EMPIRICAL RESEARCH AND THE POLITICS OF JUDICIAL ADMINISTRATION: CREATING THE FEDERAL JUDICIAL CENTER

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I

INTRODUCTION

Throughout the twentieth century, a vocal minority of law teachers, social scientists, judges, and lawyers have produced legal procedure scholarship and exhortation honoring Lord Kelvin's maxim: "When you cannot measure, your knowledge is meager and unsatisfactory."[1] This article is about that tradition, but not of that tradition. It differs from articles in this symposium that draw hypotheses and seek to disprove them by repeated observations. It is, rather, a case study of the creation of the Federal Judicial Center,[2] the federal courts' research and education agency and an important contributor to empiricism in civil procedure. This article indicates that changes in court organization, including changes to promote quantitative research, are likely to reflect developments in the larger environment of which the courts are a part. It highlights some characteristics about the politics of empirical research on procedure. It suggests that numerous interests seek to control internal research activity within the judicial branch. Beyond these points, the episodes of judicial lobbying that this article reveals remind us that predictions of human behavior, the ultimate goal of social science empirical theory, are always subject to the influence of fortuitous circumstances—chance always plays a role.

II

QUANTITATIVE PROCEDURE RESEARCH IN THE TWENTIETH CENTURY

Efforts to measure the effect of legal and procedural rules date back at least to the Progressive Era at the turn of the century, an era dominated by

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1. *Quoted in* C. PRITCHETT, THE ROOSEVELT COURT, A STUDY IN JUDICIAL POLITICS AND VALUES, 1937-1947, at xi (1948).

2. The research derives from a request in the late 1970's by the Board of the Federal Judicial Center that the Center's history be documented while it was still possible to tap the recollections and insights of those active in its creation and early work. This article is a revision of an unpublished paper delivered at the June 1980 Law and Society Association annual meeting in Madison, Wis.: Wheeler, The Creation of the Federal Judicial Center as a Case Study of Innovation, Autonomy, and Control in Judicial Administration.

what Grant McConnell called the "hope . . . that science and management would solve the problems of government."[3] Within the legal community, a representative expression of that hope was Roscoe Pound's famous 1906 speech to the American Bar Association. Pound's speech was an early call for scientific analysis of law and legal procedure. He urged recognition of the "received doctrines of scientific jurisprudence" and bemoaned the fact that the "public seldom realizes how much it is interested in maintaining the highest scientific standard in the administration of justice."[4] Later, in 1921, Benjamin Cardozo proposed a Ministry of Justice to provide judges and legislators with "expert . . . responsible . . . disinterested [and] systematic advice as to the workings of one rule or another."[5] Without such advice, Cardozo said, speaking like an early twentieth-century efficiency expert, the penalty will be "paid both in the wasted effort of production and in the lowered quality of the product."[6]

The need Cardozo highlighted led many state legislatures to establish judicial councils to pursue court improvement. The councils were also part of the larger world of Progressive Era reform. Douglas Ayer, for example, traced Thurman Arnold's efforts from 1927 to 1930 to improve West Virginia's courts to Arnold's experiences with Progressive Movement reforms in city government. "In Laramie," he notes, "Arnold had called for a city planning club as an institutionalized means of reviewing the efficiency of city employees; in West Virginia, he urged a judicial council to oversee the efficiency of the courts."[7]

The councils clearly had a research mission. They were to undertake, as the Massachusetts law put it,

> the continuous study of the organization, rules and methods of procedure and practice of the judicial system of the commonwealth, the work accomplished, and the results produced by that system . . . [and report] upon the work of the various branches of the judicial system . . . [and] submit for the consideration of the justices of the various courts such suggestions . . . as it may deem advisable.[8]

Thanks in part to the councils, the 1920's and 1930's saw what Herbert Jacob once called "a series of brilliant investigations in the administration of justice . . . full of statistical detail."[9] Faith in quantitative research, in fact, was so

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3. G. MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY 43 (1966).

4. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 337, 342 (A. Levin & R. Wheeler eds. 1979).

5. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 113-14 (1921). Cardozo's interest was primarily in substantive rules.

6. *Id.* at 113.

7. Ayer, *In Quest of Efficiency: The Ideological Journey of Thurman Arnold in the Interwar Period*, 23 STAN. L. REV. 1049, 1060 (1971).

8. MASS. GEN. L. ch. 221, §§ 34A-34B (1924). Many legislatures copied the Massachusetts formulation, including the U.S. Congress, in directing the Judicial Conference to oversee operation of the federal rules. *See* 28 U.S.C. § 331, ¶ 5 (1982). *See generally* Wheeler & Jackson, *Judicial Councils and Policy Planning: Continuous Study and Discontinuous Institutions*, 2 JUST. SYS. J. 121 (1976) (for an analytical history of the judicial council movement).

9. Jacob, *Politics and Criminal Prosecution in New Orleans*, 8 TULANE STUD. POL. SCI. 77, 77 (1963). Much of this research, including the specific objects of Jacob's remarks, was in the criminal area, as exemplified by CRIMINAL JUSTICE IN CLEVELAND (R. Pound & F. Frankfurter eds. 1922) and

deep that it appears naive in retrospect. Numbers were powerful enough, some thought, to produce agreement over the best way to organize and operate courts. People would agree, the American Judicature Society assumed in 1923, if a judicial council would only "indicate what is needed in specific instances after fortifying its policy with statistics."[10]

This era of quantitative research on legal procedures faded when the Depression dried up public funds for judicial councils and directed attention to massive economic and social difficulties which overshadowed problems in the administration of justice.[11] Interest in measuring how courts process disputes reemerged in the 1940's, however, in connection with the efforts to create court administrative agencies—auxiliary bodies charged with budgeting and personnel tasks—and with the collection and analysis of caseload data.[12] These court administrative agencies have become an important factor in the current scheme of quantitative analysis of procedure. They provide data to support the courts' rulemaking and administrative processes. These data are used by outside researchers to some degree as well.

The creation of administrative bodies within the judiciary, however, also reveals the politics of judicial administration. These politics involve a contest for control over how courts should be structured and operated—a contest that can enhance the power of one set of actors at the expense of another. The development of an internal federal court research capacity can be understood only in terms of this contest, in which judges are major players.

III

DEVELOPMENT OF COURT ADMINISTRATIVE AGENCIES —THE FEDERAL EXPERIENCE

The federal judges' initial administrative objective in the twentieth century was much more basic than to control research and education. The objective was rather to bring the federal courts under judicial supervision. A word of background about these earlier efforts is a necessary preface to a description of the efforts to develop internal judicial branch research capabilities.

Many twentieth-century court reform programs have reflected the judicial assumption "that the path to efficiency is through increased judicial power."[13] Increases in judges' administrative power thus may be at the expense of:

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summarized in A. KUHLMAN, A GUIDE TO MATERIAL ON CRIME AND CRIMINAL JUSTICE (1929). See also the literature cited in Jacob, *supra*, at n.2. There was work on the civil side as well. Some examples include F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM (1927); A. LEPAWSKY, THE JUDICIAL SYSTEM OF METROPOLITAN CHICAGO (1932); S. WARNER & H. CABOT, JUDGES AND LAW REFORM (1936). See generally the bibliographical essay in W. WILLOUGHBY, PRINCIPLES OF JUDICIAL ADMINISTRATION 607-52 (1929).

10. *Ohio Adopts Judicial Council*, 7 J. AM. JUDICATURE SOC'Y 5 (1923).

11. *See* R. WHEELER, JUDICIAL ADMINISTRATION: ITS RELATION TO JUDICIAL INDEPENDENCE 29 (1988).

12. *See id.* at 30-33.

