GOVERNANCE, *supra* note 38.

[57] D. STIENSTRA & T. WILLGING, FEDERAL JUDICIAL CENTER, ALTERNATIVE DISPUTE RESOLUTION: WHY IT DOES AND WHY IT DOES NOT HAVE A PLACE IN THE FEDERAL TRIAL COURTS (forthcoming 1995).

[58] J. EAGLIN ET AL., FEDERAL JUDICIAL CENTER, TOUGH CHOICES: THINKING ABOUT THE FUTURE OF FEDERAL CRIMINAL JUSTICE (forthcoming 1995).

Although the Center's activities relating to the work of the Judicial Conference are important, they must be viewed in context. Most of the Center's work involves its various education and training programs, with their related publications and media activities. These programs and activities are described below.

2. The Administrative Office

The original Judicial Conference proposal would have "established [the Center] in the Administrative Office of the United States Courts," rather than in "the judicial branch of government." The Center would be responsible to an autonomous board of judges, however, instead of to the Director of the Administrative Office.[59] No one thought that the Administrative Office should govern it.[60] The Director of the Administrative Office argued for complete separation, both to protect against the possible absorption of research funds and personnel to meet the operational needs of the courts, and to ensure judicial control. The Senate Report adopted the same view, stating:

> The reasons that counsel against integration of the Center and the Administrative Office are practical as well as theoretical. In their research into the administrative practices and procedures of the courts, personnel management techniques, et cetera, members of the Center staff ought to be insulated from intraorganization loyalties or pressure, or both. Such insulation can best be provided by vesting the Federal Judicial Center with an identity of its own and an organizational independence of the Administrative Office, much of whose past and present effort the Center staff may have to review and evaluate. The Center's ultimate responsibility, your committee believes, should be to the Judicial Conference of the United States.[61]

---

[59] *Hearings*, *supra* note 4, at 40.

[60] Warren Olney recalled in a 1977 interview why the statute had been drafted to put the Center in the Administrative Office: "We had to say it was located somewhere. As a matter of fact putting it within the judicial branch is a better way to word it. We didn't word it that way. I don't know maybe we weren't just good enough draftsmen." When asked if there had been any thought that the Center "would be part of the AO in the same sense as any other division," he responded: "Oh no, oh absolutely not. Not at all, no." Ms. of Interview with Warren Olney, III, in Berkeley, Cal. (Oct. 4, 1977) (on file with the Federal Judicial Center) (interviewer, Russell Wheeler).

[61] S. REP. NO. 781, *supra* note 25, at 2410-11.

The decision to place the Center outside the Administrative Office has over the years proved to have been both wise and workable (although the Center's tasks have not included review and evaluation of the work of the Administrative Office). It has undoubtedly saved the Center from operational entanglements and furthered its independence and effectiveness. Chief Justice Rehnquist has described the two agencies as "separate but mutually reinforcing support agencies, . . . provid[ing] the courts and the Judicial Conference complementary services and, on occasional matters of policy, diverse perspectives that benefit the decision-making process."[62]

The Senate Report stated that "[t]he Administrative Office and the Center will pursue parallel courses: the former as the operations and housekeeping agency of the courts, the latter as their research and development unit,"[63] and that has generally been true over the years. Like any pair of sister agencies, however, they have occasionally experienced confusion in the allocation of responsibilities. In part, this can be attributed to the need to adapt to new and unanticipated conditions and circumstances as they arose.

For example, when the Center was created in 1967, the application of data processing to the problems of the courts was still a novel idea.[64] The Act directed the Center's Board "to study . . . ways in which automatic data processing and systems procedures may be applied to the administration of the courts . . . ."[65] By the mid-1980s, however, automation had become an integral part of the courts' operations. Thus what had originally been a research responsibility of the Center became an operational function. This led to a transfer in 1990 of all development, implementation, and evaluation of court automation systems and supporting technologies to the Administrative

---

[62] Chief Justice William H. Rehnquist, *Chief Justice Issues 1992 Year-End Report*, THE THIRD BRANCH, Jan. 1993, at 6.

[63] S. REP. NO. 781, *supra* note 25, at 2409.

[64] *See Empirical Research*, *supra* note 5, at 43. In an article reporting on the early years of the Center, then retired Justice Tom C. Clark, the Center's first Director, expressed the view that while judicial education was important, "the death knell for backlogs will not be sounded without major technical and management changes such as the adoption of the COURTRAN II system." Tom C. Clark, *The Federal Judicial Center*, 1974 ARIZ. ST. L.J. 537, 545.

[65] 28 U.S.C. § 623(a)(5) (1988).

Office. The Center retained control over the development and implementation of technologies supporting its research and education missions and its internal operations, and the "evaluat[ion of] emerging technologies . . . for their application to future needs of the Judiciary."[66]

A more recent illustration is found in the implementation of the Civil Justice Reform Act of 1990,[67] which sought to bring about improvements in the civil litigation process. The Act required each district court, with the assistance of an advisory group, to evaluate its civil and criminal dockets, and develop and implement a civil justice expense and delay reduction plan. The Act charged the Judicial Conference with reviewing these plans, but it also placed responsibility on the Administrative Office and the Center for a number of critical tasks: making recommendations for a model expense and delay reduction plan, reporting on all of the districts' plans, preparing a Manual for Litigation Management and Cost and Delay Reduction, and conducting comprehensive education and training programs for judges and court staff. Though this legislation was initially opposed by the judiciary, once adopted it received much attention throughout the country.

