Operation of the Federal Judicial Councils

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PREFACE

In 1977, the Judicial Conference of the United States, through the Subcommittee on Jurisdiction of the Committee on Court Administration, requested the Federal Judicial Center to evaluate the operation of the federal judicial councils.[1] In particular, the subcommittee wished to determine the effectiveness of guidelines that the Conference had promulgated in 1974, which were based on the subcommittee's recommendation.

The Center had already undertaken an evaluation of the Circuit Executive Act; the results are to appear in a forthcoming report, The Impact of the Circuit Executive Act.[2] (The circuit executive report contains considerably greater detail on several points; therefore, we will occasionally refer to it in this report.)

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1. Judge J. Clifford Wallace of the Ninth Circuit Court of Appeals, a member of the subcommittee, made the request in a letter of Feb. 8, 1977, to Judge Walter E. Hoffman, then director of the Federal Judicial Center.

2. J. McDermott & S. Flanders, The Impact of the Circuit Executive Act (Federal Judicial Center 1979).

To evaluate the impact of circuit executives, considerable inquiry into the work of the judicial councils in each circuit was necessary. A preliminary round of one-day visits had been made to each of the ten circuits with circuit executives, to meet with the circuit executive and chief judge. A more lengthy visit to each circuit had been planned to meet with most circuit judges, several district judges, the circuit executive, the circuit clerk, and selected district clerks and other support personnel. Since the circuit executives, as staff to the councils, could not be evaluated without examining the work of the councils themselves, the scope of the original project was extended to include evaluation of the degree to which judicial councils were operating as specified in the guidelines.

Observations on the method and scope of the study and a list of persons interviewed are contained in appendix A. Generally, we tried to meet with all those who had direct interest or experience in matters relating to judicial councils or circuit executives, to the extent that could be done within our time limits (a

visit of one week to each of the largest circuits, and two or three days to each of the others). We attempted to meet with all judges and support personnel whom we could identify as having a special interest in the relevant issues. We sought persons who had written on these subjects, who were influential members of relevant committees, or who had otherwise shown special interest. We could not avoid missing some persons with whom we would have liked to meet. In addition to the information gained from personal interviews, we also drew upon council minutes, committee reports, and other documents from each circuit.

We wish to thank all who assisted us for their kind thoughtfulness. Inevitably, our work was often a significant intrusion. Not only did we take the time of busy judges and others, but we had to probe some very sensitive matters in the course of our work. We were fortunate to receive unfailing and good-humored cooperation.

Steven Flanders
John T. McDermott

INTRODUCTION

The Administrative Office Act

The judicial councils were created in 1939 as a part of the Administrative Office Act.[3] Now codified as 28 U.S.C. § 332, the relevant provision states:

> (a) The chief judge of each circuit shall call, at least twice in each year and at such places as he may designate, a council of the circuit judges for the circuit, in regular active service, at which he shall preside. Each circuit judge, unless excused by the chief judge, shall attend all sessions of the council.
>
> (b) The council shall be known as the Judicial Council of the circuit.
>
> (c) The chief judge shall submit to the council the quarterly reports of the Director of the Administrative Office of the United States Courts. The council shall take such action thereon as may be necessary.
>
> (d) Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council.
>
> (e) The judicial council of each circuit may appoint a circuit executive . . . .

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3. Pub. L. No. 76-299, 53 Stat. 1223-25 (1939). The act created, in addition to the judicial councils, the Administrative Office of the United States Courts to staff the Judicial Conference of the United States.

The section of the Administrative Office Act pertaining to judicial councils (section 306) has been amended only twice: in 1948, as part of a general recodification; and in 1971, when the Circuit Executive Act was added. The 1948 recodification included several changes in the language. One of the important changes was that the controversial reference to "necessary orders" of the council (now in section 332 (d)) replaced "directions" of the council. The original term might appear more inclusive than the more formal "orders." Also, the original language referred only to the district courts; the present subsection (d) seems to refer equally to the court of appeals ("courts within [the] circuit").

There are many excellent legislative histories of the Administrative Office Act, which created the judicial councils. The most comprehensive is contained in Peter Graham Fish's The Politics of Federal Judicial Administration.[4] The background of the statute and its legislative history are discussed in the first two sec-

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4. P. Fish, The Politics of Federal Judicial Administration (1973). See particularly ch. 4.

tions of the 1961 "Report on the Responsibilities and Powers of the Judicial Councils" (the Johnson report).[5] Justice John M. Harlan discussed the legislative history in his concurring opinion in Chandler v. Judicial Council of the Tenth Circuit.[6] Without attempting to duplicate these efforts, we will provide a few observations and quotations from the legislative history that seem helpful in defining what the judicial councils were intended to be.

The councils' supervisory powers were intended to be comprehensive, permitting them to direct changes they found necessary in the administrative operation of district courts. Professor Fish has provided a list of "administrative functions . . . within the competence of councils" culled from various judges' testimony on the Administrative Office Act.[7] These functions include:

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5. The Johnson report is reprinted as appendix B infra. The House Committee on the Judiciary ordered the report to be printed; we reprint it in this form.

6. 398 U.S. 74, 89 (1970).

7. Fish, The Circuit Councils: Rusty Hinges of Federal Judicial Administration, 37 U. Chi. L. Rev. 203, 207 (1970).

> assigning judges to congested districts, and to particular kinds of cases, directing them to assist infirm judges, ordering them to decide cases long held under advisement, requiring a judge to forego his summer vacation in order to clear his congested docket, compelling multi-judge courts to arrange staggered vacations, and setting standards of judicial ethics.[8]

During congressional hearings on the act, Congressman Emanuel Celler asked Chief Judge John J. Parker of the Fourth Circuit, "Do you put any restraints on the council at all?" Judge Parker replied: "I do not think this bill does. Of course, I assume this is true: that the councils will be restrained by the inherent limitations of the situation."[9]

Chief Justice Charles Evans Hughes preferred that the federal courts be supervised from the circuit level, by the judicial councils, rather than from Washington. Addressing the Judicial Conference of the United States in September, 1938, he stated:

> I think the difficulty in this present bill [an early version of the Administrative Office Act] lies in an undue centralization . . . .

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8. Id. (footnotes omitted).

9. Hearings on H.R. 2973, H.R. 5999 Before the House Comm. on the Judiciary, 76th Cong., 1st Sess. 22 (1939). The relevant section is included in the Johnson report, appendix B infra at 77.

> My thought is that there should be a greater attention to local authority and local responsibility. It seems to me that . . . we have under various Circuits foci of Federal action from the judicial standpoint for supervision of the work of the Federal courts.
>
> When you come to the supervision of the work of the judges, . . . there you have the great advantage of the supervision of that work by the men who know. The circuit judges know the work of the district judges by their records that they are constantly examining, while the Supreme Court gets only an occasional one.[10]

The Circuit Executive Act

The Circuit Executive Act of 1971 added subsections (e) and (f) to section 332, providing staff for the judicial councils for the first time.[11] Paragraph (6) of subsection (e) encourages the circuit executive to conduct studies and prepare recommendations and reports for the council. Paragraph (9) suggests specific staff duties regarding council meetings. With the exception of these provisions, the degree to which the act was directed to council functions is not clear.[12]

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10. Proceedings of the Judicial Conference of the United States (Sept. 30, 1938). The relevant section is in the Johnson report, appendix B infra at 75.

11. Pub. L. No. 91-647, 84 Stat. 1907 (1971).

12. See McDermott & Flanders, supra note 2, ch. 1.

One purpose of the act was to fulfill the need for an administrative assistant to the chief judge of each circuit, a function only distantly related to the need for staff for councils. The Judicial Conference of the United States had made this request in 1968. Judge William Hastie, Bernard Segal, and others provided testimony that stated or implied no conception that the purpose of the circuit executive was to staff the councils.

The legislative history of the act and its predecessors clearly shows, however, that staffing the councils was a purpose of the circuit executive. In the 1939 deliberations on the Administrative Office Act, it was clear that Chief Justice Hughes felt the councils would require staff if they were to discharge their functions. Senator Joseph D. Tydings, commenting on testimony before the Senate Committee on Judicial Improvements in 1969, said circuit executives were needed because judicial councils were unable "to develop the necessary facts on which orders for improved administration of the courts could be fashioned."[13] Chief

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13. Hearings on S. 952 Before Subcomm. No. 5 of the

Justice Warren E. Burger frequently alluded to the comprehensive responsibilities he envisioned for the circuit executives; they were to be a major source of innovation throughout their circuits. In a 1971 paper, Joseph L. Ebersole of the Federal Judicial Center observed that "[t]he Circuit Executive Act is an amendment to 28 U.S.C. 332 and as such represents a vitalization of this section." He noted that the act's language delegating duties to the circuit executive refers entirely to the circuit council as the delegating agency.[14]

Judicial Conference Guidelines

In 1974, the Judicial Conference approved a statement of "Powers, Functions and Duties of Circuit Councils."[15] It provides guidelines regarding council

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House Comm. on the Judiciary, 91st Cong., 1st Sess. 350 (1969).

14. J. Ebersole, Implementing the Circuit Executive Act 4 (Oct. 18, 1971) (unpublished paper in the Federal Judicial Center library).

15. This statement is reprinted as appendix C infra. We comment in this report on the degree of compliance with the guidelines. We note here that relatively few

responsibility to supervise dockets and to supervise behavior of individual judges that might erode public esteem for the court system. It outlines procedures for informing district courts and judges when matters affecting them are under consideration. The statement also specifies plans and materials the councils should have before them to exercise their supervisory function. The Conference observed that "[i]t is vital that the independence of individual members of the judiciary to decide cases before them and to articulate their views freely be not infringed by action of a judicial council."

Criticism of the Councils

The judicial councils have been the subject of criticism through most of their history. In 1958, then Circuit Judge Burger noted that "[t]his statute [sec-

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judges seemed to be aware of the document itself, whatever the degree of knowing or unknowing compliance. Judges who were aware of the guidelines had no particular reaction to them. The only exception was a group of judges in one circuit who questioned the authority of the Judicial Conference of the United States to issue guidelines that would be binding on a judicial council.

tion 332] vests primary power, and therefore full responsibility, in the Circuit Judges for the management of the Federal judicial system," and observed that "the Judicial Councils have not fully lived up to the expectation of the sponsors."[16] Senator Tydings concluded that "councils have been relatively [impotent] in meeting their responsibilities under section 332 . . . ."[17] Professor Fish described judicial councils as "pillars of passivity."[18] Then Chief Judge J. Edward Lumbard argued that the inaction of judicial councils had a damaging effect: "[T]heir many failures to act have themselves contributed to a feeling on the part of many judges that Section 332 gave the councils no real power; and some judges have thereby been encouraged to defy the councils."[19]

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16. Burger, The Courts on Trial, 22 F.R.D. 71, 75, 77 (1958).

17. Hearings on S. 952, supra note 13. The transcript of the hearings contains the word "important" where we have substituted "impotent." It is clear from the context of Senator Tydings's comments that "important" was a transcription error.

18. Fish, supra note 7, at 223.

19. Lumbard, The Place of the Federal Judicial Coun-

In 1976, the General Accounting Office determined that "[j]udicial councils, to a large extent, have not taken an active role in overseeing the administrative and financial activities of the district courts. In light of the long term inactivity of the councils and the factors contributing to it, the Congress should reexamine the role of the judicial councils."[20]

The councils have also been criticized on the relatively rare occasions when they have made "orders" affecting "courts within [the] circuit." The dissenting opinions of Justices Black and Douglas in Chandler v. Judicial Council of the Tenth Circuit are well-known examples of such criticism. The dissenting justices regarded the Chandler episode as another instance of a dangerous expansion of judicial supervisory power: "All power is a heady thing as evidenced by the increasing efforts of groups of federal judges to act as

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cils in the Administration of the Courts, 47 A.B.A.J. 169, 170 (1961).

20. General Accounting Office, Further Improvements Needed in Administrative and Financial Operations of the U.S. District Courts (1976) (the quoted passage appears on the cover of the report).

referees over other federal judges."[21] Both justices considered section 332 unconstitutional; the majority seemed to suggest otherwise,[22] though they did not reach the issue. Other federal judges have attacked the councils' power as excessive and unconstitutional. Chief Judge Frank J. Battisti described it as "ill-conceived"[23] and unconstitutional.[24] Judge Battisti

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21. 398 U.S. at 137.

22. The majority opinion stated:

> Many courts--including federal courts--have informal, unpublished rules which, for example, provide that when a judge has a given number of cases under submission, he will not be assigned more cases until opinions and orders issue on his "backlog." These are reasonable, proper and necessary rules, and the need for enforcement cannot reasonably be doubted. These internal rules do not come to public notice simply because reasonable judges acknowledge their necessity and abide by their intent. But if one judge in any system refuses to abide by such reasonable procedures it can hardly be that the extraordinary machinery of impeachment is the only recourse.

398 U.S. at 85 (Burger, C.J., for the Court).

23. Battisti, An Independent Judiciary or an Evanescent Dream, 25 Case W. Res. L. Rev. 711, 721 (1975).

24. Id. at 745 (quoting Justice Douglas's dissent in Chandler).

also suggested that "section 332(d) ought to be repealed."[25]

Another kind of criticism appears in proposals that would withdraw power from the councils and give it to other bodies. Two recent proposals would do this, although they are at opposite poles in other respects. The first, the Judicial Tenure Act (S. 1423, first known as the Nunn bill, now the DeConcini bill), would establish a national body to handle complaints about judges' misbehavior or nonfeasance and to provide for possible disciplinary action.[26] This proposal is modeled on disciplinary commissions now serving in many states; it most resembles the California Commission on Judicial Performance, established in 1960 (as the Commission on Judicial Qualifications). The second proposal, by the Association of the Bar of the City of New York, would establish local boards with jurisdiction over federal judges in two districts within the state

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25. Id. at 746.

26. The Senate passed this bill on Sept. 8, 1978. The legislation is the subject of the May 1978 issue of Judicature, which includes articles by Judge Lumbard, supporting the bill, and Judge J. Clifford Wallace, opposing it.

of New York; these local boards would hear complaints about judges' behavior.[27]

One proposal would supplement the councils with a new national body; the other would add to the already decentralized circuit councils a still more local structure. Both proposals contain an unavoidable implication that the judicial councils have not been adequate to the task demanded of them.

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27. Association of the Bar of the City of New York, A Proposed Procedure for Treating Complaints Concerning Federal District Judges (Mar. 1978) (unpublished paper).