13. Baar & Baar, *Introduction: Judges and Court Reform*, 3 JUST. SYS. J. 99, 101 (1977).

— the legislature, as seen in proposals to shift the locus of rulemaking authority;
— local judges and other political elites, as seen in proposals to unify the courts of any particular state into one integrated system, administered from the top;
— practicing lawyers, as seen in case management techniques; and
— administrative personnel, as seen in efforts to diminish the power of court clerks.

The basic objectives of judge-directed court reform are clear and well-captured by Peter Fish: "Negation of popular influence over courts and law, maximum institutional autonomy, judge-control, and internal judicial unification, simplification and centralization."[14] Pound's 1906 speech, for example, which the leadership of the practicing bar found distasteful, called for greater judicial control of the conduct of litigation and for greater control over courts by centralized judges.[15] In response, the American Bar Association appointed the Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation. As early as 1909, the Committee criticized the federal arrangement whereby the Justice Department managed the courts' administrative business: "It is not in accord with the genius of our legal institutions," said the Committee, "that one who practices in the courts should be head of a department comprising the courts and charged with the supervision thereof."[16]

A. Creating the Basic Instruments of Federal Judicial Administration

The first step in the judges' effort to take control of their courts' administration came in 1922, when Congress acceded to Chief Justice Taft's request that it create the Conference of (the then nine) Senior Circuit Judges, chaired by the Chief Justice.[17] In one sense, the Conference was the federal answer to the state judicial council movement. It directed each senior district judge to provide the respective senior circuit judge with a report on the state of the docket. On the basis of these crude data, the Conference would "make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment and transfer of judges."[18]

The Conference, though, was more than a research agency. Taft had come to the office a year earlier with a zeal to reform the courts.[19] He saw the Conference, states Peter Fish, as "an information and communication system, at first quite rudimentary, a policy-making institution with ready access to

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14. Fish, *Guarding the Judicial Ramparts: John J. Parker and the Administration of Federal Justice*, 3 JUST. SYS. J. 105, 105 (1977).
15. Pound, *supra* note 4, at 344-45.
16. Report of the special committee (1909), *reprinted in part in The State-Wide Judicature Act*, 1 J. AM. JUDICATURE SOC'Y 101, 103 (1917).
17. Act of Sept. 14, 1922, ch. 306, § 2, 42 Stat. 837, 838.
18. *Id.*
19. *See* Fish, *William Howard Taft and Charles Evans Hughes: Conservative Politicians as Chief Judicial Reformers*, 1975 SUP. CT. REV. 123, 134-40.

Congress and the media, and a vehicle for centralized supervision of the geographically remote district court."[20]

Taft's efforts were continued by his successor, Charles Evans Hughes, who became Chief Justice in 1930. A 1934 statute enhanced centralized judicial management by authorizing the Supreme Court to promulgate rules of law and equity for federal district courts,[21] a function that is now exercised primarily by the Judicial Conference.[22]

A 1939 statute[23] created the Administrative Office of the United States Courts as staff to the Conference. The Administrative Office Act significantly enhanced the Conference's power to set and enforce court administration policies, and it freed the courts from Department of Justice oversight. By the same statute, and reflecting the views of Chief Justice Hughes and Conference leaders,[24] Congress decentralized some management responsibility by creating a judicial council in each circuit, composed then of the judges of that circuit's court of appeals.[25] The councils would protect the Chief Justice and Supreme Court from blame if a functionary in some remote jurisdiction committed a management indiscretion—or worse.[26]

Finally, again at the judicial leadership's request, Congress mandated annual gatherings of all judges in the circuit, the circuit judicial conferences, and charged them with "considering the business of the courts and advising ways and means of improving the administration of justice within such circuit."[27] Conference participation was thus not restricted to small groups of appellate judges; in fact, Congress mandated each circuit to provide rules of lawyers' participation.[28] Nevertheless, to Chief Judge John Parker, whose Fourth Circuit conferences pre-dated the 1939 statute and included lawyers, the circuit judicial conference did not threaten to expand lawyer control over the courts. According to his biographer, Parker saw that the conferences were, "unlike bar association meetings, a forum under judge control, and [that they] thus facilitated co-optation of the bar by the judges."[29]

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20. *Id.* at 136.
21. Act of June 19, 1934, ch. 651, 48 Stat. 1064.
22. 28 U.S.C. § 331, ¶ 5 (1982), 18 U.S.C. §§ 3771-3772 (1982), and 28 U.S.C. §§ 2071-2075 (1988).
23. Act of Aug. 7, 1939, ch. 501, 53 Stat. 1223.
24. P. FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 152-65 (1973).
25. Act of Aug. 7, 1939, ch. 501, § 1, 53 Stat. 1223, 1224. More than forty years later Congress broadened council membership to include district judges. Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (codified at 28 U.S.C. § 332 (1982)).
26. P. FISH, *supra* note 24, at 136-37.
27. Act of Aug. 7, 1939, ch. 501, § 1, 53 Stat. 1223, 1224-25 (current version at 28 U.S.C. § 333 (1982)).
28. *Id.*
29. Fish, *supra* note 14, at 116.

B. From Administration to Research and Education

In 1948 the Conference of Senior Circuit Judges was renamed the Judicial Conference of the United States[30] and was broadened in the next four decades to consist of twenty-seven members in all—the Chief Justice as presiding officer, the chief judge of each circuit, a district judge from each regional circuit, and the chief judge of the Court of International Trade.[31] The Judicial Conference works mainly through an extensive system of committees that the Chief Justice appoints from members of the bench and bar. Through the Administrative Office, the Conference adopts and implements policies in such areas as budget and personnel and oversees the development of federal procedural rules for Supreme Court promulgation.[32] One of the Conference's most visible functions is the collection of data, reported by the courts, on numerous aspects of district and appellate case-processing activities.[33]

Under the leadership of Chief Justice Earl Warren, the Judicial Conference not only increased in size and level of administrative activity, but it also expanded its activities to include research and education. An early example of such efforts was a nine-month project in 1958-59, sponsored by the Pretrial Committee, to test certain pretrial procedures in the Eastern District of New York.[34] In 1966, the Administrative Office could list ten discrete research programs that various Conference committees were either conducting or had suggested.[35] Four of these projects were sponsored by the Trial Practice and Techniques Committee, which focused its attention on pretrial procedures, protracted litigation, and multidistrict litigation. Other projects included a review of circuit boundaries, studies of computer applications to courts' calendars and the jury system, and probation projects.

Moreover, the Conference and its committees were sponsoring fourteen programs of continuing education.[36] In 1950, the Conference had authorized the now-defunct Federal Probation Training Center in Chicago, which built on regional programs of the Administrative Office Probation Division. Judges' seminars on pretrial procedures for protracted cases started in 1957

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30. Act of June 25, 1948, ch. 646, 62 Stat. 869, 902.

31. 28 U.S.C. § 331 (Supp. IV 1986).

32. The Supreme Court's authority to promulgate rules derives from several rules enabling acts, codified in 28 U.S.C. § 2072 (1982) (civil procedure) and 18 U.S.C. § 3771 (1982) (criminal procedure). The Judicial Conference's participation is prescribed in 28 U.S.C. § 331 (1988). *See also supra* notes 21-22 and accompanying text.

33. 28 U.S.C. § 604(a)(2) (1982). *See* Annual Report of the Director of the Administrative Office of the United States Courts.

34. Assistance Rendered by the Administrative Office in the Execution of Judicial Conference Programs at 2-3 [hereinafter Assistance Rendered]. The Administrative Office evidently prepared this 14-page document in 1966 as background for the special Judicial Conference Committee discussed below.

Copies of unpublished letters and other documents used in this paper are, unless otherwise indicated, on file at the Federal Judicial Center.

35. Judicial Conference Program as of September 1966, Existing and Suggested, in the Areas of Research, Continuing Education and Training, enclosed with letter from Earl Warren to Stanley Reed (Oct. 14, 1966).