The Judicial Conference assigned the responsibility of implementing the Act to its Committee on Court Administration and Case Management. That Committee required substantial assistance from both agencies, as did the courts engaged in implementing the Act. The Act did not specify how to allocate these joint responsibilities, so the staff of the two agencies worked out ad hoc arrangements. Under these arrangements, the Center took primary responsibility for work falling within its traditional area of expertise: case management training, assisting in developing and managing Alternative Dispute Resolution (ADR) programs, and preparing the related publications. The Administrative Office focused on the many administrative tasks involved in the implementation of the Act. It seems safe to say that the symbiosis of the respective experience and expertise of the staff

---

[66] Memorandum to the Chief Justice (Jan. 29, 1992) (on file with the Federal Judicial Center).

[67] 28 U.S.C. §§ 471-482 (1988 & Supp. V 1993).

of the two agencies on these projects improved the performance of both and enhanced the quality of the product.

Of course, the responsibilities and consequently the size of the Administrative Office have increased substantially over the years. In part this was due to the parallel growth of the Judicial Conference's responsibility and in part because Congress assigned it new responsibility. Even as the Administrative Office moved toward decentralization by delegating some of its responsibilities to local court units, the scope of its activities grew. In a number of areas, administrative oversight of the activities of court personnel, such as probation and pretrial services officers, touches on training activities. By and large, however, close coordination of the two agencies' activities has been successfully maintained at the operational level. Close working relationships exist in various areas, such as those relating to criminal law and bankruptcy matters. The result has been to make available to court personnel the expertise of an independent organization, specializing in adult education and empirical research and unencumbered by the administrative responsibilities and concerns of an operating agency.

Could a single agency perform the functions of the Center and the Administrative Office more efficiently and effectively? In the case of these two agencies, it seems fair to say that any duplication of effort, if it existed, would be minor and beneficial, serving as a stimulant to both agencies to enhance efficiency and performance and achieve coordination.

A recent illustration of how a matter of joint concern can be turned into a cooperative venture is the publication of a case management manual for bankruptcy judges. The manual benefited from the combined application of the resources and perspectives of the two agencies. Another illustration is a project the Center recently launched to study and develop improved ways of handling pro se litigation. The Center's initiative served as a catalyst for the coordination of ongoing activities in the Administrative Office, in Judicial Conference committees, and in the courts. In sum, there are good grounds supporting the consensus within the judicial branch that the separate existence of these two agencies serves it efficiently and well.

C. Other Units Within the Judicial Branch

The Center has contacts with the Supreme Court, Congress,[68] and agencies of the executive branch, including the Bureau of Prisons, the Federal Bureau of Investigation, and, on occasion, other parts of the Department of Justice, the General Accounting Office, and the National Archives. The Center also deals with other units within the judicial branch, discussed briefly below.

1. The United States Sentencing Commission: In 1984, Congress created the United States Sentencing Commission as an "independent commission in the judicial branch"[69] to promulgate sentencing guidelines. Congress gave the Commission broad statutory authority to conduct activities, including research and training programs in sentencing for judges and probation officers.[70] The Commission began work in 1985 on its difficult assignment in an atmosphere of hostility. Judges opposed restricting their sentencing discretion and probation officers were concerned that rule-based sentencing would greatly alter their jobs. These factors, compounded by an overlap of statutory duties with the Center, led initially to some mutual suspicion and antagonism between the two agencies. Some saw the Center as driven by the judiciary's hostility to the Commission, while others thought the Commission arrogant and dedicated to serving as the handmaiden of the Justice Department, rather than as a part of the judicial branch. Notwithstanding these early antagonisms, however, the Center and the Commission achieved a cooperative relationship in the development and production of a massive training program on guideline sentencing as the system came into effect in November 1987. The joint training programs have continued and have proven efficient and successful, joining the expertise of two agencies, the Commission's in sentencing and the Center's in adult education.

---

[68] Among major projects undertaken recently at the request of Congress are a study of alternative structures for the courts of appeals, a study of the prevalence and impact of intercircuit conflicts, and a study of the operation of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035.

[69] 28 U.S.C. § 991(a) (1988).

[70] 28 U.S.C. § 995(a) (1988 & Supp. V 1993). Section 995(a)(12)-(16) establishes Commission research, data gathering, and dissemination responsibilities; § 995(a)(17)-(18) establishes education and training responsibilities.

2. Circuit and local court governing bodies: The building blocks of the federal judicial system are the twelve regional circuits, whose administration is the responsibility of the circuit judicial councils.[71] The councils have evolved since their creation by statute in 1939 into circuit governance bodies with order-making authority.[72] The chief judge of the circuit chairs each circuit council, composed of an equal number of circuit and district judges. As has been true of the Judicial Conference, the role and visibility of the councils has increased with changing circumstances. The growing trend toward decentralization has directed attention to the purpose of the councils, and the rationale underlying the 1939 Act, that as much administration as possible should be conducted close to home.[73] Although the circuit council is the chief administrative agency within a circuit, responsibility for court administration within a circuit is shared to a degree with the court of appeals and the various district courts in the circuit.