AN APPRAISAL OF COUNCIL PERFORMANCE

Docket Supervision

Section 332(d), as interpreted by the Judicial Conference of the United States, requires judicial councils to examine information on the operation of the courts within their circuits, to determine when a problem exists, and to take corrective action when necessary.[28] The Judicial Conference of the United States has specifically stated:

> With respect to the district courts, the circuit council should keep itself informed on a regular basis as to the following:
>
> (a) The condition of its docket in terms of the number of cases filed, cases terminated, and cases remaining on its docket; cases under decision unduly delayed.
>
> (b) List of prisoners in jail awaiting trial, showing date of imprisonment.
>
> (c) The operation of the Rule 50(b), Federal Rules of Criminal Procedure, plans for expediting the trial and disposition of

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28. This responsibility is defined in the Administrative Office Act, 28 U.S.C. § 332(c), (d), and (e), and is further specified in the Judicial Conference statement of "Powers, Functions and Duties of Judicial Councils," items 4, 8, 9, and 10, reprinted in appendix C infra at 83-84.

> criminal cases in the district courts of the circuits.
>
> (d) The operation of the Criminal Justice Act plans. See 18 USC § 3006A(i).
>
> (e) The operation of the jury selection plan in the district courts. See 28 USC § 1863(a).
>
> (f) The degree to which the district courts are undertaking to make the best utilization of jurors. See Guidelines for Improving Juror Utilization in the United States District Courts issued by the Federal Judicial Center. . . .
>
> Where it appears that the court of appeals or any district court in the circuit has a large backlog of cases, the circuit council should take such steps as may be necessary to relieve the situation. . . .[29]

However, several judges and support personnel we interviewed deny the existence of the councils' power to take corrective action. Others have claimed that judicial councils operate on "an appellate model": that they do not seek out problems, but rather, they respond when problems are brought to them. An "appellate" approach, although possibly appropriate in other areas of council responsibility, seems insufficient here (assuming as we do that section 332 as interpreted by the Judicial Conference is good law.) The passage

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29. "Powers, Functions and Duties of Judicial Councils," item 8, reprinted in appendix C infra at 83-84.

quoted in the preceding paragraph clearly indicates the need for an active and creative use of available measures to determine if a problem exists, and if so, whether it requires council action.

Docket supervision is extremely difficult and sensitive. Performance measures of judicial activities are notoriously controversial and subject to misinterpretation.[30] More important, the application of performance measures is initially a task for each district or circuit court itself. Internal reports showing each judge's pending case load and listing old cases not decided are standard management tools in most federal courts. They have been the basis for procedural changes, adjustments in judges' individual case loads, assignment of magistrates and other support personnel, and many other actions. We are aware of numerous instances in which courts have solved their own docket problems, with no need of council intervention. Only when courts do not solve their own problems can there be a role for the council. (Even then, docket problems

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30. Appendix D infra includes some comments on the purposes and development of the system of federal judicial statistics.

may be beyond the control of court or council, as was true in several undermanned courts before the recent judgeship bill was passed.)

In the course of our visits to circuit councils, few council members expressed confidence that their docket supervision is valuable. We were told that statistics are not timely when the council acts on them, that they are too voluminous to be useful in pinpointing problems, and that they are difficult to interpret. Some judges doubt the accuracy of the statistical reports they receive, the relevance of statistical reports to policy problems, or the policy implications that could be drawn from the reports. Finally, many doubt that they can take any useful action. As a result of these problems, council actions based on review of statistics have been sporadic and often not timely.

The actions most frequently reported to us were those specifically mandated by Judicial Conference resolutions. For example, in 1961 the Judicial Conference determined that civil cases pending for three years or

more would be considered a "judicial emergency."[31] The Administrative Office prepares a quarterly report that lists the number of these cases pending before each judge. One council determined that three-year cases were a major problem in that circuit. Following the discovery that the circuit had more three-year cases than any other circuit, the council required each district to develop a program to eliminate old civil cases.

Other circuit councils simply send a letter to each judge inquiring about the status of such cases. Unfortunately, the statistical report on which the council's action is based is often out of date. The result is that the council often inquires about matters that have already been resolved. This is often a source of embarrassment to the council or the chief judge.

An even more common cause of embarrassment is the routine letter or telephone call that frequently follows distribution of the "old motions list," which

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31. Proceedings of the Judicial Conference of the United States 62-63 (1961).

lists motions held under advisement for sixty days or more and decisions held under advisement for ninety days or more.[32] Usually this contact is made by the chief judge, sometimes by the circuit executive. Since the list deals with matters that turn over relatively rapidly, matters or motions about which the council may inquire will often have been disposed of by the time the inquiry reaches a district judge. In our view, the quarterly inquiry is an inadequate and mechanical response in the case of judges who repeatedly have a large number of undisposed matters before them. Probably, the circuit executive should maintain a record. After only a few repetitions of this inquiry, a council should attempt to assist in a more systematic fashion, i.e., express specific concern, offer assistance as appropriate, or suggest procedural or other changes.

Most councils (or courts of appeals) have taken steps to expedite preparation of transcripts for cases on appeal, especially criminal cases. Some circuit executives have been especially valuable here; in at

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32. Compilation and distribution of the "old motions list" was authorized by resolution of the Judicial Conference at a special session in Jan. 1940.

least one district, the reporter organization was restructured on the initiative of the circuit executive.[33] By these means and others, most circuits now monitor the entire process closely, and have timely, accurate information on transcript preparation.

Although specific council initiatives in response to docket problems have been infrequent, there are examples of effective council actions. One circuit council has made aggressive efforts to address the problem of "case load disparity," i.e., wide differences in the number of pending civil cases among judges of one court. Several circuits have provided courts in need of assistance with visiting judges (from within and outside the circuit). Such action usually follows a request by the chief judge of the court involved, but occasionally, a council has taken the initiative. One council mobilized a comprehensive effort to attack the severe backlog problems of a district, arranging for

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33. See McDermott & Flanders, supra note 2, ch. 5. Since delayed transcripts are more of a problem for the court of appeals than for the district court, this might not seem to be a council matter. We treat it as a council matter because a court of appeals as such could do little about the problem; section 332 provides some power to the council here.

visiting magistrates and court reporters as well as judges. Two others determined that a judge had fallen seriously behind, and arranged for visiting judges to help with some of the backlog. Both councils asked the "delinquent" judge to refrain from hearing new cases, and monitored the judges' progress for some time. They report that the judges involved are now quite current.

Another council obtained data showing unusual delays in the criminal cases within the circuit; each district was required to develop methods to speed criminal cases. (This action took place in 1972, well before the enactment of the Speedy Trial Act of 1974.) Finally, a council that was concerned about "inexcusable delays of matters referred to magistrates" conducted inquiries in each court.

It seems evident that better mechanisms are needed to implement the requirement that each circuit keep itself informed "on a regular basis" concerning the condition of district court dockets.[34] Improved staff

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34. "Powers, Functions and Duties of Judicial Councils," reprinted in appendix C infra at 83.

work could simplify, strengthen, and refine the councils' work greatly. The charge that the Administrative Office statistics are unavoidably late seems beside the point; the instances reported to us could have been corrected. Given adequate staff work, the councils can be presented at their quarterly meetings with a manageable body of timely information that highlights significant issues.

We suggest the following:

1. The circuit executive should review each annual volume of Management Statistics for United States Courts and identify problem areas for the council. In this publication, the Subcommittee on Judicial Statistics has compiled a balanced, though spare, number of measures of district court and court of appeals operation. Since no single measure can adequately assess the work of a court, the subcommittee strove to provide balance by including several complementary variables. The circuit executive could bring to the council's attention any variable in which a district court in the circuit ranked among the worst 10 or 20 percent in the United States, in which its performance is markedly

worse than in the previous years, or in which there has been a steady trend for the worse.

2. The circuit executive should identify quarterly any marked changes--especially changes for the worse--that have taken place since the previous quarter, or in relation to the Management Statistics for the previous year.

3. The circuit executive should examine the JS-1 and JS-9 reports monthly,[35] and bring any unusual problems to the council's attention. These forms, prepared each month by each district court clerk and mailed to the circuit executive and the Administrative Office, indicate the number of criminal and civil cases pending before each district judge. They provide an adequate basis for preliminary identification of a district's problems, whether these problems are caused by temporary crises or by procedures that need refinement.

4. The circuit executive should have enough contact with each district court to maintain sound, intui-

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35. Appendix E infra contains samples of these Administrative Office data forms.

tive familiarity with the problems and issues in each district court.

5. Each council should obtain special information if needed, either from the Administrative Office or directly from a district when necessary. For example, one circuit council regularly obtains information on the number of trial days per year for each district judge in the circuit. (The Administrative Office can make special computer runs for this purpose on request.) This inquiry results from the concern with "case load disparity" already mentioned. Although productivity or effectiveness is not directly associated with the number of trial days, a judge with a severely crowded docket who has fewer than average trial days may need prodding from the council. (These data have also been useful in obtaining additional judgeships.)

Once a problem has been identified, by these means and others, the council should determine the precise nature of the problem and explore innovative ways of solving it. If the problem concerns a lack of resources, the council is in a position to help; it can provide visiting judges, help a district obtain addi-

tional permanent judges, obtain court reporters on a temporary or permanent basis, or obtain supporting personnel.[36]

Too often, however, there seems to be an automatic assumption that additional resources are the only answer. Now that the circuit executives have modest staffs, they should be in a position to define the problem and propose other solutions where appropriate.

Statistics are only a starting point, however.[37] A council can often use statistics to identify respects in which a court's performance is not up to a reasonable standard. But if special conditions obtain, the implications drawn from statistics may be misleading. The circuit executive should be able to determine whether such special conditions apply to a specific court and propose solutions following contact with the court. As indicated in The Impact of the Circuit Executive Act,[38] circuit executives have pursued the task

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36. Appendix F infra lists several ways in which a circuit council can provide resources to a court.

37. See the Johnson report, appendix B infra at 81.

38. McDermott & Flanders, supra note 2.

of docket supervision less actively than the act would suggest.

It is often suggested that judicial councils' monitoring of district court statistics is impermissible, because it is inconsistent with judicial independence. In response, we note that the system of judicial statistics was devised by judges for judges, specifically to help them refine their procedures. It is not, as many seem to imagine, a system that has been imposed from outside the judiciary (except those elements that have been required by Congress). Statistics constitute more than a method of external supervision; they give judges the opportunity to examine the results of procedural alternatives. A council that uses statistics wisely can meet its statutory responsibilities without any intrusion into a judge's independent decisions.

Handling Complaints About Judge Behavior

Although the "appellate model" may not be appropriate for docket supervision, it may be the best way for a council to handle malfeasance, nonfeasance, or

other problems of individual judges' behavior. As far as we know, no one has suggested that councils should do more in this difficult area than make themselves available to hear and respond to complaints.[39] The national body proposed in the Judicial Tenure Act, like the California Commission on Judicial Performance, would operate in this "appellate" fashion.[40] However, many commentators feel that councils have not taken adequate action on complaints about judge behavior. Criticism of council effectiveness has been most vigorous on this point. The two proposals that would withdraw power from the councils and give it to other bodies focus on the method of handling complaints about judge behavior.[41]

It is not surprising, given the nature of the approach Congress devised in section 332, that there is

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39. A senior circuit judge, with a long and prominent history of supporting an active council role, argued in our meeting that the judicial council is not an investigative body. In his view, the council should take action only if a complaint is so serious that it may provoke a public scandal, and if the council determines that the court involved is unable or unwilling to act.

40. See note 26 supra and accompanying text.

41. See notes 26 and 27 supra and accompanying text.

no record of stunning achievement in this area; for the most part, there is no record at all. Congress established a system that relies on informal action. Because it has been informal, there is little or no record of council action. Chief Justice Hughes believed that the councils would be the bodies best able informally to resolve issues of judicial misbehavior (short of impeachment) because of their familiarity with the individuals, the issues, and the locale.[42] Professor Fish, among others, has argued that it is precisely this familiarity that has stood in the way of effective action: circuit judges may be unduly responsive to, or solicitous of, the other judges in the circuit.[43]

As a result of our visits with circuit and district judges, supporting personnel, and a few lawyers, we have concluded that it is in the area of handling complaints about judge behavior that the councils have been most effective. Our conclusion differs from that

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42. See the quotation from Chief Justice Hughes's address, text accompanying note 10 supra.

43. Fish, supra note 7, at 224.

of Professor Fish not in our estimate of the number or quality of reported episodes, but in the extent to which there is a discoverable problem that council efforts have failed to address. In several episodes brought to our attention, councils have taken effective action after identifying a problem with a district or circuit judge's behavior. The action taken was almost always informal. Despite considerable probing, we uncovered no clear instances in which councils had failed to act effectively (apart from previously known instances, such as those involving the late Judge Willis W. Ritter, and Judge Stephen S. Chandler).[44]

On matters of individual behavior, the circuit judges are familiar with the problems in their cir-

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44. It could be argued that the Chandler episode is not a council failure. The holding of the Supreme Court is ambiguous, and does not limit council powers. Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1969). The council did achieve its intended result, however: Judge Chandler did not take new cases. In the Ritter matter, there was little or no effective council action, although the court of appeals took numerous actions to remove Judge Ritter from specific cases. Judge Ritter was probably fortunate in that he served in Judge Chandler's circuit. The council, its members indicated to us, was hesitant to take another forceful action after a perceived failure in the Chandler case. A petition was pending before the council when Judge Ritter died.

cuits. They are cognizant of individual judges' practices that approach the boundaries of impropriety and that reflect badly on the judiciary. Circuit judges are in an excellent position to take subtle and effective action when necessary.[45]

On the basis of our visits to the circuits, we have concluded that the councils have done an effective job, as far as we can determine. We searched for complaints that had been "swept under the rug," and found

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45. We suggest that the well-known matter involving Justice McComb of the California Supreme Court probably would have been handled as well by a federal judicial council had the justice served on a court under their jurisdiction. The justice was found to suffer from senility; he was retired following investigation by the California Commission on Judicial Performance. McComb v. Comm'n on Judicial Performance, 19 Cal. 3d Spec. Trib. Supp. 1, 564 P. 2d 1, 138 Cal. Rptr. 459 (1977). A council would have acted at least as rapidly and effectively as the commission did, although possibly with much less publicity, to achieve the same result. He would probably have been asked to retire, and threatened with action under section 372(b) if he did not. There would have been no publicity if he had retired, and considerable publicity if the council had invoked section 372(b).

Some commentators have praised the California Commission's ability to act informally. Culver & Cruikshanks, Judicial Misconduct: Bench Behavior and the New Disciplinary Mechanisms, 2 State Court J. 3, 5-6 (Spring 1978). We feel that a commission would add little or nothing to the judicial councils' opportunities to take informal action.

none. It is only in regard to issues that were unresolved at the time of our visits that our information seems incomplete. We were informed that three problems of individual judge behavior were pending before councils; we were given very little information on them in response to our inquiries and cannot comment further. Judges understandably felt a special need for confidentiality on pending matters.