36. *Id.*

under the impetus of the Pretrial Committee. Also, between 1962 and 1965, the Conference authorized five seminars for newly appointed judges. Seminars for newly appointed bankruptcy referees began in 1964, and received some earmarked appropriations.[37] Congress, however, provided no statutory authorization for judicial education programs, although the periodic "sentencing institutes" that it authorized in 1958 to promote "uniformity of sentencing"[38] quickly took on an educational purpose.

C. Strained Administrative Support

By 1966, the Judicial Conference and Administrative Office had clearly become immersed in a patchwork program of research and continuing education. Staff support and funds for these programs, though, were available largely on a catch-as-catch-can basis, and Congress showed no inclination to augment the Administrative Office budget to remedy the situation.

The Administrative Office said it had "devoted whatever time and talent it could to these endeavors, but because of limitations in staff, an ever-increasing volume of housekeeping functions, and an overall lack of funds—and even of authority—it has been necessary for the judges themselves to devote considerable time . . . to the development of these programs." Thus, they suffered "noticeable inadequacies in overall results stemming mostly from an inability and consequent failure to follow through on worthwhile activities and even to document for future reference those techniques of judicial management and administration which have proved successful."[39] For example, the pretrial study in Brooklyn produced, "aside from a few basic statistical facts, . . . no journalized record of the procedures employed nor any evaluation of their success and failures." The sponsors could neither "document the project," nor "give personal training to the staff permanently assigned to the court, . . . limit[ing] any lasting improvement in calendaring techniques in the court."[40]

The judges and the Administrative Office looked to a variety of sources for funds for travel and materials in connection with these programs. Specific appropriations were available only for sentencing institutes and bankruptcy referee seminars. More often, funds were squeezed from regular judicial travel funds and other sources. At times, the Conference programs were financed by non-federal funds. The University of Chicago, for example, supplemented the regular federal appropriations that were used for the

37. REPORT OF THE SPECIAL COMM. ON CONTINUING EDUCATION, RESEARCH, TRAINING AND ADMINISTRATION TO THE CHIEF JUSTICE OF THE UNITED STATES, CHAIRMAN, AND THE MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, MAR. 1967 [hereinafter REPORT OF THE SPECIAL COMMITTEE], *reprinted in Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary, United States Senate on The Administration of Justice in the Federal Court System and S. 915 and H.R. 6111*, 90th Cong., 1st Sess. 31, 34 (1967) [hereinafter *Subcommittee Hearings*].

38. 28 U.S.C. § 334 (1982).

39. Assistance Rendered, *supra* note 34, at 1.

40. *Id.* at 3.

Chicago Probation Center.[41] A 1965 project to study probation and parole, based in the Northern District of California, was supported by a project grant from the National Institute of Mental Health to the University of California's School of Criminology.[42] A member of the Judicial Conference's Court Administration Committee, discussing a grant he was seeking to fund a law school study, complained about having "to go around . . . with our hat in hand, begging foundations and other projects that have money to spend for worthwhile purposes, to underwrite the business of the Judicial Conference. There is no continuity of action. Each project is separate in itself."[43]

Furthermore, there appeared little prospect that the House Appropriations Subcommittee on State, Justice, Commerce, the Judiciary, and Related Agencies, which effectively controlled the federal courts' budget, was at all inclined to increase the Administrative Office appropriation. The chairman, John Rooney of New York, was legendary for his hostility. The director of the Administrative Office of the Courts at the time recalled that "every single request for appropriations that we made always had a request . . . for additional help, for competent statisticians to work on these statistics and never once did we get a nickel out of Rooney."[44]

To some federal judges, the most likely cure for the situation was private funding to establish an "institute for advanced judicial studies," a "federal judicial institute to be a part of a great university."[45] The coordinating committee that the Judicial Conference created to try the multidistrict electrical equipment antitrust litigation in the mid-1960's (the forerunner of the judicial panel on multidistrict litigation)[46] explored the feasibility of such an arrangement with the University of Chicago and the Ford Foundation, but these efforts were abandoned in light of the events described below.[47]

D. Chronology of the Center's Creation

Against this background of disorganized research activity, the Judicial Conference in September 1966 authorized "a study of the possible need for congressional authorization of a broad program of continuing education, training, research and administration . . . ."[48] The study had been recommended by the Court Administration Committee, at the request of Chief Justice Warren. He asked retired Justice Stanley Reed to chair the six-

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41. REPORT OF THE SPECIAL COMMITTEE, *supra* note 37, at 34-35.
42. *Id.* at 35-36.
43. *Subcommittee Hearings, supra* note 37, at 11, 17 (statement of John S. Hastings, Chief Judge, U.S. Court of Appeals for the Seventh Circuit).
44. Interview with Warren Olney III, Director of the Administrative Office of the United States Courts, in Berkeley, California (Oct. 4, 1977). Chairman Rooney's role in the appropriations process is described *passim* in A. WILDAVSKY, THE POLITICS OF THE BUDGETARY PROCESS (2d ed. 1974).
45. W. Becker, Brief History of Events Leading to Creation of the Federal Judicial Center 2 (Oct. 25, 1977) (unpublished manuscript).
46. 28 U.S.C. § 1407 (1982).
47. W. Becker, *supra* note 45, at 5-6.
48. Report of the Proceedings of the Judicial Conference of the United States, Sept. 1966, at 37-38.

judge Special Committee on Continuing Education, Research, Training, and Administration.[49] The Reed Committee was formed by late October and met three times in the Supreme Court Building, where the Chief Justice could drop in on its meetings. At those meetings, one Committee member recalled, "the lead was taken by Mr. Olney with the support of Chief Justice Warren."[50]

Warren Olney III had been a close associate during Earl Warren's tenure as California's governor and then had served as the Assistant United States Attorney General for the Criminal Division, before returning to California. In 1958, Warren convinced him to return to Washington to become the second director of the Administrative Office, where he served until late 1967.

At its March meeting, the Judicial Conference approved the Committee's recommendation to seek legislation to create a Federal Judicial Center.[51] Even before the Conference met, however, effective judicial lobbying had put the Reed Committee's legislative proposal before the Congress. On February 6 President Johnson had issued his crime message to the Congress, calling for a federal grant program to aid local law enforcement and for revisions in federal criminal law. Sandwiched between sections on a "Unified Federal Correctional System" and "Organized Crime" was a somewhat incongruous recommendation that Congress create a Federal Judicial Center, which "will enable the courts to begin the kind of self-analysis, research and planning necessary for a more effective judicial system—and for better justice in America."[52] The message's discussion of the Center was based on Administrative Office drafts; the President's reference to "some twenty different [Judicial Conference] programs of research and education,"[53] obviously derived from a list of twenty-four projects that the Administrative Office had compiled.[54] Two days later, Senator McClellan submitted several administration bills pursuant to the message, including Senate Bill 915,[55] to create the Federal Judicial Center. Senate Bill 915 was essentially a bill that Olney had prepared, based on conversations with Warren and members of the Reed Committee.[56] Almost identical legislation, House Report 6111, was introduced in the House on February 27[57] and, with revisions, was eventually enacted.

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49. Letter from Stanley Reed to Earl Warren (Oct. 17, 1966) (accepting invitation to serve as chairman of special committee). The six judges serving on the committee were James Browning (9th Cir.), Jean Breitenstein (10th Cir.), Paul Weick (6th Cir.), Edward Devitt (D. Minn.), Arthur Lane (D.N.J.), and Edward Weinfeld (S.D.N.Y.).

50. Interview with Judge Jean Breitenstein, U.S. Court of Appeals for the Tenth Circuit, in Denver (Oct. 6, 1977).

51. Report of the Proceedings of the Judicial Conference of the United States, Mar. 1967, at 8.

52. Special Message to the Congress on Crime in America, Feb. 6, 1967, in PUB. PAPERS (Lyndon B. Johnson, 1967), Book 1, at 134, 143 (1968).