The Center regards these bodies as clients and responds to requests from them for education, training, and research assistance. Thus the Center works with circuit committees, and at times with chief judges and with court managers, on education and research projects. Its programs have always included judicial workshops for regional circuits, which it usually plans in cooperation with representatives from the involved circuits. The Center has also provided staff training programs to courts to help them address a particular problem or to serve as a pilot for possible extension to other courts. It has undertaken research to study the impact and advisability of procedures in a particular court. But the Center's policy to respond to the expressed needs of a single circuit or other court unit whenever possible must be accommodated to its primary obligation to meet aggregate system needs and to conduct system-based education, training, and research. Because its limited resources restrict the Center's abili-

---

[71] In addition to the regional circuits, the Court of Appeals for the Federal Circuit exercises national jurisdiction over specified categories of appeals.

[72] 28 U.S.C. § 332(d)(1).

[73] WHEELER, *supra* note 10, at 18 (1992) ("Instead of centering immediately and directly the whole responsibility for efficiency upon the Chief Justice and the Supreme Court, I think there ought to be a mechanism through which there would be a concentration of responsibility in the various circuits.") (quoting Chief Justice Hughes).

ty to fashion a training program or research project for a single court, it attempts to design its general program offerings in ways that should meet most identified needs of courts and judges. When programs or projects are conducted in a single court, it is generally with the expectation that the result will have system-wide utility. Moreover, increasingly the Center has developed training curricula and supporting materials that enable court personnel themselves to administer training programs on site, tailored to the needs of the court while avoiding the expense of travel.

The functional difference between how the Center and the Administrative Office allocate funds is not always understood. Congress appropriates funds to meet system resource needs as well as those of the individual court units, and the Administrative Office is charged with administering those funds. This includes allocating shares of the judicial branch appropriation among courts according to formula and, within limits, delegating its authority to spend the funds.[74] The Center, in contrast, is charged by Congress to provide education and training and conduct research, not to delegate those functions and distribute funds across the country for court units to pursue their own projects. Were the Center to attempt to allocate a portion of its funds to each court, the per court or per capita allocation would, in any particular case, be too small to do much good, and in the process the economies of scale the Center is able to realize would be lost. Instead, the Center constantly monitors needs as they are identified across the entire system and develops programs and projects that respond to the most urgent of those needs in ways that will benefit the system as well as particular courts.

III. THE CENTER'S STRUCTURE AND WORK TODAY

Responsiveness, adaptability, and initiative have marked the course of the Center's existence. They are reflected in the evolving relationships with other judicial branch entities that, as described above, have been shaped more by the exigencies of current needs than by the logic of institutional structure. They

---

[74] *See* 28 U.S.C. § 602(d) (1988).

are also reflected in the evolution of its organization and its work. The Center has come a long way from its early days when it consisted of Justice Clark, his assistant who later became the director of the Interjudicial Affairs and Information Services Division, and a research assistant who became the director of the Research Division. Its staff has grown to approximately 160 persons, its budget to over $18 million,[75] and it has undergone a number of organizational changes. Today, the Center comprises five divisions and two offices whose work is summarized briefly below.[76]

A. The Court Education Division develops and administers education and training programs and services for nonjudicial court personnel, such as those in clerks' offices and probation and pretrial services offices, and management training programs for court teams of judges and managers. It has four major program areas:

1. Orientation (initial training) for probation and pretrial services officers, newly appointed supervisors and managers, and new training specialists who administer training programs within their courts.

2. Continuing training for supporting personnel in these areas: enhancing administrative and management skills of court and systems managers (including teams of judges and nonjudges), developing leadership skills of future managers, improving critical job skills and productivity, and furthering the quality and quantity of local training.

3. Special focus programs to enhance the performance of selected employee groups, including appellate case managers, courtroom deputies, circuit executive senior staff, official court reporters, financial and docketing supervisors, and probation and pretrial services officers.

4. Local training administered by in-court training specialists who develop and arrange education and training to meet the particular needs of their courts. The Center provides funding, consultation, faculty, and also Center-developed curriculum

---

[75] To supplement its federal budget the Center has also received some nongovernmental funds for particular projects through contributions to the statutorily-created Federal Judicial Center Foundation. *See* 28 U.S.C. § 629 (1988).

[76] *See* FEDERAL JUDICIAL CENTER ANN. REP. 5 (1994).

packages with lesson plans, training aids, and sometimes video components.

The division's local programs reach over 16,000 persons. In addition it conducts over 100 seminars and workshops annually for over 3000 participants.

B. The Judicial Education Division develops and administers education programs and services for appellate, district, bankruptcy, and magistrate judges, career court attorneys, and federal defender office personnel. It has four major program areas:

1. Orientation for new judges at every level, providing in-depth introduction to the federal court system and to substantive and procedural areas (such as case management, jurisdiction, sentencing, and the rules of evidence) that will compose a substantial portion of their work.

2. Continuing education programs comprising a series of three-day seminars offering each judge an update in relevant areas of statutory and case law and in case management. These programs are designed each year by the Center, in cooperation with judicial education committees in the circuits.

3. Special focus programs that provide intensive training for small groups of judges in specific subject areas such as criminal procedure, environmental litigation, health care issues, scientific evidence, intellectual property, and financial accounting.