Among the handful of problems reported to us during our visits, the most common was excessive drinking. In one case, a highly respected judge was pressured into what has been described as a very effective cure following a council threat to take action under 28 U.S.C. § 372(b).[46] In at least two other cases, judges with alcohol problems took senior status early following an informal expression of concern from the council or chief judge.

In at least three other cases, judges took senior status because of an expression of council concern re-

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46. This section empowers a majority of the council to submit a "certificate of disability" to the president, depriving the judge of his seniority and permitting an additional judge to be appointed.

garding senility or quasi-senility. In addition, Judge Mell G. Underwood took senior status in 1966 following a threat that the council would invoke section 372(b).[47]

We were also informed of several instances in which a council took action when a judge's docket became backlogged because of a particular case. One circuit issued a formal order under section 332 that removed a district judge from the assignment list until the case causing the delay had been disposed of. Two other circuit councils achieved the same results informally. In one of these cases, the circuit executive served as the council's emissary in a series of conferences and discussions with the judge involved. In both cases, the councils independently provided judicial assistance as well.

Another council took informal action to moderate the approach of a judge who was severely criticized by the bar for his alleged excessive aggressiveness in moving cases on his docket. Reportedly, no further

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47. It has been has argued that this matter was handled very poorly. See Battisti, supra note 23, at 743-44.

action was required after the circuit chief judge conveyed to the judge in question the seriousness of the bar complaints, and the concern these caused the circuit council.

A bankruptcy scandal was averted in one district through the intervention of the judicial council. No formal action was taken.

There were cases in which a council did not take needed action. The ones that came to our attention primarily concerned docket management and related matters. One small court, for example, had a long list of pending sixty-day motions--longer than the total for all but two other circuits. No action was taken on this beyond a routine, perfunctory letter advising the judges that these motions were pending; the council did not advise the judges that the situation was in any way exceptional.

It would appear that awareness of council powers should be increased. Too many district and circuit judges deny their existence or assume they are unconstitutional or unenforceable. The scope and use of council powers would be a useful topic for discussion

at meetings of the Judicial Conferences and other bodies. We assume that the subject has been avoided in the past because of its inflammatory character. The topic should probably be avoided when a specific council action is being considered. It seems clear that the council powers will be better exercised, and their existence better understood, if they are discussed--preferably in a thorough yet low-keyed manner.

Another step to increase awareness of council powers would be the creation of committees in each circuit to consider complaints from lawyers and the public. Most lawyers do not know of the existence of section 332 powers, or how to invoke them. Establishing a formal body to consider complaints, among other purposes, could correct the situation. It would be desirable for each circuit to have a committee to handle complaints. To be effective, a committee must be well known by the bar. Perhaps it is best for the committee to have broad responsibilities as a conduit between bench and bar and to receive occasional, specific support from the chief judge. The Third Circuit, for example, has a Lawyers' Advisory Committee that consid-

ers complaints, among other functions.[48] If the supervisory powers of the councils have fallen into disuse, a likely reason is that they are little known and poorly understood.

Matters for Council Review

A large number of matters, ranging from important to routine, must be submitted to the judicial council for approval.[49] The judicial council is the actual appointing authority for each federal public defender, on the district court's recommendation. Council approval is required for most district court requests for more judges, magistrates, bankruptcy judges, and other supporting personnel. The council must review the adequacy of statutory plans, as well as changes in the salary and assignments of certain personnel. In nearly

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48. See Rule XVI of the Judicial Council of the Third Circuit, appendix G infra at 108. Under a new procedure, the Ninth Circuit will establish an ad hoc committee to conduct an inquiry in serious cases, including notice to the judge involved and hearings as appropriate. Initial screening of complaints is done by the circuit's chief judge.

49. Many of these matters are listed in appendix C infra.

all of these matters, council review precedes review by the Judicial Conference or the Administrative Office, or both.

During our visits to the circuits, we received little indication that circuit judges resist assuming these responsibilities. We frequently heard the complaint that judicial council meetings are one of a circuit judge's least interesting responsibilities; but few judges were willing to support the idea of curtailing council approval. Most felt that the time consumed was not unreasonable in relation to the importance of the matter under consideration, i.e., important matters took more time, less important matters took less time.

Some councils have taken their approval responsibilities very seriously. The Tenth Circuit council, handling a recent public defender appointment, obtained three recommendations from the district court, interviewed all three candidates, and only then made an appointment. The Third Circuit council made a recent appointment in similar fashion. Although not all councils follow this procedure, several have independently examined applicants' qualifications and have inter-

viewed candidates. Some judges outside the Tenth Circuit have argued strenuously that the opportunity to choose among several candidates is essential.

Several councils are very active in reviewing statutory plans,[50] sometimes establishing and publicizing distinct requirements as circuit policy.[51] Often the circuit executive conducts a preliminary review to determine whether the proposed plan is consistent with circuit policy and with the statute involved. The Fifth Circuit, for example, would not accept automatic mileage excuses in jury plans. Several circuits have used a model speedy trial plan--more stringent than statutory requirements--as the basis for detailed scrutiny of proposed plans.

By resolution of the Judicial Conference, the councils must decide whether senior judges are entitled

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50. See McDermott & Flanders, supra note 2, ch. 6.

51. There appears to be considerable potential here for a collision between a council's policy responsibility and the court of appeals' reviewing power. Judge Jack B. Weinstein has pointed out that courts of appeals often, in effect, find themselves reviewing their own plans when litigation reaches them questioning a district plan that, in turn, was based on a judicial council model. See J. Weinstein, Reform of Court Rule-Making Procedures 126 (1977).

to supporting staff. These decisions, made annually, are based on the standard of "substantial judicial work" rendered by the senior judge.[52] Several councils have taken a hard look at the service of each judge to determine whether supporting staff was justified. One sent an inquiry to the council in another circuit where a judge did most of his work. However, council approval of supporting personnel for senior judges is an area of recurring criticism. Several judges said that councils had certified "substantial service" with little justification.

We are not inclined to be particularly critical of councils that prefer to err on the permissive side of this difficult issue. Many senior judges clearly render "substantial service." Many of those who do not are ill. For a council to hastily withdraw the staff of a stricken judge would surely suggest that it had

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52. Resolution of the Judicial Conference of the United States, Sept. 1950. Note that "substantial service" can take many forms, so relative evaluation is complex. A senior judge may serve in various courts or circuits, or render "service" primarily to the Judicial Conference or the Federal Judicial Center. Despite some recent interest in establishing a more precise definition, the Judicial Conference has not acted to modify the 1950 standard.

determined the judge's illness to be either terminal or permanently debilitating. Wishing to avoid that implication, some councils may certify staff even though the judge did little judicial work the previous year.

During our circuit visits, we observed that the various methods councils use to grant or withhold approval of plans and resource requests could be improved in many instances. The councils often have no information that would provide an objective basis for comparing resources requested with any larger standard. District court requests are sometimes taken at face value and approved without discussion. (It should be noted, however, that many observers think council review forestalls unreasonable requests, an argument that has considerable force.) Several circuits assign a particular resident circuit judge to evaluate requests from certain districts. That judge is expected to know the districts in his "jurisdiction" well, and to be able to make a personal appraisal of the merits.

It appears that there is occasional need for a comprehensive statistical workup that presents a national picture by which local requests could be judged.

Often, no national standard exists in any formal sense; one must be inferred from a survey of practice elsewhere. In some instances, a brief cover memo summarizing a request and prior council actions could be sufficient. In important or novel situations, a more comprehensive workup would be necessary, accompanied by appropriate statistical comparisons. The circuit executive or other council staff could perform this function; effective use of staff minimizes the time that judges must spend on administrative matters.[53]

Other Council Functions

During our circuit visits, we found that the councils are more aware of their continuing responsibilities than we had expected, particularly in light of the criticism that their powers are so little used. Judicial councils have such a volume of routine business that a circuit judge is regularly reminded of his role as both judge and council member.

We examined council operations in terms of the items specified in the 1974 Judicial Conference state-

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53. See McDermott & Flanders, supra note 2, ch. 6.

ment of "Powers, Functions and Duties of Circuit Councils." We discuss below only those items not previously addressed in this report.

Item 5 specifies that the chief judge of a district court should be "informed when matters concerning his district are under consideration and shall pass the information promptly to the judges of the district." In the very few episodes in which formal council action under section 332 has been considered since 1974, we know of no instance in which this was not done. The Third Circuit has adopted useful rules for council operation; rules XIII and XIV address this matter.[54]

Item 6 requests councils to invite persons subject to council action to present their views. We know of no instance since 1974 in which this was not done.

Item 7 requests the chief judge of the circuit to hold periodic meetings with the chief judges of the district courts within the circuit, as a matter of council business. Leaving aside the District of Columbia Circuit, to which this item is not applicable, we know of four circuits that do not meet regularly.

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54. These rules are included in appendix G infra.

Several judges expressed the view that these meetings have been useful; they would probably be useful in the four remaining circuits.

Item 12 requires that circuit council meetings be held at least four times a year, and suggests use of standing and ad hoc committees. Several councils do not meet as such four times a year. However, in most circuits, council business is taken up at regular meetings of the courts of appeals, whose members constitute the councils. Therefore, in every circuit, there are at least four meetings each year at which council business may be discussed. Also, many routine matters are handled between meetings, by mail or telephone.

Council committee work is a major burden in some circuits. Sometimes, the circuit executive can handle committee work, leaving only supervisory responsibilities for the judges. For example, in the Second Circuit, the circuit executive collects data and prepares summaries for each committee that uses case flow information. A cover memorandum highlights the significant points. The same executive provided continuous support

during the Clare Committee's[55] study on the quality of advocacy, conducting substantial data collection and analysis. He is active on nearly every council committee; several committees, to some degree, owe their existence to his initiatives.

In some other circuits, the burden on judges seems greater than necessary--even if the circuit executive contributes substantially to committee work. Some circuit executives--especially in the larger circuits--are simply spread too thin. Councils themselves sometimes fail to request needed assistance. Only in a few instances is the circuit executive a participating member of council committees. In most cases, the executive's role is limited to that of secretary, or even to simply arranging meetings.

In one circuit, many judges told us they cannot use the circuit executive for "judicial business"; they define this term so broadly that judges do what elsewhere would be delegated to staff. Although the executive in this circuit serves on the committees and is

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55. The Advisory Committee to the Judicial Council on Qualifications to Practice Before the United States Courts in the Second Circuit.

available to provide help, judges more than once have drafted reports and travelled to other circuits to appraise procedures being considered for adoption.

A few councils have actively served as sources of ideas and innovations for the operation of courts throughout the circuits.[56] The General Accounting Office (GAO) has recently reemphasized the responsibility of judicial councils to press for innovations and improvements in court operations.[57]

We discussed the recommendations in the 1976 GAO report with each circuit judge and many district judges. These recommendations included improved jury utilization, a reduction in places of holding court, greater use of interest-bearing accounts for registry funds, and other matters.[58] Some judges said those minor matters were of no consequence to the councils. The issues GAO mentioned had been of continuing concern to the councils, although they were never accorded high

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56. See McDermott & Flanders, supra note 2, ch. 4, 5, and 6 for discussion of this matter.

57. General Accounting Office, supra note 20.

58. Id.

priority. We know of several councils that took specific actions in response to the report. Several circuit executives have been involved in an Administrative Office program to close little-used courthouses. This has been a major effort in at least one circuit, involving considerable correspondence with the affected bar and judges, as well as with the General Services Administration and (sometimes) Congress. Several councils have encouraged improved juror utilization, and have sponsored or supported workshops on the subject in conjunction with the Federal Judicial Center.

PROPOSALS FOR CHANGE IN COUNCIL POWERS

The supervisory powers of judicial councils make many judges uncomfortable, whether they serve on a district court or a court of appeals. Many judges feel that section 332 lacks effective enforcement power, or that it is unconstitutional, or both. Many circuit judges also feel that, whatever their powers under section 332 might be, the unpleasant duties associated with council responsibilities are "not really part of the job" or are not truly part of the judicial system.

Many judges told us that "clarification" of section 332 is needed. One circuit judge said that council power amounts to no more than a power to make speeches. Another asked rhetorically what the judicial council can do about judges who take long vacations or refuse to file required financial statements, or those whose best work is normally inadequate. Another expressed the view that "a little inefficiency is a small price to pay for judicial independence"; he opposed aggressive council action in the districts except in cer-

tain extreme situations where there was no alternative. Like many judges, he sought precise statutory definition of the situations that require council action.

A vocal minority of judges denied the existence of council powers. This minority tends to be concentrated in three circuits. Some of these judges insist that section 332 is unconstitutional; others argue that its powers are limited to those defined statutory powers that are specifically enumerated. Several judges made vigorous policy arguments against the statute. One young district judge argued that the councils may drive out independent judges and do long-term damage to the judiciary. He cited a particular trial judge as the sort of distinguished jurist who would be driven out of a system in which judicial council intervention was common. The judges expressing these views would repeal section 332 or permit it to die quietly from disuse.

Unfortunately, the suggestions that section 332 be clarified were always phrased in general terms. We know of no specific proposal that would clarify the statute while leaving intact the broad supervisory power that Congress intentionally granted. The real

problem may be the fact that both major cases that address the matter are ambiguous: neither the Third Circuit in Nolan nor the Supreme Court in Chandler reached the issue of the constitutionality of section 332 in their decisions.[59]

A council's exercise of its supervisory power can only be sporadic and infrequent; each instance is likely to be unique. Drafting legislation to define such a power seems to us impossible: the existing statute and its legislative history confer comprehensive powers that are unlikely to be strengthened by any attempt at statutory redefinition. The more likely effect (intended or not) would be to limit, rather than strengthen, the councils' supervisory powers. We suspect that the discomfort expressed to us by both circuit and district judges is unavoidable. The only prospect for

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59. Nolan v. Judicial Council of the Third Circuit, 481 F.2d 41 (1973); Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1969). It seems to us that both Nolan and Chandler are often misread or incorrectly remembered. Both cases were cited to us repeatedly as indicating that councils have no constitutional authority over judges. Actually, only the dissents of Justices Black and Douglas take that view. The majority language in both decisions consistently supports council powers.

"clarification" is that some future case would specifically address the supervisory powers granted by section 332(d).

No useful clarification concerning enforcement powers seems possible either. Few statutes that confer a substantive power are self-executing. It would be odd if section 332(d), directed to judges sworn to uphold the Constitution and the law, had some exceptional provision to define powers if the statute were ignored. It seems reasonable to assume that virtually all judges will either follow council orders, or litigate council authority on constitutional or other grounds--and obey if they lose. If a judge failed to obey a lawful order, presumably he could be subject to mandamus proceedings or even impeachment.