53. *Id.* at 143.

54. Enclosed with letter from Warren to Reed, *supra* note 35.

55. S. Res. 915, 90th Cong., 1st Sess., 113 CONG. REC. 2900 (1967).

56. Letter from Olney to Stanley Reed, James Browning, and Edward Devitt (Feb. 6, 1967); Letter from Olney to the Reed Committee (Feb. 11, 1967). The administration had made only slight revisions in the bill.

57. H.R. Res. 6111, 90th Cong., 1st Sess., 113 CONG. REC. 4565 (1967).

To get action in 1967, Olney explained in March to the Reed Committee that "it was necessary to get a bill or bills into the hopper early in the session . . . and that this was the reason for going ahead without first getting Judicial Conference approval."[58] This statement merely hints at a telling incident of judicial persuasion. At its January meeting, the Chief Justice told the Reed Committee that the idea of a Federal Judicial Center was timely, considering "the President's present interest for improvements of all kinds, as exemplified by his crusade against crime."[59] The Chief Justice thus asked the Committee to prepare a report and finalize draft legislation for such a center. When Justice Reed responded that such a report could be prepared for the October Judicial Conference meeting, the Chief Justice—"impatiently," according to an observer—insisted that the report be prepared immediately because he was in a position to have it included in the President's forthcoming message on crime. The Chief Justice noted that the President was indebted to him for his reluctant service as chairman of the committee that investigated the assassination of President Kennedy.[60] Consequently, Olney explained, "the Chief Justice personally . . . made . . . overtures to the White House with the result that the proposal for a judicial center had been incorporated in the President's message."[61]

Consequently, when the Conference met in late March, it was not faced with the bleak but typical task of developing legislation for judges to push through a disinterested Congress. Instead, there was an array of bills—set for hearings and enjoying strong executive branch support—all basically consistent with Judicial Conference preferences.

Once the Judicial Conference accepted the Reed Committee report and endorsed its proposed legislation in March, the Administrative Office turned to secure its passage. The effort "to make a case" for the bill, Olney recalled, went beyond typical Administrative Office efforts for most legislation.[62] Senator Joseph Tydings' Subcommittee on Improvements in Judicial Machinery was setting an agenda for legislation on matters such as federal judicial discipline and court administrators[63] and thus took jurisdiction of Senate Bill 915, setting hearings in April. Olney proposed to the Subcommittee staff[64] that he and a slate of five judges testify when the

58. Minutes of Reed Committee Meeting, Mar. 4, 1967, at 3.

59. Minutes of Reed Committee Meeting, Jan. 27, 1967, at 6.

60. W. Becker, *supra* note 45, at 5.

61. Minutes of Reed Committee Meeting, *supra* note 58, at 2.

62. Interview with Warren Olney III, *supra* note 44.

63. *See, e.g., Deficiencies in Judicial Administration: Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary of the United States Senate on S. 1033, The National Court Assistance Act*, 90th Cong., 1st Sess. (1967), *and The Judicial Reform Act Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary of the United States Senate on S. 3055, 3060, 3061, 3062, The Judicial Reform Act and Other Measures to Improve Judicial Administration in the Courts of the United States*, 90th Cong., 2d Sess. (1968).

64. Letter from Olney to William T. Finley, Jr., Chief Counsel of the Senate Subcommittee (Apr. 5, 1967), and letter from Olney to William R. Foley, General Counsel, House Judiciary Committee (Apr. 7, 1967). (This person is not to be confused with William E. Foley, then Deputy Director, later Director of the Administrative Office of the United States Courts from 1977 to 1985.)

Subcommittee took up consideration of the Center.[65] As Olney anticipated, the Subcommittee supplemented this list with a wider range of witnesses, including law professors and representatives of various judicial improvement organizations.[66]

In May, the House Judiciary Committee unanimously reported out House Report 6111 after conforming it to the Judicial Conference proposal in all but a few particulars.[67] In this revised form, the House passed the bill in June by a two-to-one margin[68] and referred it to the Senate Judiciary Committee, where it replaced Senate Bill 915 as the main bill under consideration. Olney regarded the bill, as passed, to "contain every important provision recommended by the Judicial Conference,"[69] and in September the Conference endorsed House Report 6111 in the form passed by the House.[70] The Senate passed the bill with revisions on November 30; the House accepted them on December 6 after conference, and the President signed Public Law 90-219 on December 20, en route to a Christmas visit in South Vietnam.[71]

E. Research and Education Within the Federal Judicial System: A Product of the Times

The Center's creation indicates that, just as the Progressive movement spawned early twentieth-century judicial research activity, the tenor of the mid-1960's influenced the Center's creators.

The legislation stated three major functions for the Center, each consistent with broader trends and objectives in the mid-1960's. The first objective, and the most prominent and pervasive, was a research function—"to conduct research and study of the operation of the courts of the United States, and to stimulate and coordinate such research and study on the part of other public and private persons and agencies."[72]

Quantitative research on legal procedure was flowering in corners of the law schools, with Levin and Woolley's[73] and Rosenberg's[74] work on civil case processing, and Kalven and Zeisel's large study of jury behavior,[75] to name

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65. Initial hopes that the Chief Justice and/or Justice Reed might testify were abandoned when Olney was "informed that the Chief Justice and others believe[d] that a precedent should not be begun for Justices of the Supreme Court to urge legislation on the Congress, however meritorious they might consider it to be." Letter from Olney to Foley, *supra* note 64.

66. *Subcommittee Hearings*, *supra* note 37.

67. H.R. 6111, 90th Cong., 1st Sess. (Comm. Print, May 19, 1967).

68. H.R. Res. 6111, 90th Cong., 1st Sess., 113 CONG. REC. 16199, 16204 (1967).

69. Letter from Olney to Alfred P. Murrah (June 20, 1967).

70. Report of the Proceedings of the Judicial Conference of the United States, Sept. 1967, at 56.

71. *See* H.R. Res. 6111, 90th Cong., 1st Sess, 113 CONG. REC. 33095, 35135, 81 Stat. 664, 670 (1967).

72. 28 U.S.C. § 620(b)(1) (1982).

73. A. LEVIN & E. WOOLLEY, DISPATCH AND DELAY: A FIELD STUDY OF JUDICIAL ADMINISTRATION IN PENNSYLVANIA (1961).

74. M. ROSENBERG, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE: A CONTROLLED TEST IN PERSONAL INJURY LITIGATION (1964).

75. H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966).

some obvious examples. In some ways the law teachers were merely catching up with social scientists' inquiries into judicial procedures. The interdisciplinary Law and Society Association, for example, had been incorporated in 1964.[76]

More broadly, the mid-1960's saw the culmination of a steady increase in public and private spending for research and development.[77] A literature had developed to analyze the phenomenon,[78] and one enthusiast praised the "fact that R & D, the industry of progress and the key to the future, is the vital ingredient that shapes the scientific world in which we live."[79] The federal government introduced "planning-programming-budgeting-systems" ("PPBS"), first in the Defense Department and in turn to all executive agencies in August 1965. PPBS stressed the role of rigorous analysis in assessing agency needs and evaluating performance.[80] Moreover, Olney recalled that a number of the judges active in the Center's creation "had corporate experience at one time or another and this matter of research and development and how it can be organized in a corporation has been an administrative problem for years, and at this particular time it was getting a lot of attention in magazines of administrative societies."[81] The times, in short, were receptive to Olney's appeal that someone in the judiciary should be "devoting full time to studying and planning how to meet the vast changes that our country and its judiciary are living through."[82]

Judicial education, the second objective in the bill, was also a timely topic. New York University's Appellate Judges Seminar had begun in 1956 and the National College of State Trial Judges in 1964.[83] Other state and national programs of judicial education developed about the same time.[84] The increase in continuing education programs was not confined to the courts, however. In early 1967, Olney advised the Reed Committee of the President's

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76. Yegge, *The Law and Society Association to Date*, 1 LAW & SOC'Y REV. 3 (1966).

