
Judgeship Creation in the Federal Courts: Options for Reform



A Report to the
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JUDGESHIP CREATION IN THE FEDERAL COURTS:
OPTIONS FOR REFORM

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This publication is a product of a study undertaken in furtherance of the Federal Judicial Center's statutory mission to conduct and stimulate research and development on matters of judicial administration. The analyses, conclusions, and points of view are those of the author. This work has been subjected to staff review within the Center, and publication signifies that it is regarded as responsible and valuable. It should be emphasized, however, that on matters of policy the Center speaks only through its Board.

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FOREWORD

The need for federal judgeships has tended to grow gradually and continuously, but judgeships are created only in fits and starts. For example, from 1968 to 1978, appellate filings grew, slowly but considerably, by a total of 108 percent. The number of judgeships, however, remained the same for that period, until the 1978 Omnibus Judgeship Act increased the number of judgeships by 36 percent. This pattern has, understandably, been a source of serious concern.

The process is erratic for quite comprehensible reasons. There is no unanimous agreement on when and by how much the size of the federal judiciary should be increased. All three branches of government are involved in the judgeship creation process, but they bring to bear differing perspectives on how best to achieve the shared goal of an effective federal judicial system.*

Chief Justice Burger has suggested on several occasions that the federal judgeship creation process might benefit from an analysis of practices in the states.

Pursuant to that suggestion, the Center invited Carl Baar, currently associate professor of politics at Brock University in

* Note, e.g., the instructive title of Kastenmeier & Remington, Court Reform and Access to Justice: A Legislative Perspective, 16 Harv. J. Legis. 309 (1979). See especially pp. 307-09, for caution on expansion of judgeships.

Canada, to undertake the present study. He has written on federal court administration, most particularly the relations between the federal judiciary and the Congress, a subject he studied as a congressional fellow of the American Political Science Association. He is also an expert in state court budgeting processes and has recently coauthored a book on Canadian judicial administration. His familiarity with comparative judicial administration--in federal, state, and foreign systems--led the Center to ask him to analyze the process of federal judgeship creation and to suggest alternatives that might advance the current debate on that subject.

Professor Baar has reviewed various state provisions under which some portion of the authority for judgeship creation is delegated to the judiciary, and he notes conditions that appear to characterize the procedures that run most smoothly. Next he considers how such a delegation might be structured in the federal system. Reviewing judgeship creation over the last several decades, he notes that adding only twelve judgeships each year would have increased the size of the judiciary by less than the seemingly large increases effected by the omnibus and emergency judgeship bills. He then suggests more modest delegation of authority to allow the judicial branch to create a small number of judgeships annually, no more than eight. Such a delegation, he notes, would be subject to external congressional checks, and, he would recommend, subject also to internal judicial branch

procedures to facilitate public scrutiny of the process.

As always, we would welcome reactions and commentary from readers of this Center publication.

A. Leo Levin

I. INTRODUCTION

The process by which federal judgeships are created has become an issue of increasing concern to policy makers and observers of federal judicial administration. The concern focuses on the erratic nature of the judgeship creation process: the need for judgeships grows relatively continuously, but the legislative action necessary to create them is often delayed. Thus, judgeships are added in large increments after long intervals. The delay is easily explained: the appointment of judges is a presidential power subject to Senate confirmation, and judgeships are usually awarded to members of the president's political party; a Congress dominated by one party is hesitant to create judgeships for a president of a different party. Thus, a Democratic Congress created judgeships at four-year intervals, as requested by the judicial branch through the Judicial Conference of the United States, during the Truman administration (1949), the Kennedy-Johnson administrations (1961 and 1966), and the Carter administration (1978), and even enacted an emergency request for additional circuit judgeships in 1968. However, Democratic Congresses were not so generous to Republican administrations. Both Eisenhower's and Nixon's initial judgeship requests were acceded to by Congress, in 1954 and 1970, but Congress created virtually no other judgeships in the Eisenhower

or Nixon-Ford administrations, despite vigorous pleas from bench and bar in affected areas.

Intraparty differences can produce additional delays in the legislative process, even when the president and a majority of the members of Congress are of the same party. The House usually takes longer to approve an omnibus judgeship bill than the Senate; because House members have no formal role in the appointment process, perhaps they have less incentive to speed a judgeship bill to passage. A judgeship bill may also be caught up in related issues of federal court organization; the most recent bill was delayed over the questions of whether and how to split the Fifth Circuit Court of Appeals.