4. Cooperative programs in some of which judges and staff receive modest support to attend continuing education programs, such as those produced by the American Law Institute—American Bar Association (ALI/ABA). In others, the Center works with law schools and universities to expand its offerings to judges.

The division conducts over fifty seminars and workshops annually for some 2600 participants.

C. The Planning and Technology Division supports the Center's education and research activities by developing, maintaining, and testing technologies for information processing, education, and communications. It also supports the long-range planning activities of the Judicial Conference, its committees and the courts with policy research, analysis of emerging technologies, and other services.

D. The Publications and Media Division develops, produces, and distributes the Center's media programs and publications.[77] It has three major program areas:

1. Producing educational video programs about the federal court system and substantive and procedural issues handled by the courts, for use in orientation programs for new judges and court personnel and in conjunction with other Center programs; and managing the distribution of these programs and of audio tapes of Center seminars and workshops.

2. Providing editorial, production, and distribution services for Center research and educational publications and other written materials, and producing and maintaining monographs, manuals, guides, and periodicals.

3. Maintaining a collection of published and unpublished materials on judicial administration and providing research assistance to Center staff and judicial branch personnel.

The Center annually distributes some 40,000 publications and 115,000 periodicals, responds to 3400 loan requests for audiovisual materials from judges and judicial branch personnel, sends over 700 copies of media programs to the courts, and answers almost 2000 requests for information from judges and from libraries, government agencies, academic institutions, and research organizations.

E. The Research Division conducts research and evaluation on the federal judicial process, court management and governance, and sentencing and its consequences. Many Center research projects are undertaken at the request of Judicial Conference committees; the Center currently serves some fifteen committees. Other projects respond to requests from courts, circuits, or Congress, or are internally generated. Research Division studies assess the need for additional judicial resources, evaluate the effectiveness of innovations in case management and court administration, and respond to court-related information needs of other branches of the government or of the public. Major current work involves a long-term study measuring litigation-related demands on judicial time in the district courts, preparation of a guide for the management of pro se litigation, study of the use

[77] The Center's media programs and publications are listed in Center catalogues published periodically.

of expert testimony in federal trials, study of alternative structures for the courts of appeals, assessment of intercircuit conflicts, study of revisions of the rules of procedure, analysis of civil justice cost and delay reduction plans and programs, and support for the effective use of ADR programs in the courts.

F. The Federal Judicial History Office is engaged in four project areas:

1. Joint efforts with the Administrative Office and the National Archives to preserve court records, as well as providing encouragement and support for the preservation of the chambers papers of federal judges.

2. Creation and maintenance of an automated database of biographical information about federal judges from 1789 to the present.

3. Furthering the preparation of oral histories of federal judicial personnel and conducting such histories in several areas, including, with the support of the Supreme Court Historical Society, of retired Justices and of women and minority judges.

4. Producing manuals and directories of federal judicial history sources.

G. The Interjudicial Affairs Office conducts programs in four areas:

1. Continuing the Center's long-standing support of state-federal judicial councils, active in about thirty-five states, and of other aspects of judicial federalism, including cooperative projects with the National Center for State Courts and publication of a newsletter.

2. Providing services to the Judicial Conference Federal-State Jurisdiction Committee and the Committee on International Judicial Relations and to the National Judicial Council of State and Federal Courts.

3. Providing briefings and education programs for foreign judicial and legal officials, assisting other agencies and organizations in developing and providing such education programs, and administering the Center's Visiting Foreign Judicial Fellows program. The Center annually provides briefings to some 600 visitors from 115 countries.[78]

---

[78] Justice Clark reported that in 1974 the Center had been visited by delegations from ten countries. *See* Clark, *supra* note 64, at 540.

Although the foregoing description reflects the Center's divisional structure, interdivisional teams carry out more and more of its work. These teams are able to bring to bear on a project all of the relevant expertise and resources available in the Center. Recent interdivisional projects included preparation of the first interactive multimedia CD-ROM program on the Federal Rules of Civil Procedure to serve both as a training vehicle and permanent reference, the presentation of seminars for judges on scientific evidence, and a management conference for chief district judges.

While the Center's mandate is directed at improved judicial administration in the federal courts, its implementation also takes into account that the federal courts are not an insular institution. Improvements in the federal courts are closely linked to the work of other institutions and organizations and benefit from cooperative relationships. A significant activity of the Center in recent years has been to advance judicial federalism by reaching out to the state court system. The Center recognizes the growing importance of a cooperative and mutually supportive relationship between the systems, especially in light of the proliferation of mass tort litigation and the demands of criminal law enforcement. To that end the Center has been actively engaged in projects with the State Justice Institute and the National Center for State Courts to help state and federal courts develop working relationships. Among other things, it participated in the presentation of two national conferences, one on the general theme of judicial federalism and the other on mass tort litigation. The Center has also developed working relationships with the American Bar Association, the American Law Institute, the New York University Institute of Judicial Administration and various other law schools and universities, the Carnegie Corporation, the CPR Institute for Dispute Resolution, and the Judicial Leadership Development Council, among others, enlarging its capacity to provide education and conduct research.