77. In constant 1972 dollars, research and development spending grew from $8,702,000,000 in 1953 to an estimated $28,879,000,000 in 1977. Spending in 1967, the year the Center was created, was $29,291,000,000. *See* NAT'L SCI. FOUND., NATIONAL PATTERNS OF R&D RESOURCES 30, Table B-5 (1977).

78. *See, e.g.*, E. MANSFIELD, J. RAPOPORT, J. SCHNEE, S. WAGNER & M. HAMBURGER, RESEARCH AND INNOVATION IN THE MODERN CORPORATION (1971); *see also* L. SILK, THE RESEARCH REVOLUTION (1960).

79. Horowitz, *Foreword*, in L. GOSLIN, A SELECTED ANNOTATED BIBLIOGRAPHY ON R & D MANAGEMENT, Indiana Business Information Bulletin No. 56, at iii (1966).

80. *See* Held, *PPBS Comes to Washington*, in THE PUBLIC INTEREST 102-15 (1966); Schick, *The Road to PPB: The Stages of Budget Reform*, 26 PUB. ADMIN. REV. 243-58 (1966). Both articles were reprinted in PLANNING PROGRAMMING BUDGETING: A SYSTEMS APPROACH TO MANAGEMENT (F. Lyden & E. Miller eds. 1968).

81. Interview with Warren Olney III, *supra* note 44.

82. *Subcommittee Hearings*, *supra* note 37, at 372 (statement of Warren Olney III). Olney, for one, had an obvious commitment to empirical research that pre-dated the Reed Committee.

83. Burger, *School for Judges*, 33 F.R.D. 139 (1964); Rosenberg, *Judging Goes to College*, 52 A.B.A. J. 342 (1966).

84. *See* INSTITUTE OF JUDICIAL ADMINISTRATION, JUDICIAL EDUCATION IN THE UNITED STATES: A SURVEY (1965); *see also* Rose & Skoler, *The National Council of Juvenile Court Judges Institute and Conference Program*, 48 JUDICATURE 225 (1965); Hansen, *The Continuing Education Program of the Wisconsin Judiciary*, 52 MARQUETTE L. REV. 240 (1968); Ketcham, *Summer College for Juvenile Court Judges*, 51 JUDICATURE 330 (1968); Fairbanks, *Educating Judges for Courts of the Poor*, TRIAL, Apr.-May 1970, at 43; *The American Academy of Judicial Education*, 54 JUDICATURE 226 (1971).

appointment of the National Advisory Council on Extension and Continuing Education, created by statute in 1965. It was, he said, an "indication of the interest and support of the executive and congressional branches of government for programs of continuing education."[85]

The third objective for the Center came from the statutory directive that its Board "study and determine ways in which automatic data processing and systems procedures may be applied to the administration of the courts of the United States . . . ."[86] A separate systems development mission was not included in the original Reed Committee draft legislation because the Commmittee saw automation as falling within the broad research and development function of the Center. Warren had preached to the Reed Committee that the reduction of backlogs could only come by "taking advantage of every advance in business and know-how that the twentieth century has to offer," and the Committee itself noted in its report the need for "scientific study and research, . . . a system [sic] analysis of court processes in the light of modern methods of data recordation and retrieval."[87]

The separate statutory provision on automation derived from alternative legislation submitted by Representative Robert McClory, who believed that the federal courts should "utilize such modern devices and techniques" as a "great many State courts [had developed] to fully utilize their judicial talent and to expedite the administration of justice."[88] There were some substantive purposes for this provision. McClory called attention, for example, to Representative William M. McCulloch's observation in 1966 that "the Federal courts could use such machines" to comply with the jury selection requirements of the then-pending Civil Rights Bill of 1966.[89] In summary, the objectives set by the courts and the Congress for the Center represented objectives that the federal courts regarded as necessary, but they did not occur spontaneously to the Center's creators. In each case, the objectives were on larger agendas in the world beyond the federal courts.

IV

RESEARCH AND EDUCATION WITHIN THE FEDERAL JUDICIARY: CONTEST OVER DIRECTION AND FORM

The debate over the Center's organization and governance shows that the politics of control over judicial administration extend to the research function and agencies exercising it and implicate the different perspectives that have traditionally characterized debate concerning the locus of power over judicial administration. The crucible for the resolution of these issues was the

85. Letter from Olney to the Reed Committee (Jan. 24, 1967).

86. 28 U.S.C. § 623(a)(5) (1982).

87. Minutes of Reed Committee Meeting, *supra* note 59, at 4; REPORT OF THE SPECIAL COMMITTEE, *supra* note 37, at 35.

88. H.R. Res. 6111, 90th Cong., 1st Sess., 113 CONG. REC. 16202 (1967).

89. Letter from William M. McCulloch to Emanuel Celler (Aug. 5, 1966), in ADDITIONAL VIEWS OF REPRESENTATIVE ROBERT MCCLORY, H.R. REP. No. 351, 90th Cong., 1st Sess. 23, at 24.

hearings on the House bill before the Senate Judiciary Subcommittee on Improvements in Judicial Machinery, chaired by Senator Joseph Tydings of Maryland.[90]

A. Assertion of Judicial Responsibility

The creation of the Center was more than an effort to institutionalize the Conference's jerry-built programs of research and education when the "volume of litigation in the federal courts [was] steadily increasing [and] its character . . . constantly changing, usually in the direction of greater complexity."[91] Seen in the broader context of twentieth-century judicial administration, the creation of the Center was part of an effort to assert and strengthen judicial control over the direction and management of the third branch.

Earl Warren's tenure as Chief Justice had been marked by an expansion of the membership and programs of the Judicial Conference. With its increased size, however, the Conference became in many ways a non-deliberative body to validate committee recommendations, giving the committees considerable power to shape Conference policy on matters such as legislation. Warren, to be sure, was able to influence committee actions and recommendations—mainly through his appointment power and through the work of Warren Olney.[92] Peter Fish concluded, however, from studying the Judicial Conference committees in the 1960's, that when viewed "as operating agencies," they suffered "from a pervasive absence of power" to affect court performance.[93] Neither the Conference nor its committees, in other words, presented the means for effective policy planning and implementation.

This lack of direction was not a new concern to Warren. Almost ten years prior to the creation of the Center, he had warned the American Bar Association that the courts could not rely on "a continuous tinkering in order to remedy every little outcropping of inefficiency." Instead:

> Our strength must come mainly from improved methods of adjusting caseloads, dispatching litigation for hearing, resolving complicated issues, eliminating non-essential ones, increasing courtroom efficiency, and through dispatch in decision making and appeal.[94]

To be effective, moreover, steps to achieve these ends had to be taken under judicial control. "These things Congress cannot do for us," Warren said. "We must do them ourselves."[95] A Federal Judicial Center as a policy and planning agency, independent of the courts' operational arms but under the control of the judges, offered a mechanism for effective management of an otherwise meandering and drifting institution. It would provide the judicial leadership not only with an opportunity for firmer control, but also with the

90. *Subcommittee Hearings*, *supra* note 37.
91. REPORT OF THE SPECIAL COMMITTEE, *supra* note 37, at 32.
92. P. FISH, *supra* note 24, at 265, 293.
93. *Id.* at 283.
94. Warren, *The Problem of Delay: A Task for Bench and Bar Alike*, 44 A.B.A. J. 1043, 1046 (1958).
95. *Id.*

opportunity to be seen in control, so as to foster the impression of an agency of government able to handle its own affairs.