The number of judgeships necessary for effective performance of federal court responsibilities is difficult to determine. No objective, valid, and equitable standards exist for measuring judgeship needs. There is some disagreement on the extent to which needs can be met by improved administration rather than by increased numbers of judgeships. There is also the question of whether some disputes might be dealt with more effectively in state courts or by alternative, nonjudicial processes, rather than by the federal judiciary; that question places the issue of judgeship creation within the larger context of federal court jurisdiction.

However difficult it is to determine how many judgeships the federal courts should have, the present method for obtaining judgeships is inadequate. It is inadequate for three reasons.

First, new positions are unavailable for long periods when they may be desperately needed. The voluntary transfer of judges from a district with current dockets to one with heavy backlog may be useful for a short period, but it becomes less effective in dealing with continuous requirements that extend over several years. The inability to obtain a single judgeship at the time of need means that when the judgeship is finally created and filled, it may be insufficient to reduce delay to an acceptable level. Second, when legislative action is taken following a long delay, large numbers of new positions are created--large enough to jar the federal judicial system. A variety of administrative problems develop: orientation of new judges is more difficult; the logistics of courthouse space and staff are more complex; and the appointment and confirmation process itself accumulates backlogs. Broader policy questions also arise: Should each new president have an initial opportunity to have a substantial impact on the composition of the federal judiciary? Or should the impact be spread throughout a full term of office, better reflecting a president's changing views over time?

Finally, the present method of judgeship creation is inadequate because it has increased the federal court's dependence on a manpower strategy to deal with increasing case loads. Whether Justice Frankfurter was correct or not a generation ago in warning that expanded judgeships demeaned the judicial currency,¹ the

1. See Justice Frankfurter's concurring opinion in *Lumberman's Mutual Casualty Co. v. Elbert*, 348 U.S. 48, 59 (1954).

use of periodic omnibus bills has allowed all three branches of government to put off basic questions of how large the federal judiciary should be and whether other means for dealing with increasing case loads should be developed. Caseload data can be marshaled to support even the recent record increase in size of the federal judiciary: the 1978 judgeship bill increased the number of trial judges by 30 percent following an eight-year period in which the trial case load increased by 37 percent, and the bill increased the number of appellate judges by 36 percent following a ten-year period in which the federal appellate case load increased by 108 percent. Whatever the growth in case filings, however, it is unlikely that leaders within any of the three branches of government would advocate that judgeships grow indefinitely. Calls for alternative approaches to handling cases--improvements in administrative efficiency, increased use of magistrates, development of nonjudicial methods of dispute resolution--are increasingly common. The problem is that these pleas have little weight when compared with the support generated for an omnibus judgeship bill at the beginning of a new administration. The present system encourages the development of an inflationary psychology: secure as many judgeships as possible to protect the converging interests of executive, legislative, and judicial branches against an uncertain future.

How can the process of creating federal judgeships be made to produce more rational outcomes? The American Judicature Society addressed that general question in a 1973 report on

judgeship criteria in state court systems.² The author of the report argued that

ultimately any growing society must inevitably get back to a judicial fact of life--that there can be no substitute for increasing the number of judges. . . . [I]nternal measures designed for the most part to increase efficiency [can] in no sense . . . be said to eliminate an inevitable need for judges. . . .

. . . But across the board additions of new judgeships are not necessarily the answer. This increase in personnel must be timed so that it will be most effective. Judicial time is a resource that must not be wasted. If additional judgeships are created before they can be fully utilized, the result is waste, and the taxpayer bears the burden. On the other hand, if we postpone adding judges until delays and backlogs become intolerable, then it is the citizen seeking justice who must suffer. For our courts, then, timing is everything.

In some courts, decisions concerning additional judgeships are handled smoothly without delay or inconvenience. More often, however, the creation of more judgeships can be an arbitrary process which often turns on which political party is in office or on how effectively a district can lobby before the state judiciary committee.⁴

The report therefore concludes that in "an ideal system"

[t]he power to create judgeships should be removed from the exclusive control of the legislature. Instead, the supreme court or other appropriate commission should have the responsibility of interpreting the data supplied by the Office of Court Administration, and then create the necessary judicial positions. . . .

2. See C. Manning, *Judgeship Criteria: Standards for Evaluating the Need for Additional Judgeships* (American Judicature Society 1973). A literature search, conducted Dec. 11-12, 1978, by American Judicature Society librarian Tim Pyne, yielded no update of this study.