There is a wide range of supervisory powers available to judicial councils. The legislative history of the Administrative Office Act clearly suggests that section 332(d) was intended to confer a vigorous power. When the statute was passed, no doubt was expressed concerning either its scope or its constitutionality. In addition to the formal power under section 332,

section 372(b) is also available to the councils. Under that section, a majority of the council can authorize the president to appoint an additional judge to assist a "permanently disabled" judge who does not voluntarily retire. The majority must find "that such judge is unable to discharge efficiently all the duties of his office by reason of permanent mental or physical disability . . . ." The informal power of persuasion--supported by the threat of either formal action--is an important council power. Whatever attitudes judges may have toward these formal and informal powers, we found no specific instance outside the public record in which existing powers were inadequate.

Since our visits to the courts, there has been some renewed interest in an amendment to provide for district judge representation on the councils. We cannot comment on this at length because we did not raise the question systematically in our meetings; the issue was discussed only if someone else introduced it. This did not happen often; we uncovered no extensive interest in district judge representation. Some district judges proposed representation; others opposed it. One

appellate judge mentioned that if district judges were to sit in on many council meetings, they would soon conclude that they had more important things to do.

There is widespread concern, however, about the secrecy of council sessions at which important decisions about a judge may be made. Some circuits invite representatives of the district judges' association to attend council meetings and participate informally; this practice was commended to us during our circuit visits.

A few judges mentioned to us that they felt that councils should have subpoena power. We cannot comment on this proposal, except to observe that some circuit judges see the absence of this power as an obstacle if a serious problem should arise. We know of no such instances to date, but this could conceivably be a problem in the future.

Finally, one circuit judge said that the councils need more power to mobilize resources when a district needs major assistance. At present, a council can do no more than request judges to help another court. In order to bring in supporting personnel, a council must

make numerous specific requests of the Administrative Office, and gain approval for each. The judge feels that the council's responsibility in this area should be matched by adequate authority. Procedures, or a statute, that would provide emergency powers might be useful. When one council attempted to mount a comprehensive effort to rid a district of its backlog, so much time was needed to smooth the administrative path in order to move people around that the effort may not have been worth the trouble.

Apart from this last item, we see no particular promise in any of the proposed changes we heard. Rather, we feel the councils have worked fairly well. An agenda for improving the operation of judicial councils should focus on the recommendations we have summarized, which emphasize improving the methods of the councils' operation.

APPENDIX A

Scope and Method

This report is based on two series of meetings with judges and support staff, as well as a review of judicial council minutes, correspondence of judges and supporting staff (especially circuit executives), and reports and other documents. The research was selective: our effort was to meet with those with particular interest or involvement in the work of circuit excutives and judicial councils, and to read the relevant documents that were brought to our attention. In keeping with our purpose, we met with more judges than support staff, and more appellate judges than trial judges. The conferences were open-ended and discursive, and varied in content depending on the work and interests of the person interviewed.

The selective character of our research imposes evident limitations. It is possible that our understanding of the work of a particular circuit executive or judicial council is distorted by unrepresentative

views or experiences of certain individuals. We were aware of this possibility, however, and made a positive effort to forestall it by seeking diverse views. In particular, we used our initial interviews with circuit chief judges and circuit executives (held in December 1976 and January 1977) to identify people we should seek out in our second round of conferences later in 1977. We used this method throughout our study.

The method of this study permits us to add a new perspective to what has been written by others who have evaluated council operations. No one else has met with so many people in every circuit who are very familiar with council operations and the issues that have been brought to councils. On the other hand, our survey has limitations. We made no systematic effort to survey lawyers, because that job seemed clearly unmanageable. If discussions with lawyers had added complaints about judges beyond those reported here, we would have had to conduct a separate investigation into the merits of each complaint. Our burden of "screening" would have been at least equal to that of the California Commission on Judicial Performance.

Instead, we limited our agenda to "live" issues that came before a council or that someone in the courts thought should have come before a council. We have some confidence in this approach because the judges and support staff we interviewed were frank with us in many respects we could confirm. Of course, we cannot claim to have uncovered every abuse that councils should have acted on.

The two authors, assisted by Professor David Neubauer, met with the individuals listed below, and a number of their subordinates, in the course of preparing this report. Nearly all interviews were conducted by Professor McDermott and one other interviewer (Flanders or Neubauer). Nearly all the conferences were held in the chambers or offices of the persons mentioned; a few conferences were held elsewhere, usually in Washington. About five interviews were conducted by telephone only.

First Circuit

Chief Judge Frank M. Coffin

Judge Levin H. Campbell

Chief Judge Andrew A. Caffrey, District of Massachusetts

Chief Judge Edward Thaxter Gignoux, District of Maine

Dana H. Gallup, Circuit Clerk

Second Circuit

Chief Judge Irving R. Kaufman

Judge Wilfred Feinberg

Judge Walter R. Mansfield

Judge William H. Mulligan

Judge James L. Oakes

Judge William H. Timbers

Judge Murray I. Gurfein

Judge Ellsworth A. VanGraafeiland

Senior Circuit Judge J. Edward Lumbard

Chief Judge David N. Edelstein, Southern District of New York

Chief Judge Jacob Mishler, Eastern District of New York

Judge Charles L. Brieant, Jr., Southern District of New York

Judge Marvin E. Frankel, Southern District of New York

Judge Lawrence W. Pierce, Southern District of New York

Judge Milton Pollack, Southern District of New York

Judge Robert J. Ward, Southern District of New York

Judge Edward Weinfeld, Southern District of New York

Raymond F. Burghardt, Clerk, Southern District of New York

Nathaniel Fensterstock, Senior Staff Attorney

A. Daniel Fusaro, Circuit Clerk

Robert D. Lipscher, Circuit Executive

Lewis Orgel, Clerk, Eastern District of New York

Third Circuit

Chief Judge Collins J. Seitz

Judge Ruggero J. Aldisert

Judge Arlin M. Adams

Judge John J. Gibbons

Judge Max Rosenn

Judge James Hunter III

Judge Joseph F. Weis, Jr.

Judge Leonard I. Garth

Senior Circuit Judge Albert Branson Maris

Senior Circuit Judge Francis L. Van Dusen

Chief Judge Joseph S. Lord III, Eastern District of Pennsylvania

Chief Judge Lawrence A. Whipple, District of New Jersey (now, Senior Judge)

Judge John P. Fullam, Eastern District of Pennsylvania

Judge Daniel H. Huyett 3rd, Eastern District of Pennsylvania

Judge Murray M. Schwartz, District of Delaware

Judge Herbert J. Stern, District of New Jersey

William A. (Pat) Doyle, Circuit Executive

John J. Harding, Clerk, Eastern District of Pennsylvania

Louise Jacobs, Senior Staff Attorney

Angelo W. Locascio, Clerk, District of New Jersey

Thomas F. Quinn, Circuit Clerk

Bernard Segal, Esq., Former President of the American Bar Association

Fourth Circuit

Chief Judge Clement F. Haynsworth, Jr.

Judge Harrison L. Winter

Judge John D. Butzner, Jr.

Judge Donald Russell

Senior Judge Albert V. Bryan

Chief Judge J. Robert Martin, Jr., District of South Carolina

Chief Judge Edward S. Northrop, District of Maryland

Judge Albert V. Bryan, Jr., Eastern District of Virginia

Senior Judge Walter E. Hoffman, Eastern District of Virginia

Samuel W. Phillips, Circuit Executive

Paul R. Schlitz, Clerk, District of Maryland

William K. Slate II, Circuit Clerk

Fifth Circuit

Chief Judge John R. Brown

Judge Homer Thornberry

Judges James P. Coleman

Judge Irving L. Goldberg

Judge Robert A. Ainsworth, Jr.

Judge John C. Godbold

Judge Lewis R. Morgan (now, Senior Judge)

Judge Charles Clark

Judge Paul H. Roney

Judge Thomas G. Gee

Judge Gerald B. Tjoflat

Judge James C. Hill

Senior Judge Elbert Parr Tuttle

Judge C. Clyde Atkins, Southern District of Florida

Judge Edward J. Boyle, Sr., Eastern District of Louisiana

Judge Newell Edenfield, Northern District of Georgia

Judge Jack M. Gordon, Eastern District of Louisiana

Judge James Lawrence King, Southern District of Florida

Judge William C. O'Kelley, Northern District of Georgia

Judge Alvin B. Rubin, Eastern District of Louisiana (now, Fifth Circuit Court of Appeals)

Joseph I. Bogart, Clerk, Southern District of Florida

Ben H. Carter, Clerk, Northern District of Georgia

Lydia Comberrel, Deputy Clerk, Fifth Circuit

Maxwell Dodson, Librarian

Gilbert Ganucheau, Circuit Chief Deputy Clerk

Henry Hoppe III, Senior Staff Attorney

Thomas H. Reese, Circuit Executive

Edward S. Wadsworth, Circuit Clerk

Sixth Circuit

Chief Judge Harry Phillips

Judge George Clifton Edwards, Jr.

Judge Anthony J. Celebrezze

Judge John W. Peck

Judge Pierce Lively

Chief Judge Charles M. Allen, Western District of Kentucky

Chief Judge Frank. J. Battisti, Northern District of Ohio

Judge John Feikens, Eastern District of Michigan

Judge Timothy S. Hogan, Southern District of Ohio

Chief Judge Damon J. Keith, Eastern District of Michigan (now Judge, Sixth Circuit Court of Appeals)

Judge Cornelia G. Kennedy, Eastern District of Michigan (now, Chief Judge)

John P. Hehman, Circuit Clerk

James A. Higgins, Circuit Executive

Seventh Circuit

Chief Judge Thomas E. Fairchild

Judge Luther M. Swygert (former Chief Judge)

Judge Walter J. Cummings

Judge Wilbur F. Pell, Jr.

Judge Robert A. Sprecher

Judge William J. Bauer

Judge Harlington Wood, Jr.

Chief Judge James B. Parsons, Northern District of Illinois

Chief Judge William E. Steckler, Southern District of Indiana

H. Stuart Cunningham, Clerk, Northern District of Illinois

Collins T. Fitzpatrick, Circuit Executive

William A. Heede, Clerk, Southern District of Indiana

Thomas F. Strubbe, Circuit Clerk

Eighth Circuit

Chief Judge Floyd R. Gibson

Judge Donald P. Lay

Judge Gerald W. Heaney

Judge Donald R. Ross

Judge Roy L. Stephenson

Judge William H. Webster (now Director, FBI)

Chief Judge Edward J. Devitt, District of Minnesota

Chief Judge James H. Meredith, Eastern District of Missouri

Chief Judge John W. Oliver, Western District of Missouri

Judge Donald D. Alsop, District of Minnesota

Judge William H. Becker, Western District of Missouri (former Chief Judge, now Senior Judge)

Judge Robert V. Denney, District of Nebraska

Senior Judge Roy W. Harper, Eastern District of Missouri

Judge Earl R. Larson, District of Minnesota (now, Senior Judge)

Judge Albert G. Schatz, District of Nebraska

Robert F. Connor, Clerk, Western District of Missouri

R. Hanson Lawton, Circuit Executive

Robert Longstaff, Magistrate, Southern District of Iowa

Mary Jane Lyle, former Senior Staff Attorney

Robert J. Martineau, former Circuit Executive

William L. Olson, Clerk, District of Nebraska

Richard C. Peck, Magistrate, District of Nebraska

William D. Rund, Clerk, Eastern District of Missouri

Harry A. Sieben, Clerk, District of Minnesota

Ninth Circuit

Chief Judge James R. Browning

Judge Walter Ely

Judge Shirley M. Hufstedler

Judge Eugene A. Wright

Judge Ozell M. Trask

Judge Herbert Y. C. Choy

Judge Alfred T. Goodwin

Judge J. Clifford Wallace

Judge Joseph T. Sneed

Judge J. Blaine Anderson

Senior Circuit Judge Ben Cushing Duniway

Chief Judge Walter Early Craig, District of Arizona

Chief Judge Robert F. Peckham, Northern District of California

Chief Judge Albert Lee Stephens, Jr., Central District of California

Judge Stanley A. Weigel, Northern District of California

Wallace J. Furstenau, Clerk, District of Arizona

Greg Hughes, Acting Senior Staff Attorney

Edward M. Kritzman, Clerk, Central District of California

William B. Luck, Circuit Executive

William L. Whittaker, Clerk, Northern District of California

Tenth Circuit

Judge David T. Lewis (former Chief Judge, now Senior Judge)

Chief Judge Oliver Seth

Judge William J. Holloway, Jr.

Judge Robert H. McWilliams

Judge James E. Barrett

Judge William E. Doyle

Senior Judge Jean S. Breitenstein

Chief Judge Fred M. Winner, District of Colorado

Richard J. Banta, Senior Staff Attorney

Jesse Casaus, Clerk, District of New Mexico

Emory G. Hatcher, Circuit Executive

James R. Manspeaker, Clerk, District of Colorado

Howard K. Phillips, Circuit Clerk

District of Columbia Circuit

Judge David L. Bazelon (former Chief Judge)

Chief Judge J. Skelly Wright

Judge Carl McGowan

Judge Edward A. Tamm

Judge Spottswood W. Robinson III

Judge George E. MacKinnon

Judge Roger Robb

Judge Malcolm Richard Wilkey

Judge Gerhard A. Gessell, District Court

James F. Davey, Clerk, District Court

Charles E. Nelson, Circuit Executive

APPENDIX B

87th Congress, 1st Session - - - - - House Document No. 201

REPORT ON THE POWERS AND RESPONSIBILITIES OF THE JUDICIAL COUNCILS

A REPORT

OF THE

JUDICIAL CONFERENCE OF THE UNITED STATES

WITH A

FOREWORD BY THE CHAIRMAN

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

PRESENTED BY MR. CELLER

JULY 5, 1961--Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE

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H. Res. 250

In the House of Representatives, U.S.,
June 29, 1961.

Resolved, That the report entitled "Report on the Powers and Responsibilities of the Judicial Councils", by the Judicial Conference of the United States, March 13, 14, 1961, together with a foreword by Honorable Emanuel Celler, chairman of the Committee on the Judiciary, be printed as a House document.

Attest:

RALPH R. ROBERTS, *Clerk.*

CONTENTS

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES,
Washington, D.C., March 24, 1961.

Hon. SAM RAYBURN,
Speaker of the House of Representatives,
The Capitol, Washington, D.C.

DEAR MR. SPEAKER: Pursuant to the provisions of title 28, United States Code, section 331, I am transmitting herewith a report on the operation of the judicial councils of the circuits, provided for in title 28, United States Code, section 332, adopted by the Judicial Conference of the United States at a meeting held at Washington, D.C., March 13-14, 1961.