Thus, at the Reed Committee's second meeting, Warren said (as paraphrased in the minutes) that the "time has urgently come when the Judicial Conference needs to get its aims and goals before the Congress, the Executive, and the general public and let them know what it is trying to accomplish to improve the administration of justice in the country."[96] The Chief Justice, recalled a member of the Committee, wanted to "gear up the whole judicial machinery so it could function more effectively . . . . [T]he whole judicial system should move forward with the demands that were being made . . . ."[97] The proposed Center, recalled another member, would have "the time to be engaged in the business of planning and thinking about the future and the overall plans and problems in the judiciary."[98] All of the effort of the Conference or individual judges, the Reed Committee worried, "has not resulted in any important legislative proposals"[99] being offered by the judiciary.

Indeed, to Olney it was a source of some concern that a timely presidential message and legislative cooperation meant that no one "in the Congress or anywhere else outside of the Special Committee [knew] . . . that the entire concept of the Federal Judicial Center originated in the judiciary and not in either the executive or legislative branches."[100] Olney later indicated that he had not wanted judges to "have the feeling that this was something that was sprung on them by the Congress or by outsiders,"[101] or as he said at the time, "that the Special Committee and the Conference are merely rubber stamping the proposals for judicial welfare that originated elsewhere."[102] Nevertheless, as late as June 1967, wire service stories on House passage of the Center characterized it as "recommended by the President's Crime Commission."[103]

B. Assertions of Judicial Autonomy

The Center's objectives influenced its form and engaged the traditional debate over the proper roles of judges and non-judges in directing the courts' administration. Who would set its policy, and where would be its place within the federal judicial establishment? The underlying positions were hardly bipolar. The Center's judicial proponents recognized that it would have to

96. Minutes of Reed Committee Meeting, *supra* note 59, at 4.

97. Interview with Judge Edward Weinfeld, Southern District of New York, in New York City (Nov. 25, 1977).

98. Interview with Chief Judge James Browning, U.S. Court of Appeals for the Ninth Circuit, in San Francisco (Oct. 5, 1977).

99. REPORT OF THE SPECIAL COMMITTEE, *supra* note 37, at 32.

100. Letter from Olney to the Reed Committee (Mar. 10, 1967). Shortly after the bill was introduced, the *New York Times* reported the ABA's endorsement of "a plan by President Johnson to establish a center to train Federal Court employees, including Federal judges." *Johnson Backed by Bar on Courts*, N.Y. Times, Feb. 15, 1967, at 22, col. 1.

101. Interview with Warren Olney III, *supra* note 44, at 11.

102. Letter from Olney to the Reed Committee (Mar. 10, 1967).

103. *House Backs a Center to Study U.S. Courts*, N.Y. Times, June 20, 1967 (article apparently not microfilmed for permanent edition).

turn to non-judges for advice, technical assistance, and recommendations, but they insisted it be under the control of the judges. The Senate Subcommittee on Improvements in Judicial Machinery and its chairman did not propose to take the Center from the basic control of the judges, but argued strongly for broadening the leadership of the Center.

1. *The Governing Board.* Debate over the composition of the Board illuminates most clearly the traditional debate in the specific context of the Center. The role of the Board was paramount; the statute makes it responsible for the Center's "direction and supervision."[104] Olney and others thought—albeit mistakenly—that the Board would become the main source of continuity at the Center apart from its chief executive officer. They assumed that the bulk of the Center's work would be done by agencies and outside contractors. Olney and evidently the Reed Committee as well assumed that the Commissioner of Education would provide major assistance in most Center training activities (save for judges) and that the Census and Budget Bureaus and the National Archives would perform its research projects, "to say nothing of the Department of Justice."[105] The Senate Subcommittee deemphasized the Center's reliance on other agencies[106] but assumed that much of the work would be done on contract as well as by a transitory staff serving for the duration of a project or other brief periods.[107]

The statute provided, as proposed by the Reed Committee, for a Board of the Chief Justice, the Administrative Office Director, and two circuit and three district judges elected by the Judicial Conference.[108] Thus, the only non-judge member of the Board is a member in good standing of the federal judicial administrative establishment.[109]

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104. 28 U.S.C. § 623(a) (1967).

105. Letter from Olney to the Reed Committee, *supra* note 56.

106. If anything, the Subcommittee appeared more worried than did the Conference about protecting the Center from entanglements with outside agencies and parties. Thus, a provision in the Reed Committee bill that would authorize the Center to "utilize insofar as possible the services or facilities of any" federal agency was dropped from the bill as passed. *See* Special Committee Report, App. A, *supra* note 37, at 41. The Center, though, was subsequently authorized to contract for the services of public as well as private agencies. 28 U.S.C. § 624(3) (1967). A Reed Committee provision, authorizing the Board to request information from other agencies was retained. *See* 28 U.S.C. § 624(2) (1967). The Subcommittee stressed, however, that the authorization extended only to "such information as bears a substantive relation to the administration of justice in the courts of the United States." S. REP. No. 781, 90th Cong., 1st Sess., *reprinted in* 1967 U.S. CODE CONG. & ADMIN. NEWS 2402, 2417.

The Subcommittee also rejected a Reed Committee provision that would entitle the Board to accept private gifts, fearing a potential conflict of interest for judges on the Board. S. REP. No. 781, at 2417-18. Legislation enacted by the 100th Congress authorizes such acceptance through a separate foundation. Judicial Improvements and Access to Justice Act, PUB. L. No. 100-702, § 629 (1980).

107. For this reason, the Subcommittee exempted Center professional staff from civil service regulations. *See* 28 U.S.C. § 625(b) (1967); S. REP. No. 781, *supra* note 106, at 2419.

108. As noted below (see text at note 129), the Senate barred Conference members from serving.

109. The Director of the Administrative Office is appointed by the entire Supreme Court. 28 U.S.C. § 601 (1948). The Chief Justice's influence in the appointment is considerable.

The idea of a Board for the Center came from the model of the Smithsonian Institution's Board of Regents, which includes the Chief Justice, the Vice President, other officials, and public members.[110] By tradition, the Chief Justice chairs that Board. For Warren, consequently, the Smithsonian, a government research agency led by a board, was a prototype for the research agency he wished to create within the judicial branch.[111] Thus, Olney drafted, "at the suggestion of the Chief Justice," a bill for a Center explicitly patterned after the Smithsonian, with "a Board of Regents" composed of the Chief Justice, district and circuit judges, and the Administrative Office Director, but including also the Vice-President, the Speaker of the House, and the Attorney General. Olney suggested the Secretary of Health Education and Welfare ("HEW") and the Commissioner of Education as possible alternatives to the legislative members.[112]

In subsequent revisions, the idea of a Board was retained but its interbranch character—based on the Smithsonian model—was quickly abandoned for several reasons. There appeared no need to have the Education Commissioner in addition to the HEW Secretary. Subsequently, Warren determined "emphatically" to drop the Attorney General, who was deeply involved in judicial selection and elevation, whereupon the HEW Secretary was also dropped to avoid "invidious comparisons" to the Justice Department. Moreover, HEW's non-judicial training assistance could be secured by a provision, standard in most organic legislation, authorizing the Center to request assistance from federal agencies. That provision, Olney thought, could receive additional force "by instruction from the White House and the President."[113]

Once the Judicial Conference approved the bill, Olney saw his chief task as defeating "possible complications" that would effectively "wreck" the Center.[114] Most worrisome were Senate Subcommittee objections to limiting the Board to the third branch. At the hearings, Tydings hammered consistently on the point. Why, he asked the Attorney General, was there no "business administrator and no one from the College of Business Deans, the National Association of Trial Court Administrators, or any other professional administrative group?"[115] "What about a representative from the National Society of Management?" he asked Maurice Rosenberg.[116] "Might [it] not be helpful," he asked the President of the American Bar Association, "to include

110. 20 U.S.C. § 42 (1894).

111. A Reed Committee member and former Clerk of the Supreme Court under Warren recalled that "some of the inspiration for [the Center] had come out of that experience." Interview with Chief Judge James Browning, *supra* note 98.