3. *Id.* at 7.

4. *Id.* at 1.

5. *Id.* at 19.

This conclusion follows from a statement made earlier in the report, which explains that

[w]hen the power to create additional judges is placed in the judiciary, the entire system is given a flexibility, quickness of response, continuity of action and expert guidance which were previously missing.⁶

In the years since the American Judicature Society report was published, additional recommendations have been made for judicial control of judgeship creation, most recently by Chief Justice Warren Burger in his 1980 State of the Judiciary address.⁷

This report considers questions related to judicial control of judgeship creation: Do present state practices suggest that it is possible and worthwhile to delegate judgeship creation to the courts themselves? What judicial agency could be given authority over judgeship creation in the federal courts? What limitations and checks should be placed on that authority in order to ensure that the judiciary's administrative discretion is exercised responsibly? Could other actions be taken that would indirectly improve the judgeship creation process?

6. Id. at 17.

7. Burger, The State of the Federal Judiciary 1980, 66 A.B.A.J. 295 at 297 (1980).

II. LESSONS FROM THE STATES

In preparing this report, the author surveyed state court administrative personnel and other persons knowledgeable about state practices in creating judgeships. An effort was made to ascertain judgeship creation practices in: (1) large urban industrial states; (2) states cited in the 1973 American Judicature Society study as placing limits on legislative discretion over the number of judgeships; and (3) states cited in a 1978 national survey by William Lockhart as mandating legislative action to create judgeships.⁸ In all, data were obtained on the judgeship creation practices of twenty-three states.

The data suggest that the process of selecting judges affects the likelihood and ease of creating judgeships. For example, when a strong merit selection system is in place and recognized by legislators, as in Utah and--to a lesser extent--New Hampshire, the legislature appears willing to create judgeships when the court system finds them necessary, apparently because partisan conflict with the executive branch is less salient. The key factor, it should be emphasized, is not eliminating partisanship in judicial appointments, but ensuring that political con-

8. That survey was part of a larger study: J.W. Lockhart, The Determination of the Need for Circuit Court Judges in Florida: The Use of Multi-Variate Regression Techniques (Apr. 1978) (internship report for the Institute for Court Management, Denver, Colo.).

flicts do not pit the executive against the legislative branch. Thus states with elected judges, such as Michigan, are successful in judgeship creation when the governor plays no role in making initial appointments to new judicial positions. Perhaps the most successful state is South Carolina, where interbranch conflict is almost nonexistent. There, judges are selected by vote of both houses of the state legislature. As a result, in the words of one court official, "we have to hold them back" from creating more judgeships than the state needs. The side effects are predictable: South Carolina's judiciary is populated with a number of former legislators and judicial salaries are a healthy \$49,000 per year, with two-thirds salary on retirement. The direct effects are also visible: 78 percent of South Carolina's civil cases are disposed of within one year, 52 percent within six months.

A number of states do not establish specific numbers of judgeships in their statutes, but either use statutory formulas or delegate authority to the judiciary to determine the number of judgeships. Among these states are Alaska, Idaho, Illinois, Iowa, Kansas, New Hampshire, New Jersey, Ohio, and South Dakota. However, five of the nine states with formulas or delegated authority (Alaska, Idaho, Illinois, New Jersey, and Ohio) apply the formula or delegated authority only to limited or special jurisdiction judgeships, while maintaining the requirement of statutory change to create general jurisdiction judgeships. Those states are therefore analogous to the federal system, in which

Congress controls the number of district and appellate judges, while the judicial branch establishes the number of magistrates to be appointed in the district courts, subject only to the appropriation authority of Congress. It is likely that more than five states follow similar practices for limited and special jurisdiction judgeships; two of the five states noted here were not cited by either the Lockhart or the American Judicature Society studies, suggesting that some of the twenty-seven unreported states may fall in the same category.