Respectfully,

EARL WARREN,
Chief Justice of the United States.

FOREWORD

By Hon. Emanuel Celler, Member of Congress

It is gratifying to receive from the Chief Justice this report of the Judicial Conference of the United States on the powers and responsibilities of judicial councils. It is important and urgent that the judges of the United States rid themselves of any lingering doubts on this subject and that the judicial councils in all circuits discharge their broad administrative functions as contemplated and authorized by the Congress.

The report of the Judicial Conference, which follows, accurately sets forth the legislative history of the laws enacted in 1939 which created the judicial councils of the circuits and the Administrative Office of the U.S. Courts, with all-inclusive responsibility for court management and judicial administration. Since I, at the time, was a member of the Committee on the Judiciary of the House, I know it was the intention of the Congress to charge the judicial councils of the circuits with the responsibility for doing all and whatever was necessary of an administrative character to maintain efficiency and public confidence in the administration of justice.

The Committee on the Judiciary, of which I am privileged to serve as chairman, has had in the past good reason to question whether the judicial councils have exercised the broad powers Congress conferred upon them by the enactment of section 332 of title 28 of the United States Code and whether the councils were as effective as they might be and were intended to be in maintaining the high standards desirable in judicial administration.

In past years many problems have been called to the attention of the Committee on the Judiciary which, in my judgment, should have been settled by the judicial council of the circuit and need never have been brought to the attention of the Congress if the judicial council had met the responsibility and exercised the powers conferred upon it by the Congress. I will mention only one example.

The Congress is not infrequently importuned to create additional judicial districts and divisions. Most of these demands originate from inadequate judicial service in the localities concerned. Nearly all of them could and should be remedied by action of the judicial council of the circuit in arranging and planning judicial assignments to provide an equitable distribution of the judgepower of the circuit.

The language of title 28, United States Code, section 332 was recommended to the Congress in 1939 by the judges themselves and was deliberately worded in broad terms in order to confer broad responsibility and authority on the judicial councils. It was the considered judgment of the Congress that the judicial councils were by their very nature the proper agents for supervising management and administration of the Federal courts. The councils are close

to all the courts of the circuit and know their needs better than anyone else and, by placing responsibility and authority in the councils of the circuits, administrative power in the judicial branch was decentralized, as it ought to be, and in each circuit kept in the hands of judges of the circuit.

There is an urgent need for the judicial councils in all circuits to recognize their full responsibilities and to perform more effectively the function originally intended by the Congress. This report by the Judicial Conference of the United States concludes that the present statute is adequate. There is, therefore, every reason to expect that in the future the judiciary will undertake to do their own housekeeping and not leave these responsibilities to the Congress or to some other agency to be authorized by the Congress.

I am convinced that if the recommendations in this report of the Judicial Conference are fully implemented and carried out by the judicial councils of the circuits there will result a wholesome and general improvement in the administration of the Federal judicial system, which is as much desired by the Congress as by the judiciary.

EMANUEL CELLER,
Chairman, Committee on the Judiciary.

REPORT ON THE RESPONSIBILITIES AND POWERS OF THE JUDICIAL COUNCILS

Adopted by the Judicial Conference of the United States at its spring session held March 13–14, 1961

Introduction

The Judicial Conference of the United States, at its September 1960 session, directed that a study and report be made on the responsibilities and powers of the judicial councils of the circuits, under title 28, United States Code, section 332, in the light of the background, history, expressions, experience, and other data existing as to the statute.

A special committee was appointed for this purpose—consisting of Chief Judge Harvey M. Johnsen of the Eighth Circuit, chairman; Chief Judge J. Edward Lumbard of the Second Circuit; Circuit Judge Richard T. Rives of the Fifth Circuit; Chief Judge Royce H. Savage of the northern district of Oklahoma; and Chief Judge Roszel C. Thomsen of the district of Maryland—and a report of its studies and conclusions was duly filed.

The Judicial Conference, after a thorough consideration of the report, which resulted in certain appropriate modifications, adopted the report at its session on March 13–14, 1961, and directed that it be published.

I. Background of the Statute

Section 332 presently appears as part of chapter 15 in the Judicial Code, which is entitled "Conferences and Councils of Judges." This convenient grouping into a separate chapter of the various provisions existing in the code for judicial conferences and councils, together with the simplification and change engaged in as to some of the original language, which was done by the revision and codification act of 1948, possibly has tended to dim a little the setting and the context in which the provision for judicial councils was initially enacted.

The provision for judicial councils of the circuits came into being as a section of Public Law No. 299, approved August 7, 1939 (53 Stat. 1223), whose enacting clause read:

> That the Judicial Code is hereby amended by adding at the end there of a new chapter to be numbered XV and entitled "The Administration of the United States Courts," as follows:

Sections 302 to 305 of this new "Chapter XV—The Administration of the United States Courts" contained the provisions for the establishment, structure, and functions of the present Administrative Office

of the U.S. Courts. Section 306 followed, coordinately and relatively, with provision for another instrumentality in the statutory scheme of "The Administration of the United States Courts."

The provisions of section 306, as here pertinent, were:

> To the end that the work of the district courts shall be effectively and expeditiously transacted, it shall be the duty of the senior circuit judge of each circuit [now designated as chief judge] to call at such time and place as he shall designate, but at least twice in each year, a council composed of the circuit judges for such circuit who are hereby designated as a council for that purpose * * *. The senior judge shall submit to the council the quarterly reports of the Director [of the Administrative Office] required to be filed by the provisions of section 304, clause (2), and such action shall be taken thereon by the council as may be necessary. It shall be the duty of the district judges promptly to carry out the directions of the council as to the administration of the business of their respective courts. * * *

In the revision and codification made of the Judicial Code in 1948, this language was shortened; a sentence was added that "The council shall be known as the Judicial Council of the circuit"; the word "directions" was changed to "orders"; and the expression "To the end that the work of the district courts shall be effectively and expeditiously transacted," etc., was rephrased and constituted into a separate paragraph, which is the final paragraph in present title 28, United States Code, section 332, and which reads:

> Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within the circuit. The district judges shall promptly carry into effect all orders of the judicial council.

The change of the word "directions" to "orders" would seem to have been one of form and emphasis rather than of substance, in view of the edict contained in the original statute that "It shall be the duty of the district judges promptly to carry out the directions of the council as to the administration of the business of their respective courts." Thus, there has occurred no change of substance in the statute since its original enactment, except that, by the substitution made of the expression "the effective and expeditious administration of the business *of the courts within the circuit*" (emphasis supplied), for the previous phrases of "the work of the district courts" and "the administration of the business" of these "respective courts," it can perhaps be argued that the provisions of the section now are as specifically applicable to a court of appeals, under the general term "the courts within its circuit," as to a district court.

The point here, however, is that the background, history, and expression from which the original statute emerged are as significant in relation to the present statute as in their lighting of the purpose and scope of the initial enactment.

The relationship existing under Public Law No. 299 between the creation of the Administrative Office of the U.S Courts and the establishment of judicial councils of the circuits, as instrumentalities in "The Administration of the United States Courts," has been referred to above. In examining the purpose which the judicial councils thus were designed to serve, it is of fundamental interest to note why and how the provision for them came to be made a part of the statute.

At the time of the September 1938 session of the Judicial Conference, there had been pending in the Congress a measure, known as the Ashurst bill, sponsored by the Attorney General, and having

as its objectives (in the characterization made by the Judicial Conference report) (1) "to give the courts the power of managing their own business affairs [budget, supplies, etc.] and to that extent relieve the Department of Justice of that responsibility," and (2) "to secure an improved supervision of the work of the courts through an organization under judicial control." [1]

Some of the judges throughout the system were in disagreement or doubt as to the desirability of lodging in such an administrative organ the powers provided for in the bill, even though the office was to perform its functions under the control of the judiciary itself. Members of the Supreme Court also were opposed to the measure as it stood, because of their view that the responsibility for the functioning of the Administrative Office and the proper exercising of the powers set up in the bill would fall on that Court and could cast upon the Chief Justice the necessity and burden of becoming involved at local levels in the complaints, problems, and questions which might arise—thus "possibly making the Chief Justice and the Court itself a center of attack."

In the September 1938 conference, Chief Justice Hughes took occasion to discuss these difficulties in relation to the scope and purpose of the bill, which he characterized as extending to—

> the discovery of the needs of the courts, not merely from an administrative point of view in its more restricted sense, but discovery of unnecessary delays, of inefficiency and *of all the various matters relating to the work of the judges which may be regarded as important to a more ideal administration of justice in the Federal courts.* [Emphasis supplied.]

He then made the following proposal to the Conference:

> Now, my thought has led me to this consideration:/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. It seems to me that * * * we have in the various circuits foci of Federal action from the judicial standpoint for supervision of the work of the Federal courts.
>
> 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 immediate responsibility for the work of the courts in the circuits, with power and authority to make the supervision all that is necessary to induce competence in the work of all of the judges of the various districts within the circuit.
>
> Now we have had in the States considerable effort in this direction through the appointment of judicial councils. * * * 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.* [Emphasis supplied.]
>
> My suggestion for your consideration is that there should be in each circuit a judicial council. * * *
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> * * * * * * *
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> When you come to the supervision of the work of the judges, * * * there you have the great advantage of the supervision of that work by the men who know. The circuit judges know the work of the district judges by their records that they are constantly examining, while the Supreme Court gets only an occasional one. And the circuit judges know the judges personally in their districts; they know their capacities. And if complaints are made, they have immediate resort to the means of ascertaining their validity. That direct supervision can be made very effective, and I think far more so than the more remote supervision, entailing a great deal of labor and circumlocution, imposed upon the Chief Justice.[2]

[1] Report of the Judicial Conference, September session, 1938, p. 12.

[2] These quotations, and those which have preceded them, have been extracted from Transcript of the Proceedings of the Judicial Conference, Sept. 30, 1938, pp. 174-192.

The Judicial Conference approved this suggestion of Chief Justice Hughes and made provision for a committee to prepare a legislative measure—

> having in view the incorporation of the provisions of the present bill looking to the transfer of the budget from the Department of Justice to the administration of the courts by some proper means, and likewise embracing a provision looking toward the establishment of judicial councils or some other like method within the several circuits and the District of Columbia *for the control and improvement of the administration of justice therein.*[3] [Emphasis supplied.]

The committee thus created collaborated with a committee appointed by the Attorney General in the preparation of a bill, which was introduced in the Senate as S. 188, 76th Congress, 1st session, and which, with some minor changes, became Public Law No. 299. It should be noted here, however, that the provisions of the section on judicial councils represented the concept and the product of the members of the Committee of the Conference, under the directions given them as set out above, and that no change whatsoever was made by Congress in the provisions or in the language which the Committee proposed. Congress enacted the section dealing with judicial councils precisely as the committee had formulated it. It thus gave to the judiciary, in exact form and content, what the Committee of the Conference, under the responsibility imposed upon it by the Conference, was convinced, and held out to the committees of the Congress, embodied the responsibility and had the capacity to function as an effective instrumentality in the correlated scheme being enacted, for "The Administration of the United States Courts."

II. Legislative History of the Statute

In seeking to gain the acceptance of Congress for the provision for judicial councils, as well as for the provisions of the bill generally, various members of the Committee of the Conference testified before the congressional committees.

Chief Justice Groner of the Court of Appeals for the District of Columbia, who was Chairman of the Conference Committee, spoke of the considerations engaged in at the September 1938 session of the Conference, which had prompted the appointment of the Committee and which had entered into the Committee's drafting result, as follows:

> There was a general recognition of the fact that, altogether aside from the question of the administration of the funds of the courts, there was a feeling on the part of the judges and a large part of the members of the bar that there ought to be some method of compiling the statistics of the work of the courts, and of keeping abreast of the work by bringing those statistical figures to the attention of some organization of the courts which could apply corrective measures when they were necessary.
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> * * * * * * *
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> The additions in the bill over the former bill are in a provision which creates in each circuit what is called a judicial council, composed of all the circuit judges in the circuit. The provisions in relation to the duties of the judicial council, condensed, are that the administrative officer shall examine the state of the dockets, shall ascertain the cause of apparent delays in the disposition of cases, the time which the judges give to the trial of cases, and the whole subject of the work of the district courts, and once in each quarter he is required to put that information together, with his comments in the form of a report, which he submits to the newly instituted judicial council.
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> * * * * * * *

[3] Report of the Judicial Conference, September session, 1938, p. 12.

The bill provides that it shall then be the duty of the judicial council in each circuit to consider the report of the administrative officer, and promptly to take such action as may be necessary to correct whatever is made the subject of criticism therein. * * *

So far as I know personally, the criticism of the courts is due to delay. I have not heard, except perhaps in one or two instances, any substantial criticism of the work of the courts, except that the length of time which ensues between the commencement of a suit and its conclusion is too long, particularly the delay which exists in one or two or three or four districts in the country.

Those matters this bill undertakes to provide for by outlining certain duties of the judicial council. Under the present judicial setup we have no authority to require a district judge to speed up his work or to admonish him that he is not bearing the full and fair burden that he is expected to bear, *or to take action as to any other matter which is the subject of criticism, or properly could be made the subject of criticism, for which he may be responsible.*

The bill also provides what is not now true, that it shall be the duty of the district judge, when admonished or when matters are otherwise brought *to his attention by the judicial council, to take whatever steps are thought to be necessary or declared to be necessary to correct those things which ought not to exist in a well-run judicial system.*[4] [Emphasis supplied.]

This part of the testimony of Judge Groner was formally incorporated into Senate Report No. 426, which was made to accompany S. 188, in Congress consideration of the bill. Judge Groner added a comment, in concluding his testimony, to the effect that representatives of the Administrative Office should be able to be of assistance informationally to the judicial councils in "finding out, in regard to delays or any other matters of comment or criticism, the cause of it * * *."[5] He made reference also at the end of his testimony, as he had done at the start, to the duty and responsibility of the courts, in preserving the independence of the judiciary, "of protecting themselves against the criticism or against those things which produce criticism" and "of maintaining the general and universal confidence of the people in the courts,"[6] and indicated his belief that the provisions of the bill would help to serve that end.

There was testimony of similar effect by other members of the Conference Committee, as well as by other judges and lawyers. The late Judge John J. Parker, a member of the Conference Committee, stated, in his testimony at the hearings before the Committee of the Judiciary of the House of Representatives 76th Congress, 1st session, page 22:

Judge PARKER. This (council) can deal with all sorts of questions that arise in the administration of justice.

Mr. CELLER. Do you put any restraint on the council at all?