IV. ASSESSING THE CENTER'S ROLE

A. The Institutional Context

In assessing the Center's role, it is first necessary to understand the context in which it operates. The Center is charged by its statute with "further[ing] the development and adoption of improved judicial administration in the courts of the United States."[79] The premise underlying that charge was that merely adding judges would not improve the administration of justice; better judicial administration demands better research, better training, and better continuing education.[80] But the path to improved judicial administration, notwithstanding its obvious appeal, is strewn with vexing questions and dilemmas.

Judicial administration, in its broadest sense, encompasses those policies and practices that shape the process for the just and efficient resolution of the disputes before courts.[81] Chief Justice Warren's assertion that "[t]he most important job of the courts today is not to decide what the substantive law is, but work out ways to move the cases along and relieve court congestion" shows the importance attached to judicial administration at the time of the Center's creation.[82] Judicial administration, or working out ways to move cases along and relieve court congestion, is a comprehensive responsibility. It concerns the mechanics of court operations — making the best use of personnel and, as Justice Clark was expecting, of automation and data processing. The Center's work has contributed to progress in this area.

Improving judicial administration also involves the work of judges. In the federal court system that process is in the hands of some 1800 judges — over half of them life-tenured, appointed by the President and confirmed by the Senate, the rest appointed by the courts and serving for terms. The defining characteristics of this system are:

---

[79] 28 U.S.C. § 620(a).

[80] *See supra* note 4 and accompanying text. Indeed, whether the addition of more judges might not risk a deterioration of the quality of justice in the federal courts is a much-mooted subject. *See* BERMANT ET AL., *supra* note 1.

[81] A. Leo Levin, *Research in Judicial Administration: The Federal Experience*, 26 N.Y.L. SCH. L. REV. 237, 238 (1981) (citing Russell R. Wheeler, *Judicial Reform: Basic Issues and References*, 8 POL'Y STUD. J. 134, 135 (1979)).

[82] *Id.* at 240.

- A deep institutional commitment to the constitutional vision of an independent judiciary.
- An institutional structure that in a sense is highly democratic but can also be seen as totally nonhierarchical and perhaps even anarchic.
- A legal framework that grants judges, within the limits of established substantive and procedural law, wide discretion in the management of their judicial duties.
- A conservative professional tradition which, committed to precedent and respect for settled expectations as an element of due process, is not readily receptive to change.[83]

These defining characteristics set the federal judicial system apart from institutions in, for example, business and industry, that tend to look at innovation and change as essential to survival. That is not to say the courts are monolithic in resisting innovation and change; in fact, many judges strongly support it. It is to say, however, that the burden of proof plainly rests on those who would urge it.

B. The Center's Response

How then has the Center fared in pursuing its mission to further the "adoption of improved judicial administration" in a highly individualistic system not susceptible to direction from the top and institutionally resistant to change?[84] Perhaps instinctively, the Center from the outset recognized that though improved judicial administration in the abstract might be welcomed, particular reforms would not generally be received with open arms. Thus, although in some areas the Center has made the case for change (judicial case management, for example), it has usually eschewed the role of an advocate of change.

The Center has worked within the limits created by its setting. To do its job, it must be a part of the judicial institution. But to do its job, it must also be independent of the institution, capa-

---

[83] Judges tend to resist change even when the case for change seems compelling; for example, many judges still decline to give preliminary and simplified jury instructions, to allow jurors to take notes, and to provide them with a written copy of the charge.

[84] Many judges would probably agree with Lord Macauley who, when asked to support a reform measure in the House of Lords, responded: "Reform? Don't talk to me about reform. Things are bad enough as they are."

ble of challenging prevailing views. The thread that runs through all of its work has been to open doors and windows, to help the judiciary seek out the facts through rigorous research, and to challenge it to ask the right questions and identify and consider options.

Much of the Center's work has used the approach and techniques of social science research, which are different from the adversary process on which the courts traditionally rely to reach decisions. Those techniques depend on the analysis of the available evidence to determine whether it supports or refutes a hypothesis. Social science methodology imposes a measure of rigor and discipline on the process of reaching conclusions. It requires the rejection of a priori reasoning. Thus, on the one hand it challenges assumptions and settled ways, and is not designed to validate preferences of and outcomes desired by the establishment. On the other hand, it can also disappoint individual judges who, having devised their own techniques that they are convinced will improve the administration of justice and speed dispositions, may look on research as a means of confirming their intuition rather than exposing possible problems. Similarly, its use may cause conflict with judges who may look on teaching others about their technique as an opportunity, not to analyze its strengths and weaknesses, but to promote its use.