112. Olney described this draft and its origins in a January 24, 1967 memorandum to the Committee and at the meeting itself (minutes of Reed Committee meeting, Jan. 27, 1967, at 5). The original bill, dated December 15, is included in the January meeting agenda materials.

113. Letter from Olney to Stanley Reed, James Browning, and Edward Devitt (Jan. 30 and Feb. 1, 1967).

114. Letter from Olney to Judge John Oliver (May 17, 1967).

115. *Subcommittee Hearings*, *supra* note 37, at 9, 280.

116. *Id.* at 280.

outside representation, such as one member of the bar, a member representing the National College of Court Administrators, or perhaps a member representing the deans of the law schools across the country?"[117]

When Judge Rosel Thompson objected that "professors . . . and lawyers . . . each have their specific and particular interest, and they might be riding their own hobbies," Tydings asked him "to go one step further and tell me about judges."[118]

There was occasional agreement from non-judicial witnesses that the Board should be expanded. The American Judicature Society's Glenn Winters, for example, thought that "lawyers should be in there, representatives of the law schools, the court administrators, representatives of business administration, of research and technology, and representatives of the media and the public relations."[119] The judges, though, adhered consistently to the view that the Board should be restricted to the judiciary. Their point was not so much to claim unique competence for themselves; rather, a Board drawn from the judiciary would have, according to a Ninth Circuit judge, "a greater popular acceptance among the judges . . . . [T]hey will respond more favorably."[120] Judge Edward Devitt, a member of the Reed Committee, said, "[A]dvice and assistance from a variety of other professionals and sources" will and can be sought by the Board, but "[i]t is not necessary to place non-judges on the Board to obtain their advice and assistance . . . ." Such action would "result in rejection by many courts and judges of [Center] research and programs."[121]

In September, nevertheless, Tydings had the Reed Committee polled on whether the Board should be expanded to include a non-voting lawyer and management consultant or, alternatively, whether the statute should prescribe an "Advisory Council" of attorneys, law professors, and administrators. Even within the Subcommittee, however, there was disagreement. Ranking minority member Hruska opposed the change. Presumably unanimous opposition from the Reed Committee convinced Tydings not to pursue the amendment.[122] The concept, though, was not lost. Soon after it began operations, the Center established six advisory committees on topics such as research, continuing education, library and publications, and state-federal relations. Judges dominated the committees, but they also included

117. *Id.* at 301.

118. *Id.* at 309.

119. *Id.* at 297.

120. *Id.* at 286 (testimony of Judge Stanley Barnes). Olney, for example, explained the view that non-judges do not know enough about the "broad sweep of things" that would come before the Board, and he defended the Conference's preference for a Board drawn solely from the judiciary. He said, however, that those views "are really their views, not my personal ones." *Id.* at 367-68. Some ten years later, he stated that his "opposition to [non-judges on the Board] was not based on the logic or on criticism of the idea but on the fact that it would make the bill unsaleable" to the judges. The judges all have friends in the Senate and they could have just killed the whole thing off at once . . . ." Interview with Warren Olney III, *supra* note 44.

121. *Subcommittee Hearings*, *supra* note 37, at 452.

122. Memorandum from Warren Olney III to the Reed Committee (Sept. 13, 14, 1967).

academics, other government officials, and industry representatives. Eighth Circuit Judge Harry Blackmun chaired the Advisory Committee on Research, which also included Circuit Judge Carl McGowan (D.C.), District Judge Hubert Will (N.D. Ill.), George Graham of the National Academy of Public Administration, University of Chicago Law School Dean Phil Neal, Maurice Rosenberg of Columbia Law School, and the Director of the National Institute of Mental Health, Dr. Stanley Yolles.[123]

2. *The Director.* A majority of the Senate Subcommittee also took a different view of the type of person who should serve as the Center's chief executive officer. At the January Reed Committee meeting, Warren agreed with some of the members that the Center's executive officer "should be a judge, either active or retired."[124] One member recalled "pretty much a consensus [that] it should be a judge."[125] None of the proposals restricted the office to a judge, but all recognized that judges might well direct the Center. Drafts provided, as did the enacted statute, that judges serving would not receive additional compensation beyond their judicial salary.[126] Indeed, discussion of the Center's director rested on the widely shared assumption that Justice Tom Clark would be the first incumbent, as he was.

The Senate bill would not have barred a judge from serving, but the accompanying report delineated qualities clearly not restricted to judges: "A dynamic and progressive administrator with a background of demonstrated achievement in the management of a large and multifaceted research and development enterprise, or with comparable administrative experience in a professional school, law firm, or other institution." The director, while clearly responsible to the Board, would broaden the Center's contracts by serving as its "ambassador-at-large to the academic, professional, and business communities."[127]

3. *Centralized or Decentralized Judicial Control.* The locus of judicial control has been another traditional point of contention in twentieth-century court administration debate. One Senate modification was aimed at diluting centralized judicial control. The Senate bill precluded members of the Judicial Conference from serving on the Center's Board. The object of the preclusion was, as Tydings put it during hearings, to create "a little independence from the Judicial Conference" and have the Center "represent primarily the whole Federal Judiciary."[128] It would, in the words of the Senate report, "guard against interlocking directorates of the Center and the

123. The Advisory Committees are listed on an insert to THE THIRD BRANCH, Dec. 1968, after 4.

124. Minutes of Reed Committee meeting, *supra* note 59, at 6.

125. Interview with Judge Jean Breitenstein, *supra* note 50.

126. 28 U.S.C. § 626 (1967).

127. S. REP. No. 781, *supra* note 106, at 2416-17. The Center's directors have been one Supreme Court Justice (Tom Clark), two appellate judges (Alfred P. Murrah and John C. Godbold, the incumbent director), one district judge (Walker E. Hoffman), and one law professor (A. Leo Levin).

128. *Subcommittee Hearings*, *supra* note 37, at 9.

Judicial Conference."[129] The record does not reveal Conference views, if any, on this provision, which was added late in the bill's history.

4. *Judicial Versus Bureaucratic Control.* A more distinct change that the Senate achieved in the Reed Committee bill was to establish the Center outside the Administrative Office.[130] Although the Reed Committee bill "established [the Center] in the Administrative Office," the preamble of its report referred to its establishment in the judicial branch.[131] Placing the Center in the Administrative Office was consistent with another Reed Committee provision in the enacted bill that the Administrative Office would perform the Center's accounting and clerical functions.[132] The Reed Committee stressed repeatedly that the Center would "be directed by its own autonomous board of judges . . . and with its own Chief responsible to the Board and not to the Director of the Administrative Office."[133]

The strength of that insistence illuminates the contest between judges and administrators, still another aspect of the politics of judicial administration. When the Reed Committee met to prepare its final report, the agenda Olney submitted included this question: "Why should the Federal Judicial Center be organized with an autonomous Board and Chief instead of by the simple addition of positions and funds to the Administrative Office?" Olney suggested two reasons: to avoid absorbing research and training resources and personnel into the Administrative Office's "daily operations," and to allow for a separate Board that could utilize private funds and contract with both public and private agencies.[134] During the Committee's meeting, though, Judge James Browning urged that the report also say that the programs of an autonomous Center "could be controlled and operated by judges rather than by the Administrative Office,"[135] so, as he later observed, "the Center would be responding to the judicial rather than the administrative judgment about what was needed . . . ."[136]

Administrative Office Director Olney agreed with the need for autonomy, but his motivation was less to preserve the judges' power than to protect the research function of the Center. "Since the main responsibility of the Administrative Office is that of keeping house for the judiciary," he told the Reed Committee, "should the office become shorthanded, as is very often the case, the additional positions would very likely be utilized in the general

129. S. REP. No. 781, *supra* note 106, at 2413.

130. The draft approved by the Conference and the House provided: "There is established within the Administrative Office of the United States Courts a Federal Judicial Center . . . ." REPORT OF THE SPECIAL COMMITTEE, App. A., *supra* note 37, at 40. The bill that passed reads: "There is established within the judicial branch of the Government a Federal Judicial Center . . . ." 28 U.S.C. § 620(a) (1967).