Judge PARKER. I do not think this bill does. Of course, I assume this is true: That the councils will be restrained by the inherent limitations of the situation. They would know that, if they commanded a judge to do something, unnecessarily or unwisely, he would refuse to do it, and that would probably be the end of the matter.

It is unnecessary here to go further into the testimony before the congressional committees. The general purport of all this may concludingly be summarized in the expression made by the late Arthur T. Vanderbilt, a member of the Attorney General's Committee which collaborated with the Committee of the Conference, the then president of the American Judicature Society, and a former president of the American Bar Association:[7]

[4] Hearing before the Subcommittee of the Committee on the Judiciary of the Senate, Apr. 4 and 5, 1939 on S. 188, pp. 9, 10, 11.
[5] Id., p. 14.
[6] Id., pp. 14 and 19.
[7] Id., p. 16.

I would like to point out that the present bill has a great advantage over the bill that was introduced last year, and for that I think the credit must go to the Chief Justice and the other members of the Supreme Court, in that it does not attempt to centralize all the business affairs of the Federal courts in Washington, but rather creates a system of decentralization in recognizing the circuit courts of appeals, 11 of them, * * * *as the operating units in bringing about the proper administration of justice.* This bill has at least that very great advantage that, the circuit judges being responsible for the condition of the district courts within the circuits, have it within their power to know much more about what is going on in that circuit than could the Chief Justice or the Associate Justices of the Supreme Court here at Washington. I think the principle or the example there set is one which is very important and will be very helpful in the administration of the bill. [Emphasis supplied.]

It seems patent that what the Committee of the Conference intended, what its members and the other witnesses who testified held out to the committees of the Congress, and what the report which accompanied the bill reflected as being the legislative understanding and object of the provision, was that it imposed upon a judicial council the responsibility of seeing that the work and function of the courts in its circuit were expeditiously and effectively performed; and that this responsibility of observation, supervision, and correction went to the whole of a court's functioning, in both personal and institutional aspect.

In the language set out in Senate Report No. 426, page 4, extracted from one of the witnesses' testimony, the concept was—

that whatever is wrong in the administration of justice, from whatever source it may arise, is brought to the attention of the judicial council, that it may be corrected by the courts themselves.

III. Literature on the Statute

The section on judicial councils does not appear to have been the subject of much outside expression, indicative of general legal view upon it.

At the 1958 Attorney General's Conference on Court Congestion and Delay in Litigation, however, Circuit Judge Warren E. Burger commented as follows (Report of the Conference, pp. 9–10):

These [last] two sentences of section 332 * * * are in general terms, but they are all-embracing and confer almost unlimited power. Any problem—whatever it may be—relating to the expeditious and effective administration of justice within the circuit is within the power of the circuit judicial council.

Similarly, in an address before the National Conference of Judicial Councils in 1960 (reported in vol. 47, A.B.A. Journal, p. 169) Chief Judge J. Edward Lumbard, a member of this Special Committee, stated:

As this language [of sec. 332] is about as broad as it could possibly be, there is no doubt that the Congress meant to give to the councils the power to do whatever might be necessary more efficiently to manage the courts and administer justice.

Further, in an article appearing in the June 1960 American Bar Association Journal, Circuit Judge Prettyman made this characterization of the statute and its implications:

This statute is flat and unequivocal in conferring power. With the power goes corresponding responsibility. With responsibility goes corresponding duty.

The statute has also been referred to in the Report to the Senate Appropriations Committee, of April 1959, of the Field Study of the

Operations of United States Courts, made by staff member Paul J. Cotter, where, among other things, the observations were made (pp. 33 and 36):

> The objectives of this legislation, which was passed in 1939, appear quite clear. * * *
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> * * * * * * *
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> * * * It was the judiciary, for the most part, which urged Congress to enact the present law relating to the supervisory functions of judicial councils. It has been on the statute books for approximately 20 years without any requests for changes being made, and it would appear incumbent upon the judiciary to make it work or to request amendment to the present law.

IV. Recognition of the Scope of the Statute Made in its Application and Use

The purpose of this report is to indicate the responsibilities and powers of the judicial councils as they exist under the present statute. It is not, therefore, necessary to go into the question of the number of times that the statute has affirmatively been used by the several councils. The special Committee of the Conference, appointed to make this study, has been able to obtain from each chief judge of the circuits individual examples of situations in which the statute has been employed, in order to examine the scope of the responsibility and power which has thereby been given recognition in its application.

These examples show a variety of situations in which the councils, mostly through having the chief judge deal with the matter in personal approach, have undertaken and effected corrections of things which lie within the full scope of the responsibility pointed out above.

In other words, most of the councils appear, from the things with which they have dealt in these situations, to have recognized that their responsibilities and power extend, not merely to dealing with the questions of the handling and dispatching of a trial court's business in its technical sense, but also to dealing with the business of the judiciary in its broader or institutional sense, such as the preventing of any stigma, disrepute, or other element of loss of public confidence occurring as to the Federal courts or to the administration of justice by them, from any nature of action by an individual judge or a person attached to the courts.

It might be observed, also, that while the various councils have perhaps not been as active generally as they might and should have been, the various actions they have taken indicate that at least some of them have been far more active and alert as to their responsibility than they have been given credit for being by the profession. This lack of cognizance of what they have done probably results from the informal manner in which their responsibility has been exercised—and ordinarily properly so—to accomplish their object.

V. Other Statutes Indicative of the Intended Importance of Judicial Councils

The role of the judicial councils as an instrument of intended importance in the administration of the Federal court system is given emphasis, it is believed, by the recognition and function accorded them under a number of special statutes. It would needlessly prolong this report to enumerate and discuss all of these, but one example will

sufficiently serve in illustration. Thus, under title 11, United States Code, section 62(b), in the field of bankruptcy, the Council is given the power to make removal of a referee for cause, where the judges of a district court fail so to remove him by a concurrence of a majority of them.

VI. Enforcement Powers of the Judicial Councils

Section 332 provides that the Council "shall take such action (on the quarterly reports of the Administrator) as may be necessary"; that it "shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit"; and that "The district judges shall promptly carry into effect all orders of the judicial council."

It will be noted that there is no express provision for sanctions in relation to the orders of the council. It is apparent from the testimony of the witnesses before the committees of Congress that this was deliberate on the part of the conference committee in drafting the section; that it was felt that the command of the statute, that all orders of the Judicial Council should be carried into effect, would be sufficient, in the nature and spirit of the judicial office, and in the tradition of the scheme of authority which has always existed in a judicial system, to cause those orders to be obeyed; and that any defiance of a council's order would be extremely rare; and that there would exist implicitly or inherently some way of dealing with it, if it occurred.

Thus, in the Senate committee hearings, Senator (now Circuit Judge) Danaher, in referring to the question of "lack of teeth," commented on the provision relating to the reports of the Director, that the Council may take such action as may appear to be necessary, and indicated that he felt that "that answered the question as to the teeth" (pp. 18 and 19). Arthur Vanderbilt replied, "I think it does quite completely and adequately." He added that, as to situations in which the admonition of the Council might not be respected, "Those cases are so rare that I do not think you would ever have to bother with them." And he had precedingly observed, "I think the circuit court and the judicial council would have adequate power to deal with such a situation" (p. 19).

The significance of this, in the view of the Judicial Conference, is merely to make it clear that the omission of any provision for specific sanctions was in no way intended to affect the Council's responsibility to exercise its supervisory and corrective functions or to prompt it to engage in any deterrence in respect thereto.

VII. Conclusions

On the basis of the foregoing, the Judicial Conference of the United States is of the following views and conclusions:

(1) Under section 332, the judicial councils are intended to have, and have, the responsibility of attempting to see that the business of each of the courts within the circuit is effectively and expeditiously administered.

(2) The responsibility of the councils "for the effective and expeditious administration of the business of the courts within its circuit" extends not merely to the business of the courts in its tech-

nical sense (judicial administration), such as the handling and dispatching of cases, but also to the business of the judiciary in its institutional sense (administration of justice), such as the avoiding of any stigma, disrepute, or other element of loss of public esteem and confidence in respect to the court system, from the actions of a judge or other person attached to the courts.

(3) The councils have the responsibility and owe the duty of taking such action as may be necessary, including the issuance of "all necessary orders," to attempt to accomplish these ends.

(4) These responsibilities should ordinarily be approached, in the spirit and tradition of the judicial institution, in an attitude of attempted cooperation and assistance to the district courts and not of purported policemanship, since the purpose of the statute is to make the Council an instrument to help prevent problems from arising, to help find solutions for those which have arisen, as well as to take such corrective action for prevention or solution "as may be necessary."

(5) If the councils are effectively to serve these purposes, it is manifest that they must undertake to keep themselves informed. Their primary source of information will, of course, be the reports of the Director of the Administrative Office, as referred to in the statute. But formal statistics alone will not always, and perhaps not usually, be sufficient as a basis for the exercise of intelligent responsibility. Statistics may point out the existence of a problem, but they do not ordinarily demonstrate the causes or reasons underlying the problem. Thus, in the attempt to deal with a problem, such as where a court appears to be falling behind and perhaps to be approaching an incipient congestion, it would seem desirable for the Council to call upon the Administrative Office to undertake to make an exploration into the particular situation, in order to enable it to get at the underlying picture and understand what it is that needs suggestion or corrective action on the part of the Council.

(6) In the judgment of the Judicial Conference the present statute is adequate to enable the judicial councils, on proper exercise of their responsibilities, to serve their intended purpose, as an instrumentality in the statutory scheme of Public Law No. 299, for "The Administration of the U.S. Courts," to assist in achieving "the effective and expeditious administration of the business of the courts." The expression which the Conference made in the report of its September 1939 session, page 11, after the enactment of the act, is entitled to be renewed:

> It is confidently expected that through the operation of this act the important objectives to which reference has been made will be measurably attained.

VIII. Suggestions and Comments

The Judicial Conference makes these suggestions and comments:

(1) The tasks of a judicial council might perhaps be made easier by gaining understanding and cooperation, through a discussion of its responsibilities and concerns, and its approach to them, at the judicial conference of the circuit. In this connection it should be noted that the purpose of these conferences, under title 28, United States Code, section 333, is

> considering the business of the courts and advising means of improving the administration of justice within such circuit.

(2) Understanding of the functions and concerns of both the judicial councils and the judicial conferences of the circuits by the bar should be encouraged.

(3) Some formality in the holding of council meetings and the setting up of an agenda can perhaps contribute to their functioning. Too much informality may tend to a dilution of the sense of responsibility.

(4) Understanding of the work of the council and of the spirit of its approach to its responsibilities can perhaps be fostered by inviting the district judge, who is the representative on the Judicial Conference of the United States, to attend a council meeting. In this respect, the same purpose in comprehension will perhaps be served as to the council, as results to a court of appeals in calling a district judge at some time to sit with it and thereby become familiar with its processes.

(5) It is not possible to cover within the compass of this report all of the specific things which the Conference has discussed as falling within the responsibilities of the councils. These have included such matters as the responsibility of dealing with situations where a judge, eligible to retire, has become incapacitated, so that the work of the court is materially being prejudiced thereby. Another illustration is having a judge who has an accumulation of submitted cases not take on any further trial work until such cases have been decided. These specific matters could be numerously multiplied. For purposes of the present report, the all-inclusive general statements made above will have to suffice.

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POWERS, FUNCTIONS AND DUTIES OF CIRCUIT COUNCILS *

1. Section 332(d) of Title 28, United States Code, reads:

'Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council."

2. The purpose of 28 USC § 332 is to create a "system of decentralization" by recognizing in each circuit the judicial council as "the operating unit in bringing about the proper administration of justice." Hearings before a Subcommittee of the Senate Judiciary Committee, 76th Congress, 1st Sess., on S. 188, April 4–5, 1939, at p. 20.

3. The judicial council "shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit." 28 USC § 332. *It is vital that the independence of individual members of the judiciary to decide cases before them and to articulate their views freely be not infringed by action of a judicial council.*

4. "The responsibility of the councils 'for the effective and expeditious administration of the business of the courts within its circuit' extends not merely to the business of the courts in its technical sense (judicial administration), such as the handling and dispatching of cases, but also to the business of the judiciary in its institutional sense (administration of justice), such as the avoiding of any stigma, disrepute, or other element of loss of public esteem and confidence in respect to the court system, from the actions of a judge or other person attached to the courts." Report of the Judicial Conference of the United States on the Powers and Responsibilities of the Judicial Councils (June 1961).

5. The chief judge of a district court should be informed when matters concerning his district are under consideration and shall pass the information promptly to the judges of the district.

6. Before any action is taken with respect to a particular judge or other person attached to the courts in the circuit, that judge or other person should be invited to present his views to the council after being advised of the nature of the action which may be taken together with the reasons. Monitoring the substance of judicial decisions is not a function of the judicial council.

7. The chief judge of the circuit, as a representative of the council, should periodically call a meeting of all the chief judges of the district courts to discuss with them matters of mutual concern. It is suggested that copies of the minutes of these meetings be furnished all active court of appeals and district court judges in the circuit. The judges of the district courts should be encouraged to recommend matters for consideration by the circuit council and, where appropriate, they should be advised what action, if any, is taken on the recommendations.

8. With respect to the district courts, the circuit council should keep itself informed on a regular basis as to the following:

(a) The condition of its docket in terms of the number of cases filed, cases terminated, and cases remaining on its docket; cases under decision unduly delayed.

(b) List of prisoners in jail awaiting trial, showing date of imprisonment.

* Judicial Conference of the United States, March, 1974.

(c) The operation of the Rule 50(b), Federal Rules of Criminal Procedure, plans for expediting the trial and disposition of criminal cases in the district courts of the circuits.

(d) The operation of Criminal Justice Act plans. See 18 USC § 3006A(i).

(e) The operation of the jury selection plan in the district courts. See 28 USC § 1863(a).

(f) The degree to which the district courts are undertaking to make the best utilization of jurors. See Guidelines for Improving Juror Utilization in the United States District Courts issued by the Federal Judicial Center.

Although the circuit council should rely when possible on statistics available from the Administrative Office, it may require the district courts to supply this information by filing reports with the council.

9. Where it appears that the court of appeals or any district court in the circuit has a large backlog of cases, the circuit council should take such steps as may be necessary to relieve the situation, including working with the court in question in procuring the assignment of judges from other districts and circuits to that court.

10. Where it appears that a circuit or district judge has a large backlog of cases or decisions to be made, the circuit council should take such steps as may be necessary to relieve the situation after first giving an opportunity to the circuit judge or the district court to take appropriate action in the case of a district judge.

11. When the district judges are encountering difficulty in agreeing upon the adoption of rules and orders dividing the business of the court, the circuit council should lend its assistance in resolving the problem. When the district judges are unable to agree upon the adoption of rules or orders dividing the business of the court, the circuit council shall make the necessary orders. 28 USC § 137.