It might be thought that placing research and education outside of the judicial branch would avoid the problems faced by a research and education agency located within the judicial branch but expected to bring critical analysis to its structure and procedures. The classic justification for academic freedom is to protect scholars' ability to study and teach uninhibited by the preferences of ruling elites. Its premise is that in the long run people learn better and knowledge is more reliable if acquired by a process that is above all disinterested. But experience has shown that the academy for the most part is not a source for the research and education the courts require. Many aspects of judicial administration are not only complex but also arcane, and the academy ordinarily does not possess the requisite level of experience to be helpful to judges. Public institutions such as the courts benefit from an in-house research and education capability because it can provide an accumulated, uninterrupted body of knowledge and expertise — what Maurice Rosenberg

called in the 1967 hearings on the Center bill "an agency that has a consecutive strain on the line and is willing to work three years without necessarily turning up a tremendous new discovery, but just adding one more brick to the edifice of knowledge."[85]

To serve the judiciary effectively, therefore, the Center has had to commit itself to conducting research and education responsibly and with unimpeachable integrity, following the facts wherever they may lead. This has not always been easy, when at times the Center's conclusions came into conflict with the views of judicial leaders. To accomplish its purpose, the Center has followed these guidelines in its research:

- Be certain that the research and data gathering meet the highest professional standards.
- Accept the results with caution, however, recognizing that no research design is perfect.
- Recognize the limits of empirical research and be open to the possibility that the knowledge and intuition of experienced judges can effectively complement research findings.
- State clearly what the research can and cannot do and what it can and cannot tell,[86] compelling policy makers to identify the questions they want answered and to realize that those questions are theirs and not the Center's.
- Provide services that will be helpful to the courts, including responding to quick turn-around requests for information (even if not involving full-scale research).
- Inform policy makers about the value of systematic quality research: the advantages of learning the strengths and weaknesses of a proposal through controlled experimentation rather than after it has been made fully operational.
- In appropriate cases, include carefully circumscribed policy advice and recommendations, clearly disclosing the source.

Similarly, in its education and training programs, the Center, while offering participants the benefits of accumulated learning and experience of others, has sought to eschew prescription,

---

[85] *See Hearings, supra* note 4, at 280 (statement of Professor Maurice Rosenberg). *See generally* Levin, *supra* note 81 (discussing benefits of in-house research for federal courts).

[86] Research, for example, can tell policy makers whether more cases will settle under an appellate settlement program than were there no program, but it cannot tell them whether the quality of justice is better under the program than were there no program.

challenging them to question the status quo, to test assumptions, and to consider options.

C. Has the Center Succeeded?

No discernible objective measures exist to assess the results of the Center's work. While the productivity of the federal courts has increased enormously since 1967,[87] there is no objective measure for determining whether the quality of justice has improved, deteriorated, or remained the same. Nor obviously can the Center take credit for the increase in productivity — most of it is attributable to much greater judicial workloads. But the Center surely has made major contributions to it: from the outset, much of its work has been directed to improving judicial case management. For example, the Center's earliest education programs supported the shift from the master calendar to the individual assignment system, now the standard throughout the system.[88] Case management has been central to Center training programs — both for judges and court personnel — and remains so today. Center research has analyzed case management techniques and practices, both in the district and the appellate courts; its studies of appellate screening processes and prebriefing conferences, for example, have led to their widespread adoption. Center publications have reported on the results of studies, discussed options and possibilities, provided references and guidance, and raised the level of judicial sophistication. Orientation for new judges and probation and pretrial services officers, continuing education for all judges, management and supervisory training for those in positions of leadership, and skills training for court staff generally undoubtedly have played a vital, if immeasurable, part in enabling the courts to meet the challenges of growing volume and of new tasks.

It would be wrong, however, and unfortunate, to see the Center's commitment as being simply to increased efficiency. It has never lost sight of the fact that its first obligation is to the quality of justice. Its commitment is well described in Rule 1 of the Federal Rules of Civil Procedure: to further the just, speedy,

---

[87] *See supra* note 1; *supra* text accompanying notes 25-26.

[88] *See* Clark, *supra* note 64, at 545.

and inexpensive determination of cases. Whatever the project, whether education, training, or research, the quality of justice must in the end be its justification, through the improvement of skills, expansion of knowledge, and deepening of understanding of judges and other judicial branch personnel.

The ways in which the Center has contributed to improved judicial administration are too numerous to catalogue here. But aside from research, planning, education, and training, the Center has also filled another important need: to enable judges to meet and communicate with each other and benefit from the resulting exchange of views and experience. Of all professionals, judges are probably the most isolated. The Center has provided them with opportunities to break out of that isolation, to learn from each other, and in the process to gain a sense of being a part of a cohesive, collegial, and dynamic institution. If we cannot measure with precision the Center's impact, we can say with assurance that without the Center, the federal courts would be a poorer institution.

That is not to say that all that the Center has done has inevitably met with success or approval. As noted, Conference committee proposals based largely on the Center's studies and recommendations of nonbinding mandatory court-annexed arbitration and of the discretionary use of cameras in civil trials have not met with the approval of a majority of the Judicial Conference, though they received substantial support outside. Judicial views of optimum arrangements and content for education and training vary, and no single program will satisfy all. Some of the Center's discussion papers have addressed controversial areas and engendered spirited debate. But the debate over matters such as these has itself been beneficial, enriching the dialogue and the quality of policy deliberations in the judiciary. Across the entire spectrum of the Center's work, approval greatly outweighs disapproval.

CONCLUSION

As we hold up the mirror of history, we see yesterday reflected in today. Much of the same alarm about the state of the federal courts heard at the time of the creation of the Center is heard again. The volume of cases and the complexity of the task

continues to be staggering, and the decline in resources has exacerbated the conditions of the courts. The needs that led to the creation of the Center are perhaps even more pressing today than they were then. If the Center did not exist, it would have to be invented.