131. REPORT OF THE SPECIAL COMMITTEE, App. A., *supra* note 37, at 40.

132. *See* 28 U.S.C. § 628 (1967).

133. REPORT OF THE SPECIAL COMMITTEE, *supra* note 37, at 38.

134. Agenda for Reed Committee Meeting, Mar. 4, 1967.

135. Minutes of Reed Committee Meeting, *supra* note 58, at 7.

136. Interview with Chief Judge James Browning, *supra* note 98.

housekeeping functions of the office."[137] Behind this statement lay Olney's worry that operations would always drive out planning and research. "You can never have," he later said,

> research and development function effectively if it is either under or a part of the regular on-going day-to-day operation of the company. When that happens, the research and development is always absorbed. The people are used for this emergency and that job . . . in this area the great need was to have the research separate from the regular run of the Federal judiciary so that it would not be controlled by them and so that it would have its own budget and have its own people and make its own decisions as to what was worth studying and what was not . . . ."[138]

The Reed Committee's report to the Conference, however, stressed the need for judicial control over the Center, not the need to insulate research from operation, as the main reason for its autonomy. The report listed the importance of judicial control as the first of four reasons for an independent Center. The Committee stressed its care in recommending "an organization which could be controlled and operated by judges and would not fall under the control of any administrative officer." The report emphasized the Administrative Office Director's agreement.[139]

The Senate concurred in the need for Center autonomy, but it stressed Olney's reasons for that autonomy rather than the reasons emphasized by the judges. The Senate report suggests that placing the Center within the Administrative Office, even with an autonomous Board, might not serve one of the goals the Conference had in mind—to prevent Administrative Office projects from absorbing Center staff. Moreover, though, the Senate worried that a Center established within the Administrative Office could not avoid the complications of intra-agency loyalties, or have the necessary impartiality were the Center ever in a position to review Administrative Office operations in the course of examining the administration of the federal courts.[140]

In short, the bill that President Johnson signed in Australia in December 1967 had been hammered out in the legislative process. Judges insisted, fairly successfully, that they should control research and education, and legislators tried to loosen both judicial control and centralized judicial control.

V

CONCLUSION

Case studies such as this one have their limitations as a research tool. They can provide a skewed or narrow picture of reality, and one must be wary in drawing generalizations or broader explanations from the events recorded in a case study. Often they do not even give a full picture of the event or institution under study. The course of Judicial Center development, for example, has in some ways been quite different from what one might expect based on its legislative history. Instead of a small organization with a

137. Minutes of Reed Committee Meeting, *supra* note 58.
138. Interview with Warren Olney III, *supra* note 44.
139. REPORT OF THE SPECIAL COMMITTEE, *supra* note 37, at 38.
140. S. REP. No. 781, *supra* note 106, at 2410.

transitory staff, it now has almost 100 authorized personnel positions. Turnover in the professional positions has been relatively low.[141]

Case studies also have their advantages. When read with other data, they can suggest hypotheses, and cumulatively they can lend support to generalizations about political behavior. Moreover, because they reveal subtleties that generalizations must perforce deemphasize, they can serve the useful purpose of tempering or qualifying those generalizations. The creation of the Center suggests five observations.

First, those active in the Center's creation realized that quantitative research, no less than traditional doctrinal legal research, is not a purely mechanical enterprise. Whoever controls the research apparatus could influence the research questions and approach.[142]

Second, differences of opinion on how courts should be administered—even the classical differences revealed in the creation of the Center—occur within a larger framework of agreement. Some of this agreement derives from shared fundamental principles. For example, allegiance to the concept of separation of powers has meant that there is rarely disagreement over the view that the American judiciary should have the dominant voice in its own administration. Even the strongest alternative offered by the Subcommittee was to increase the Conference's proposed Board of the Center to nine, merely by adding two non-judicial members. Similarly, there was no disagreement on the value of such an agency, or its objectives, drawn as they were from contemporary trends. By the same token, the judges recognized implicitly, even if perhaps grudgingly, that they could not effect an organizational change of the magnitude under discussion without the approval of the legislative branch.

Third, accommodation and adjustment among competing views was achieved through the give-and-take of the legislative process. That process emphasized, for example, that it was important that an agency created to plan administrative policy affecting a broad range of citizens and litigants be seen as receptive to more diverse sources of expertise than would be expected from its Board of judicial directors.

Fourth, despite legislative and executive support for the concept of research development in the judiciary, it was the judicial branch leadership

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141. Two contemporary analyses of the Center's work are Levin, *Research in Judicial Administration: The Federal Experience*, 26 N.Y.L. SCH. L. REV. 237 (1981), and Bermant & Wheeler, *From Within the System: Educational and Research Programs at the Federal Judicial Center*, in REFORMING THE LAW 102 (G. Melton ed. 1987). *See also* the Center's statutorily mandated, 28 U.S.C. § 623(a)(3) (1967), annual reports.

142. In this regard, I am bound to note an observation about the Center's research efforts:

> Particularly within the sociolegal research community, "outsiders" may assume that "inside" research is based on the model of legal or justification research, in which the conclusions are reached before the research is begun. The only solution to this is to be sure that the assumption is false, and to guard the research process from the subtle but powerful corrosive effects to which it may be subject. We believe that it is to the significant credit of the leadership of the Federal Judicial Center over the two decades of its experience that this . . . disadvantage has been minimized.

Bermant & Wheeler, *supra* note 141, at 143.

that conceived and promoted the idea. This is not to deny that Congress has major responsibilities in improving federal judicial administration.[143] It does suggest that much of the impetus for legislative change in the courts will of necessity come from the courts.

Finally, a case study can illustrate the role of fortuitous circumstances in effecting change.[144] President Johnson contributed significantly to the Center's creation when he made the Conference recommendation part of his Crime Control message. Furthermore, the proposal was perceived initially as a request from a source other than the Judicial Conference. This perception could only have been helpful within Congress, despite Olney's worry that it would annoy the judges. By inclusion in the President's legislative agenda for crime control, the Center got on the legislative fast track. Moreover, inclusion in the President's message meant that the American Bar Association ("ABA") at its mid-winter meeting shortly thereafter, could thus endorse the proposal. Given the coolness between Justice Warren and the ABA, endorsement by the ABA may have been difficult to achieve otherwise.

Recall how the Center proposal came to be included in the President's message. Warren, evidently aware that the message was in production, prodded the Reed Committee to produce a draft bill quickly so that he could ask President Johnson to include it. Warren acted on the basis of his sense that the President would be receptive—in a way obligated—to help the Chief Justice. The help Warren sought was that the President urge Congress to create a Federal Judicial Center. Johnson's obligation to Warren, to the degree it existed, derived in some measure from the help that Warren gave the President in 1963, when he reluctantly agreed to chair the Kennedy assassination investigation. This is not to say that Warren sought Johnson's help only because he had a chit to cash, or that Johnson helped only to repay a debt. On the other hand, the record makes clear that Warren had his favor to Johnson in mind when he approached the President to ask for support.

Courts, because of the norms of judicial independence, are normally unable to trade or logroll for legislative favors. The creation of the Center grew from an exception to that rule.

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143. *See* Kastenmeier & Remington, *Court Reform and Access to Justice: A Legislative Perspective*, 16 HARV. J. ON LEGIS. 301 (1979).

144. *See generally* Kim, *The Limits of Behavioural Explanation in Politics*, in APOLITICAL POLITICS, A CRITIQUE OF BEHAVIORIALISM 38 (C. McCoy & J. Playford eds. 1967).