12. Circuit council meetings should be held at least four times a year. Standing and ad hoc committees may be utilized to reduce the burden on the council as a whole and persons not members of the council, including district judges, members of the bar, law professors and laymen, may be appointed to such committees.

13. Before the circuit council adopts any general order affecting the operation of the courts within its circuit, the judges of the district courts should be afforded an opportunity to comment. In appropriate cases it will also be desirable to afford an opportunity for comment to the bar and public groups known to be concerned.

14. A circuit council may delegate limited power to the chief judge of the court of appeals to act on its behalf, but such power shall not extend to the adoption of general rules or to the taking of final action with respect to a particular judge or other person.

15. All duties delegated to the circuit executive by the circuit council shall be subject to the general supervision of the chief judge of the circuit. When authorized by the circuit council, the chief judge may also delegate specified portions of his powers to the circuit executive.

16. Where any formal order of the circuit council is not complied with, the matter may be referred to the Judicial Conference of the United States, or the circuit council may take other appropriate action.

10

Duties Which May Be Delegated to the Circuit Executive

The circuit executive shall act as secretary of the circuit council. The circuit council may delegate power to the circuit executive. The duties delegated to the circuit executive of each circuit may include but need not be limited to:

(a) Exercising administrative control of all nonjudicial activities of the court of appeals of the circuit in which he is appointed.

(b) Administering the personnel system of the court of appeals of the circuit.

(c) Administering the budget of the court of appeals of the circuit.

(d) Maintaining a modern accounting system.

(e) Establishing and maintaining property control records and undertaking a space management program.

(f) Conducting studies relating to the business and administration of the courts within the circuit and preparing appropriate recommendations and reports to the chief judge, the circuit council and the Judicial Conference.

(g) Collecting, compiling and analyzing statistical data with a view toward preparation and presentation of reports based on such data as may be directed by the chief judge, the circuit council and the Administrative Office of the United States Courts.

(h) Representing the circuit as its liaison to the courts of the various states in which the circuit is located, the marshal's office, state and local bar associations, civic groups, news media, and other private and public groups having a reasonable interest in the administration of the circuit.

(i) Arranging and attending meetings of the judges of the circuit and of the circuit council, including preparing the agenda and serving as secretary in all such meetings.

(j) Preparing an annual report to the circuit and to the Administrative Office of the United States Courts for the preceding calendar year, including recommendations for more expeditious disposition of the business of the circuit.

Legislative Responsibilities of the Circuit Councils

The responsibilities of the circuit councils under 28 U.S.C. § 332 and other legislation are:

(a) The circuit council must meet at least twice each year to provide for the effective and expeditious administration of the business of the courts within its circuit. 28 U.S.C. § 332(a)(d).

(b) The United States district courts are required to devise plans for random jury selection, for the appointment of counsel under the Criminal Justice Act, and for achieving prompt disposition of criminal cases under Rule 50(b), Federal Rules of Criminal Procedure. The circuit councils are required to approve these plans and to direct appropriate modifications. 28 U.S.C. § 1863; 18 USC § 3006A.

(c) Where the need arises for a circuit judge to be temporarily assigned to another circuit, the Chief Justice of the United States may make the assignment with the consent of the chief judge or the circuit council of the circuit furnishing the assigned judge, 28 U.S.C. §§ 291(a), 295.

CONTINUED

1 OF 2

(d) A retired circuit or district judge may be designated and assigned by the chief judge or the circuit council of his circuit to perform such judicial duties within the circuit as he is willing and able to undertake. 28 U.S.C. § 294(c)

(e) The circuit council may designate the place for keeping the records of the district courts and the court of appeals within the circuit. 28 U.S.C. § 457.

(f) The circuit council may find that court quarters and accommodations are necessary and, upon that determination, the Administrator of General Services, at the request of the Director of the Administrative Office, may establish such accommodations. 28 U.S.C. §§ 142, 635(a).

(g) Upon a certificate of physical or mental disability signed by a majority of the members of the circuit council of the circuit, the President, with the advice and consent of the Senate, may appoint an additional judge for any judge of a circuit who is eligible to, but who does not, retire, 28 U.S.C. § 372(b).

(h) The circuit council may by order designate the residence of a district judge at or near a particular place within a district if the public interest and the nature of the business of a district so require. 28 U.S.C. § 134(c).

(i) When the district judges are unable to agree upon the adoption of rules or orders dividing the business of the court, the circuit council shall make the necessary orders. 28 U.S.C. § 137.

(j) Any district court may, with the consent of the circuit council, pretermit any regular session of court for insufficient business or other good cause. 28 U.S.C. § 140(a).

(k) A district court may, by the concurrence of a majority of the judges, remove a referee in bankruptcy for cause. Where there is no concurrence, the referee may be removed by the circuit council. 11 U.S.C. § 62(b).

(l) The circuit council shall advise the Judicial Conference of the United States of their recommendations and reasons concerning the number of referees and their respective territories, salaries and schedules of fees. 11 U.S.C. § 65(b); see also 11 U.S.C. §§ 68, 71(b)(c)

(m) A district court may, by the concurrence of a majority of the district judges, remove a magistrate for cause. Where there is no concurrence, the magistrate may be removed by the circuit council. 28 U.S.C. § 631(h).

(n) The circuit councils shall advise the Judicial Conference of the United States of their recommendations and reasons concerning the number of magistrates and their respective locations and salaries. 28 U.S.C. § 633(b)

(o) The circuit councils may appoint a circuit executive. 28 U.S.C. § 332(e).

(p) The circuit council approves or disapproves the supporting personnel of the seinior circuit and district judges each year. Resolution of the Judicial Conference of the United States.

(q) The circuit councils develop plans for limiting publication of judicial opinions. Resolution of the Judicial Conference of the United States.

(r) The circuit councils may delegate authority to the circuit executive to approve for payment appointment vouchers and vouchers for expenses or other services (CJA Forms 20 and 21). Resolution of Circuit Council, 4th Circuit, October 4, 1972.

(s) Where the chief judge of any district court advises that the number of court reporters in the district is insufficient to meet temporary demands and that services of additional court reporters should be provided, the circuit council may notify the Director of the Administrative Office, who shall arrange for additional reporters on a contract basis. 28 U.S.C. § 753(g)

APPENDIX D

Performance Measures and Court Performance: Some Observations

One of the truisms of judicial administration is that judges are "allergic" to statistics. Very few judges have had any training or experience in using quantitative performance measures or other statistics. In our experience, most judges dislike dealing with court statistics; they doubt the value of statistics; and they are often suspicious of efforts to interpret court data for policy purposes. The few federal judges who do have an interest in and aptitude for quantitative measures are usually regarded by their colleagues with bemused tolerance at best. Often their efforts arouse hostility.

Despite this climate, statistics are a significant element in the operation of federal courts. The federal judiciary is supported by a massive system for data gathering and interpretation that--for all its limitations--is probably without peer in any court system anywhere. However, preparation of the necessary

documents does take substantial staff time, and considerable judge time is consumed in perusing the resulting reports. This is especially true for judges who serve on judicial councils. We feel that councils could make more effective use of statistics with the benefit of some observations about the history, purpose, and interpretation of federal judicial statistics.

Judge Charles E. Clark (1889-1963) of the Second Circuit Court of Appeals was the primary architect of the present system of federal judicial statistics. Judge Clark, former professor and dean at Yale School of Law, is often thought of as the foremost author of the Federal Rules of Civil Procedure. As chairman of the Statistics Committee of the Judicial Conference from 1946 to 1958, he directed development of the system of federal judicial statistics, an enterprise that largely resulted from his initiatives before his appointment to the bench. The structure of the present system of federal judicial statistics was proposed in a report of the American Law Institute (ALI) in 1934.[60]

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60. American Law Institute, A Study of the Business of the Federal Courts, May 10, 1934.

(This project had been initiated by the National Commission on Law Observance and Enforcement.) This document, completed under Dean Clark's direction, developed a case reporting system for two purposes: to provide voluminous data for the report itself, and to propose a system for permanent adoption that would provide similar materials routinely. The system, itself modeled on prior work in Connecticut by Dean Clark,[61] was adopted in large part by the Administrative Office when it was established in 1939. Forms proposed in the ALI report are very similar to those now in use, especially the JS-2, 3, 5, and 6. These forms define the system's most distinctive characteristic: it is a case accounting system that keeps track of each case as it moves to completion and that permits flexible analysis for the kinds of procedural studies especially of interest to Judge Clark. The report concludes its proposal for a new statistics system by quoting Justice Frankfurter:

> [A]n adequate system of judicial statistics, improved and amplified by experience, will, through the critical interpretation of the figures, steadily make for a more vigorous and

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61. C. Clark and H. Shulman, Law Administration in Connecticut (1937).

> scientific approach to the problems of the administration of justice.[62]

Interpreting Statistics

An adequate "critical interpretation of the figures" seems to us a rarity in federal courts in general, and judicial council work in particular. Frequently, too much or too little is drawn from available statistical reports. We have heard judges and staff refer to one statistical report or another as though it distinguished the good judges from the others. It should be obvious that there are no measures available that deal significantly with any of the qualitative aspects of a judge's work.[63] The rather narrow quantitative

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62. A Study of the Business of the Federal Courts, supra note 60, part II at 24 (quoting F. Frankfurter and J. Landis, The Business of the Supreme Court (1927)).

63. A measure of reversal rate might seem appealing. However, to us there are no promising possibilities because other variables than the quality of a judge's work have a significant impact. No matter how the measure is constructed, a reversal rate figure will be heavily affected by such extraneous factors as the size of a judge's case load, its composition, the number of appeals, the lawyers' selectivity in appealing the cases that have a realistic chance of success, a judge's jurisprudential compatibility with the reviewing court, a judge's habits in regard to making an appeal-proof record (not necessarily equivalent to good

measures available cannot provide any indication of the quality of work done. The number of cases terminated per year is a measure of productivity, nothing more. The number of three-year-old pending civil cases is a management tool to highlight cases that, by Judicial Conference standards, probably need attention. Narrow measures of this kind should not be interpreted to suggest broad implications that the data cannot sustain.

A single quantitative measure is rarely adequate as a measure of even a rather simple and quantitative concept, such as "productivity" or "speed." In appendix E infra, we recommend use of monthly forms that show each judge's number of cases assigned, terminated, and pending. The number of cases pending is especially useful, both as a rough indication of the relative success of each judge's efforts to manage his docket and as a management tool to identify problems that need

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judging), a judge's originality or willingness to take chances, and luck.

Sometimes, however, a judge may be reversed so often that a pattern may be said to exist. For example, we were told that one judge in a very large court accounts for a majority of the reversals of that court, a pattern not easy to explain away even if all of the above factors contributed to it.

attention by judge, court or--conceivably--judicial council. At most, however, this item is a starting point. Policy conclusions should not be drawn from the figures in a mechanical fashion because a surprising figure may have some special cause. Particularly when one court is compared to another, case load figures are affected by local factors that may be beyond the court's control. Especially for this reason, the approach of the Judicial Conference in Court Management Statistics is appealing. A balanced picture is easier to achieve when several measures for several years appear on a single page.

Acting on Statistics: The Problem of Judicial Independence

Obviously it is best if management tools, such as pending case load data and lists of old pending motions, are used and acted on by the judges themselves. If they are not, and a judge or court becomes seriously behind in ways that appear to have a remedy, we believe there are many actions that a court or judicial council can take that do not intrude on a judge's independent powers. Those powers protect a judge from improper in-

fluence on decisions. However, a judge or court system cannot be sheltered from responsibility to outsiders to use its resources wisely in reaching decisions. Congress and the Judicial Conference provide and allocate resources as they determine the public interest requires. They also establish policies on case processing on the same basis. Resource decisions by others are simply unavoidable; no one would suggest that it is an imperative of judicial independence that every federal court have an unlimited claim on the Treasury. The policies of the Judicial Conference on old cases, old motions, etc., are in some degree a corollary of this fact; they also were clearly intended by Congress.

We have no doubt, as a practical matter, that judicial councils can use statistics as a basis for action without any substantive implication. For example, a council can draw a court's attention to an excessive number of old motions, offer procedural suggestions and resource assistance, or insist the court find some solution. Similarly, a council can insist that a judge defer a vacation and refine his trial calendar management if it finds he has both an excessive pending case

load (taking all special conditions into account) and a small number of trial days. The council could also make a number of procedural suggestions (greater use of magistrates, for example) and insist a solution be found from among them.

APPENDIX E

Administrative Office Data Forms

The Administrative Office data forms shown on the following pages are routinely prepared by district court clerks and submitted to the Administrative Office. They are obviously valuable in informing judicial councils about the operation of courts within the circuit. The JS-1 form provides summary information each month on the criminal docket, including the number of criminal defendants before each judge or magistrate of the court. The JS-9 forms provides similar information on the civil docket. Both forms are routinely submitted to the circuit executive, and should be available within a few days of the close of each month.

The JS-11 form summarizes juror usage for each day, and can easily be used to produce weekly or monthly figures. Some councils have arranged to have this form sent to the circuit executive.

There are many other statistical reports. Councils receive periodic reports on civil cases pending three years or more, motions under advisement for sixty days or more, and decisions under advisement for ninety days or more. These are used by all councils, so we do not reprint them here. Numerous other summary reports are available for particular purposes; they summarize material submitted on the various case reporting forms and similar documents.