The Center's record confirms the wisdom of its founders and its own capacity to adapt and to respond to the demands of the times. The decision to create it as a separate and independent agency within the judicial branch has been vindicated by the efficiency and effectiveness with which the Center has been able to perform its functions and the speed with which it has adapted and responded to changing conditions. The reasons that motivated the Center's founders in designing its structure remain valid. That the Center's work has met with approval, however, does not afford it laurels on which to rest. The needs of the judicial branch change constantly. As we have seen, the Center, no less than the federal judicial system, is a very different place today from what it was twenty-five, even five or ten years ago. If it is to serve well, it will have to continue to evolve, to adapt to ever-changing circumstances. Current programs, no matter how well they meet the needs of today, will not necessarily meet those of tomorrow. Entirely new demands will appear to which the Center will have to respond, perhaps under conditions of greater adversity. What those demands will be no one can say now, but it is safe to say that the judiciary's need for the Center will grow, not decline. No other body is available to serve that need as the Center can serve it, and as it has served it over the years. With a long record of accomplishments and a rich store of experience and expertise, the Center is well situated to continue to bring improved judicial administration to the federal courts in the years ahead.

WILLIAM W SCHWARZER
Bibliography

Books, Manuals, and Monographs

MANUAL FOR COMPLEX LITIGATION, THIRD (William W Schwarzer ed., forthcoming 1995) (with FJC staff)

WILLIAM W SCHWARZER, LYNN H. PASAHOW & JAMES B. LEWIS, CIVIL DISCOVERY AND MANDATORY DISCLOSURE: A GUIDE TO EFFICIENT PRACTICE (2d ed. 1994)

WILLIAM W SCHWARZER & RUSSELL WHEELER, ON THE FEDERALIZATION OF THE ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE (1994), *reprinted in* 23 STETSON L. REV. 651 (1994)

WILLIAM W SCHWARZER, A. WALLACE TASHIMA & JAMES M. WAGSTAFF, FEDERAL PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL (1994)

WILLIAM W SCHWARZER, IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES (1993) (with FJC staff)

WILLIAM W SCHWARZER, MANUAL FOR LITIGATION MANAGEMENT AND COST AND DELAY REDUCTION (1992) (with FJC staff)

WILLIAM W SCHWARZER, NANCY WEISS & ALAN HIRSCH, JUDICIAL FEDERALISM IN ACTION: COORDINATION OF LITIGATION IN STATE AND FEDERAL COURTS (1992), *reprinted in* 78 VA. L. REV. 1689 (1992)

WILLIAM W SCHWARZER, LONG RANGE PLANNING FOR CIRCUIT JUDICIAL COUNCILS (1992)

WILLIAM W SCHWARZER, ALAN HIRSCH & DAVID BARRANS, SUMMARY JUDGMENT UNDER RULE 56 FRCP (1991), *reprinted in* 139 F.R.D. 441 (1992)

WILLIAM W SCHWARZER & ALAN HIRSCH, THE ELEMENTS OF CASE MANAGEMENT (1991)

WILLIAM W SCHWARZER, MANAGING ANTITRUST AND OTHER COMPLEX LITIGATION (1982)

Chapters

William W Schwarzer, *Management of Expert Evidence, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (1995)

William W Schwarzer & Alan Hirsch, *The Modern American Jury — Reflections on Veneration and Distrust, in* VERDICT, ASSESSING THE CIVIL JURY SYSTEM (1993)

William W Schwarzer, *Defining Standards of Review, in* THE FEDERAL APPELLATE JUDICIARY IN THE 21ST CENTURY (1989)

William W Schwarzer, *Instructing the Jury, in* MASTER ADVOCATES' HANDBOOK (1986)

William W Schwarzer, *Practical Problems of Organizing Closely-Held Corporations, in* ADVISING CALIFORNIA BUSINESS ENTERPRISES (1958)

Articles

William W Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. (forthcoming 1995)

William W Schwarzer, *A Small Claims Calendar in Federal District Courts: A Proposal for a Pilot Program*, 78 JUDICATURE (forthcoming 1995)

William W Schwarzer, *Judicial Federalism — A Modest Legislative Proposal*, 73 TEX. L. REV. 1529 (1995)

William W Schwarzer, *Rule 11: Entering A New Era*, 28 LOY. L.A. L. REV. 1501 (1994) (Burns Lecture)

William W Schwarzer, *Open Questions About ADR*, 12 CENTER FOR PUB. RESOURCES ALTERNATIVES 6 (1994) (Keynote Address at National ADR Institute for Federal Judges)

William W Schwarzer, *Civil and Human Rights and the Courts Under the New Constitution of the Russian Federation*, 28 INT'L LAW. 825 (1994)

William W Schwarzer & Alan Hirsch, *Summary Judgment After* Eastman Kodak, 45 HASTINGS L.J. 1 (1993); 154 F.R.D. 311 (1994)

William W Schwarzer, *In Defense of "Automatic Disclosure in Discovery,"* 27 GA. L. REV. 655 (1993)

William W Schwarzer, *Sentencing Guidelines and Mandatory Minimums: Mixing Apples and Oranges*, 66 S. CAL. L. REV. 405 (1992)

William W Schwarzer, *Democracy's Dawn — American Judges and the Rule of Law Abroad*, JUDGES' J., Fall 1992, at 34) (Robert H. Jackson Lecture, National Judicial College)

William W Schwarzer, *Fee Shifting Offers of Judgment — An Approach to Reducing the Cost of Litigation*, 76 JUDICATURE 147 (1992)

William W Schwarzer, *Sentencing Guidelines and Mandatory Minimums: The Need for Separate Evaluation*, 4 FED. SENTENCING REP. 352 (1992)

William W Schwarzer, *New Discoveries for the Discovery Process*, LEGAL TIMES, Nov. 25, 1991

William W Schwarzer, *Punishment Ad Absurdum*, CAL. LAW., Oct. 1991, at 116

William W Schwarzer, *Judicial Discretion in Sentencing*, 3 FED. SENTENCING REP. 339 (1991)

William W Schwarzer, *Science and Technology in Judicial Education and Research*, 1 CTS., HEALTH SCI. & THE LAW 423 (1991)

William W Schwarzer, *Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective Than Discovery?*, 74 JUDICATURE 178 (1991); 1 TRIAL PRAC. 1 (1990)

William W Schwarzer, *Reforming Jury Trials*, 1990 U. CHI. LEGAL F. 119; 132 F.R.D. 575 (1991)

William W Schwarzer, *Reflections on a Visit to the Soviet Union*, 3 CAL. INT. LAW SECTION NEWSL., Winter 1990, at 4

William W Schwarzer, *"New Frontier" for U.S. Courts*, S.F. CHRON., Aug. 1, 1990, (Briefing) at 6

William W Schwarzer, *The Cost of Rule 11*, 7 THE COMPLEAT LAW., Spring 1990 at 27

William W Schwarzer, *Federal Courts Turn 200 Years Old*, S.F. CHRON., Sept. 20, 1989, (Briefing) at 2

William W Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703 (1989)

William W Schwarzer, *Oral Argument*, THE RECORDER (San Francisco), June 29, 1989

William W Schwarzer, *Mistakes Lawyers Make in Discovery*, 15 LITIG., Winter 1989, at 31

William W Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013 (1988)

William W Schwarzer, *The Workload of the Federal Courts*, N.Y.U. SYMP. ON FED. CTS. (1987)

William W Schwarzer, *Guidelines for Discovery, Motion Practice and Trial*, 117 F.R.D. 273 (1987)

William W Schwarzer, *Summary Judgment and Case Management*, 56 ANTITRUST L.J. 213 (1987)

William W Schwarzer, *U.S. Constitution Doesn't Need Fixing*, S.F. CHRON., Feb. 11, 1987, (Briefing) at 3

William W Schwarzer, *The Constitution and Foreign Relations*, S.F. CHRON., Feb. 4 1987, (Briefing) at 1

William W Schwarzer, *Summary Judgment: A Proposed Revision of Rule 56*, 110 F.R.D. 213 (1986)

William W Schwarzer, *Sanctions Under the New Federal Rule 11*, 104 F.R.D. 181 (1985)

William W Schwarzer, *Grading the Judge*, 10 LITIG., Winter 1984, at 5

William W Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465 (1984)

William W Schwarzer, Book Review, 71 CAL. L. REV. 1572 (1983)

William W Schwarzer, Remarks to National Conference on Discovery Reform, *in* 3 REV. LITIG. 118 (1982)

William W Schwarzer, Remarks to Annual Meeting of A.B.A. Antitrust Section, *in* 51 ANTITRUST L.J. 223 (1982)

William W Schwarzer, *Jury Instructions: We Can Do Better*, 8 LITIG., Winter 1982, at 5

William W Schwarzer, *On Communicating with Juries: Problems and Remedies*, 69 CAL. L. REV. 731 (1981)

William W Schwarzer, *Assuring Effective Assistance of Counsel*, 7 LITIG., Winter 1981, at 5

William W Schwarzer, *Dealing with Incompetent Counsel: The Trial Judge's Role*, 93 HARV. L. REV. 633 (1980)

William W Schwarzer, *Beating the Trial Court Paper Chase*, 5 LITIG., Spring 1979, at 5

William W Schwarzer, *Reflections on a Visit to China*, 54 CAL. ST. BAR J. 162, 234 (1979)

William W Schwarzer, *Managing Civil Litigation: The Trial Judge's Role*, 61 JUDICATURE 400 (1978)

William W Schwarzer, *Regulated Industries and the Antitrust Laws*, 41 ICC PRAC. J. 543 (1974)

William W Schwarzer, *Flying the Canadian Rockies*, AOPA PILOT, Aug. 1969

William W Schwarzer, *Toward World Law — A Reply*, 37 CAL. ST. BAR J. 66 (1962)

William W Schwarzer, *World Peace Through World Law: The Disarmament Problem*, 47 A.B.A. J. 1171 (1961)

William W Schwarzer, *A Break for Farmers — A Further Word*, 33 CAL. ST. BAR J. 290 (1958)

William W Schwarzer, *Enforcing Federal Supremacy: Relief Against Federal-State Regulatory Conflicts*, 43 CAL. L. REV. 234 (1955)

William W Schwarzer & Robert R. Wood, *Presidential Power and Aggression Abroad*, 40 A.B.A. J. 394 (1954)

William W Schwarzer, *Wages During Temporary Disability*, 5 STAN. L. REV. 30 (1952); INDUS. L. REV. Q., July 1953, at 12