J.S. 1 (Rev. 6/76) (Pursuant to P.L. 93-619)

District Code_____

*REPORT OF CRIMINAL DOCKET — UNITED STATES DISTRICT COURTS FOR MINOR, MISDEMEANOR AND FELONY PROCEEDINGS

PART I:

DISTRICT_____ PERIOD_____

	Total	Magistrate	Court (Judge)
1. *CASES PENDING AT THE CLOSE OF PRECEDING PERIOD*	1	2	3
2. *CASES FILED THIS PERIOD*	4	5	6

a. Defendants in cases filed.
Offense level: Petty (district judge ONLY)_____7 Minor_____8
Misdemeanor_____9 Felony_____10 Total_____11 (Lines 7, 8, 9 and 10 equal box 11)

b. Received by transfer under Rule 20 included in box 4._____

c. Docket numbers of juveniles _____

3. *CASES PENDING AT CLOSE OF THIS PERIOD*	12	13	14
4. *DEFENDANTS DISPOSED OF DURING THIS PERIOD*	15	16	17

a. Defendants in cases disposed of. (Lines 18, 19, 20 and 21 equal box 15)
Offense level: Petty_____18 Minor_____19 Misdemeanor_____20 Felony_____21

b. Defendants transferred under Rule 20 included in 4a_____

c. Docket Nos. (Rule 20)_____

d. Docket Nos. of defendants disposed of under 21 USC 844(b) _____

5. *SUPPLEMENTARY J.S. 3 REPORTS:* (Band together for mailing)

a. Convictions on charges undisposed of at the time of initial conviction or acquittal _____

b. Modifications of sentences or corrections _____

6. *DOCKET NUMBERS USED FOR SPECIAL PURPOSES:*

a. Jurisdictional transfer of probationers:
List here any number assigned in your *regular* Criminal Docket to probationers, jurisdiction over whom has been transferred to your district under 18 U.S. Code 3653. (Do NOT submit J.S. 2 cards.) _____

b. Removals under Rule 40(b):
List here any number assigned in your *regular* Criminal Docket to a proceeding under Rule 40(b), F.R.Cr.P. (Do NOT submit J.S. 2's or 3's for any of these numbers.):_____

c. Information filed to establish prior convictions in narcotic cases: List here any number assigned in your *regular* Criminal Docket to an information filed by the U.S. Attorney for the purpose of establishing a prior conviction in a narcotic case. (Do NOT submit J.S. 2's or 3's for any of these numbers.):_____

d. List here docket number(s) assigned to secret indictment(s), add JS-2 report to lines 2 and 2a when indictment is made a public record._____

** to be submitted by the Clerk of Court ONLY*

PART II

NUMBER OF CRIMINAL DEFENDANTS ASSIGNED TO INDIVIDUAL JUDGES OR MAGISTRATES DURING PERIOD AND THE TOTAL NUMBERS PENDING AT END OF PERIOD

JUDGE OR MAGISTRATE (A)	NUMBER OF DEFENDANTS Assigned During Period (B)	Pending at End of Period (C)	JUDGE OR MAGISTRATE (A)	NUMBER OF DEFENDANTS Assigned During Period (B)	Pending at End of Period (C)
			Total criminal defendants for whom final proceedings were still pending as of end of period.	ASSIGNED	
				UNASSIGNED	
				TOTAL	

NOTE: Column "C" of the current report should be equal to the total of Column "C" from the previous report *plus* the number of new assignments (Column B of current report) *less* the number terminated or transferred to other judges during the current period.

Comment:

This report is to be mailed to:

STATISTICAL ANALYSIS AND REPORTS BRANCH
DIVISION OF INFORMATION SYSTEMS
ADMINISTRATIVE OFFICE OF THE U.S COURTS
SUPREME COURT BUILDING
WASHINGTON, D.C. 20544

Attn: Speedy Trial Section

cc: Circuit Executive

Submit only one report covering all divisions within your district, accompanied by all report forms J.S. 2 and 3.

Person submitting report

MONTHLY REPORT OF CIVIL CASES BY THE CLERK OF COURT

JS-9 (Rev. 8/74)

UNITED STATES DISTRICT COURT FOR _____

PART I: MOVEMENT OF CIVIL CASES FOR THE MONTH OF _____ 19___

SEE INSTRUCTIONS ON THE REVERSE SIDE

1. Cases pending at the close of preceding month.	
2. Cases filed during this month exclusive multidistrict litigation cases.	
3. Multidistrict litigation cases received this month.	
4. Total cases filed during this month.	
5. Cases terminated during this month exclusive of multidistrict litigation cases.	
6. Multidistrict litigation cases transferred out or terminated this month.	
7. Total cases terminated this month.	
8. Cases pending at close of this month.	

OTHER ACTIONS

9. Number of additional JS-6 forms in multiple party cases. ▶

10. Number of within-district transfers listed on reverse side of this sheet. ▶

PART II NUMBER OF PENDING CASES AT CLOSE OF MONTH, BY JUDGE

NUMBER OF CIVIL CASES ASSIGNED TO INDIVIDUAL JUDGES DURING MONTH AND THE TOTAL NUMBERS PENDING AT END OF MONTH

JUDGE (A)	NUMBER OF CASES ASSIGNED DURING MONTH (B)	NUMBER OF CASES PENDING AT END OF MONTH (C)	JUDGE (A)	NUMBER OF CASES ASSIGNED DURING MONTH (B)	NUMBER OF CASES PENDING AT END OF MONTH (C)

NOTE: Column "C" of the current report should be equal to the total of Column "C" from the previous report *plus* the number of new assignments (Column B of current report) *less* the number terminated or transferred to other judges during the current month.

Total civil cases for which final proceedings are still pending as of the end of month.

ASSIGNED	
UNASSIGNED	
TOTAL PENDING	

MONTHLY REPORT OF WITHIN-DISTRICT TRANSFERS

(Within-district transfers do not require additional J.S. 5s and 6s)

Cases originally filed in:			Transferred to:			
Office	Docket	Docket No.	Office	Docket	Docket No.	Date

If the sequence of docket numbers of cases filed is broken for any reason except because of a within-district transfer (listed above) please list the docket number omitted and the reason therefore in the space below.

INSTRUCTIONS: FOR

PART I

Line 1 of this report must agree with line 8 of the report for the preceding month.
Line 4 must equal the number of J.S. 5 forms and line 7 must equal the number of J.S. 6 forms (excluding those listed on lines 9 and 10 accompanying this report.)

Lines 3 and 6 are to reflect forms used to report transfers pursuant to 28 U. S. C. 1407.

PART II

If there is not enough space in PART II for all judges' names, use an additional form.

FURNISH ONLY ONE REPORT COVERING ALL DIVISIONS WITHIN YOUR DISTRICT.

MAIL THIS REPORT NOT LATER THAN THE 5th OF EACH MONTH TO:

OPERATIONS BRANCH -- D.I.S.
ADMINISTRATIVE OFFICE OF THE U.S. COURTS
SUPREME COURT BUILDING
WASHINGTON, D.C. 20544

cc: Circuit Executive

JS-11
(Rev. 8/77)

101

Petit Juror Usage

A MONTHLY REPORT TO THE
ADMINISTRATIVE OFFICE OF U.S. COURTS

FOR MONTH OF	YEAR

DISTRICT

DISTRICT NUMBER

PLACE OF HOLDING COURT

DATE	A JURIES IN TRIAL		NUMBER OF JURORS			
	Civil 1	Criminal 2	Total Available To Serve B	Selected or Serving C	Challenged D	Not Selected, Serving or Challenged E
				Total	Total	Total
TOTAL COLS. 1 And 2			Total			
	A		B			

DIVIDE "A" INTO "B" FOR JUROR USAGE INDEX

F. COMMENTS

In this space each District court should record such facts about daily juror situations as noted in Sec. 6 of the manual of instruction (*see examples)

PREPARED BY

TELEPHONE NO.

*e.g. Consolidation of cases for trial, multiple voir dires held, "reuse" of jurors, voir dires lasting more than one day, sequestration of juries, and any other facts helpful for analysis.

INSTRUCTIONS

1) Use only one line for each day of juror activity.
2) Column B equals Col. C plus Col. D plus Col. E.
3) Column A—Show the number of separate jury trials in process, whether or not the trial is completed that day. Also, if two trials occur in same courtroom within the day count these as two.
4) Column B—Show total number reporting as available to serve, whether or not put on a panel or a jury. Exclude any excused jurors if they were not paid an attendance fee (per instruction No. (2) of Summons Form AO-222).
5) Column C—Show number selected or serving as jurors for any specific case trial, even if the case is to be tried at a future date or if case settles before evidence is introduced.
6) Column D—Show number challenged and not selected or serving for any trial service that day. Persons challenged for one jury trial but selected for another are counted in Col. C.
7) Column E—Show jurors not selected, serving or challenged for any specific trial. Include jurors reporting for instruction or orientation.

Return to: Adm. Off. of U.S. Courts, Statistical Analysis and Reports Division, Jury Reports, Wash., D.C. 20544

APPENDIX F

Council Actions to Provide Resources

There are several actions a judicial council can take if it determines that a district needs assistance. These include:

Obtaining Additional Judgeships. Some districts that appear to need more judgeships have not made the necessary request to the Judicial Conference Subcommittee on Judicial Statistics. Since these requests need council approval, the council is in a position to evaluate relative needs. If it is the council's view that a district needs and could obtain more help than requested, the council's intervention could be very useful. The authors are aware of several districts that could have obtained more judgeships in the recent bill had they requested them.

Further, the council can help to sustain requests when they are being considered by the Judicial Conference and Congress. Some councils and circuit chief judges have been especially effective.

Obtaining Visiting Judges. The judicial councils, mainly through the chief judge, are involved in nearly all visiting judge assignments (see 28 U.S.C. §§ 291-294). Statutory requirements and the procedures of the Judicial Conference and Administrative Office provide an opportunity for councils to provide specific assistance when a court has a temporary problem. Unfortunately, the mechanism by which visiting judges are provided has experienced tremendous pressure in recent years because many courts have needed help and few have been able to supply it. Perhaps this will change when additional judges are appointed in 1979 and after.

Obtaining Court Reporters. 28 U.S.C. § 753(g) provides for court reporters on a contract basis upon a showing of need by the council.

Other Assistance. The councils, and especially the circuit executives, are often in a position to assist with requests for other support personnel, space, or facilities. Sometimes the initiative has come from the circuit executive, who identified a problem--and a solution to it--that was not evident to the court involved.

APPENDIX G

ADDENDUM C

RULES

of the

JUDICIAL COUNCIL

of

THE THIRD CIRCUIT

Approved for Publication
November 5, 1976

Council Rule XVI
Revised September 1, 1978

RULES OF THE JUDICIAL COUNCIL OF THE THIRD CIRCUIT

I.

The Judicial Council of the Third Circuit shall consist of the judges of the circuit who are in regular active service. 28 U. S. C. § 332(a) and (b). Senior judges of the circuit are honorary non-voting members of the Council, but as such shall not attend executive sessions of the Council.

II.

The Chairman of the Council shall be the Chief Judge of the Circuit. 28 U. S. C. § 332(a). In his absence, the active circuit judge of the Court next in precedence who is present shall act as Chairman.

III.

The Secretary of the Council shall be the Circuit Executive or an active judge of the circuit designated by the Chairman to serve as Secretary.

IV.

The Chairman shall call meetings of the Council at least twice each year. 28 U. S. C. § 332(a).

V.

Meetings of the Council shall be held in Philadelphia, or at such places as the Chairman may designate.

VI.

A quorum for holding a meeting shall consist of a majority of the circuit judges who are in regular active service.

VII.

The Council shall, to the extent provided by statutes or resolutions of the Judicial Conference of the United States, do among other things the following: Receive from the Chief Judge the reports of the Director of the Administrative Office of the U. S. Courts and shall take such action thereon as shall be deemed necessary (28 U. S. C. § 332(c)), and make all necessary orders for the effective and expeditious administration of the business of the courts within the circuit (28 U. S. C. § 332(d)). Additional responsibilities of the Council, specified by statutes or resolutions of the Judicial Conference of the United States, are summarized in Appendix A below.

VIII.

A written agenda of subjects to be discussed by the Council shall be prepared by the Chairman and sent to the members of the Council at least seven days before any meeting, unless the Council, by vote, provides for a lesser time. Any member of the Council may place subjects on the agenda by submitting such subjects in writing to the Chairman at least five (5) days before a meeting of the Council. Additional subjects may be added to the agenda at any time by majority vote of the members of the Council.

IX.

Minutes of the meetings of the Council shall be taken by the Secretary. A draft of such minutes shall be circulated by the Secretary no later than fifteen (15) days after such Council meeting for comments, corrections and additions. After the minutes are approved by the Council, they shall be filed with the Clerk of the Court and also with the Administrative Office of the United States Courts unless there is a majority vote of the Council to the contrary.

X.

In addition to the circuit judges of the Court who are in regular active service, the Chairman, with the approval of a majority vote of the Council, may from time to time invite to meetings of the Council, senior Circuit Judges, district judges (either active or senior), members of the bar, representatives of the public or members of the news media.

XI.

In all matters in which action by the Council is required or permitted, such action of the Council shall be on motion that is seconded and approved by a majority vote of the members of the Council.

XII.

Those matters upon which the Council acts by mail or telephone vote shall be ratified by the Council at the next meeting of the Council following such vote, and be recorded by the Secretary in the minutes.

XIII.

Matters involving the certification of disability of an active judge (28 U. S. C. § 372(b)) shall be resolved by the Council only after reasonable notice in writing to such judge and an opportunity afforded him or her to respond in writing and to be heard with counsel if such judge desires.

XIV.

Any matter involving a complaint with respect to the conduct of a specific judge or specific court personnel shall be resolved by the Council only after reasonable notice in writing is given to such judge or personnel and after they have been afforded an opportunity to reply in writing and to be heard with or without counsel if they desire.

XV.

Committees of the Council shall be appointed by the Chairman for one-year terms, unless other provision is specifically made.

XVI.

Among other Committees, the Council may create a Lawyers Advisory Committee (LAC) consisting of lawyers representing various sections of the bar. The members shall be appointed by the Chairman with the approval of the Council as follows:

1. The LAC shall be composed of not more than fifteen (15) members who shall serve staggered three-year terms;

2. Two (2) members shall be nominated from each United States Court District one of whom shall be nominated by the active circuit judge or judges stationed therein and one who shall be nominated by the active judges of the district court. One (1) member shall be nominated by the judges of the District Court of the Virgin Islands. The remainder will be considered "at large" members and will be nominated by the Chairman of the Council;

3. Ordinarily a member shall not serve more than one three-year term consecutively.

The Lawyers Advisory Committee may be consulted by the Council from time to time regarding rules, procedures or policies of the Council or Court and shall be a conduit between the bar and the Council or Court regarding matters affecting the administration of justice within the circuit.

XVII.

These rules may be amended by a majority vote of the Council.

THE FEDERAL JUDICIAL CENTER

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

By statute, the Chief Justice of the United States is chairman of the Center's Board, which also includes the Director of the Administrative Office of the United States Courts and five judges elected by the Judicial Conference.

The Center's **Continuing Education and Training Division** conducts seminars, workshops, and short courses for all third-branch personnel. These programs range from orientation seminars for judges to on-site management training for supporting personnel.

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

The **Innovations and Systems Development Division** designs and helps the courts implement new technologies, generally under the mantle of Courtran II—a multipurpose, computerized court and case management system developed by the division.

The **Inter-Judicial Affairs and Information Services Division** maintains liaison with state and foreign judges and judicial organizations. The Center's library, which specializes in judicial administration, is located within this division.

The Center's main facility is the historic Dolley Madison House, located on Lafayette Square in Washington, D.C.

Copies of Center publications can be obtained from the Center's Information Services office, 1520 H Street, N.W., Washington, D.C. 20005; the telephone number is 202/633-6365.

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