Of the four states with limits on legislative discretion over general jurisdiction judgeship creation, only Kansas provides a possible model for the federal court system. In 1968, the legislature gave the Kansas Supreme Court, as administrative head of the system, authority to create judgeships in four urban counties, subject only to the appropriations authority of the legislature. In 1976, that authority was extended to all district judges and associate district judges in the consolidated trial court system. Under that authority, the court has created eleven general jurisdiction judgeships, including five in 1977 and one in 1978. All recommended judgeships have been funded by the legislature, but the court system acknowledges the legislature's supremacy by not certifying the judgeship until after funding is approved, usually some months after the original recommendation. Thus, Kansas has an independent, judicially controlled, and regularized process of judgeship creation. Legislative review of the exercise of that judicial authority,

however, has shifted from lawyer-centered judiciary committees to the legislative appropriations committees. The Kansas Supreme Court has been conservative in exercising its authority, turning down judgeship requests from local courts and often choosing to convert former local magistrates to associate district judges (under other statutory authority) rather than requesting additional positions. Kansas practice is also well entrenched because it succeeded an earlier system that apportioned judges on the basis of population. Finally, Kansas selects judges through merit selection in twenty-two of its twenty-nine counties (the governor selects from a list submitted by a local nominating committee), and through local elections in the other seven counties (with gubernatorial appointment only to fill vacancies). In short, Kansas has not only a model method of judicially controlled judgeship creation, but also a set of political conditions within which it can function effectively.

The three remaining states with limits on legislative discretion over general jurisdiction judgeship creation--Iowa, New Hampshire, and South Dakota--each suggest options for judgeship creation in the federal courts. In 1967, Iowa adopted a statutory formula for allocating judgeships that gives equal weight to case loads and population density. The formula was altered in 1976 to give more weight to caseload figures and ensure that five rural counties would obtain judgeships denied by the old formula. The change bore fruit in 1977, but the legislature froze the number of judgeships in 1978, refusing for the first time to accept

the "objective" results of applying a statutory formula.

New Hampshire has a strict population formula: one superior court judgeship for each 60,000 inhabitants or major fraction thereof. The formula has been successfully applied, in part because of the high caliber of appointments made to those judgeships through the shared authority of the governor and the elected, five-member Governor's Council. However, the number of judgeships has appeared inadequate, and a 1976 effort by the judiciary to get the legislature to go beyond the formula was defeated. The Iowa and New Hampshire experiences thus suggest that simple--even if less valid--formulas may be politically effective, but efforts to amend a formula to meet judgeship needs can jeopardize the whole process. A formula will only work if one chooses correctly to begin with and adopts a formula that shares the possibly contradictory characteristics of simplicity and sensitivity to future judicial needs.

South Dakota operates under a 1972 constitutional provision that allows the state supreme court to determine by rule the number of circuits and judgeships in the state. The court system has used this authority to shift a vacant judgeship from one circuit to another and to reduce the total number of judgeships in the state, but has yet to propose an increase in the number of judgeships. Court officials in that state are still doubtful whether the legislature will follow the letter of the law and budget any new judgeships. Their concern may be well founded; in Michigan, the state constitution says that "the number of judges

shall be changed . . . on recommendation of the supreme court," but the legislature has read "shall" to mean "may" and has rejected about one-fourth of the supreme court's recommendations over the years.

An overview of the nine states with formulas or delegated authority suggests that their success is linked to their conservatism--not taking advantage of their delegated authority--and the development of cooperative working relations with the state legislature. Thus, four of the five states with delegated authority for limited and special jurisdiction judgeships (all but New Jersey) report that they are also successful in obtaining general jurisdiction judgeships through the traditional legislative process. Idaho and Alaska both stress the establishment of cooperative relations with the legislature as a key to success. In summary, successful maintenance of either a formula or delegated authority requires the same kind of sound legislative relations that produces success in the traditional method of creating judgeships through legislative action.

A decentralized or fragmented legislative process, as in California, Ohio, the Massachusetts District Court (limited jurisdiction), and to some extent Alabama, may lead to success in creating judgeships. In those states, judgeships are viewed as local needs, and legislation springs from alliances of local courts, bar, and county officials. Ohio's state court administrative office plays little part in the process, but judgeships are created without great difficulty. In California, the judi-

cial council screens all local judgeship requests and informs the legislature of their soundness by quantitative criteria, but each new judgeship is included in separate bills for each county. Judgeship creation is part of a county legislative package, not the judiciary's legislative package--as in the federal courts. Because these state legislatures have traditionally recognized local needs and responded to local demands, judgeships have been created on a regular basis.

Legislative authority seems strong and secure in the large urban industrial states--California, Florida, Illinois, Massachusetts, Michigan, New Jersey, New York, Ohio, and Pennsylvania. Yet in most of these states, judgeship creation has not been a problem. Many court administrators were satisfied with the existing complement of judgeships and skeptical about creating additional judgeships. A number of their states are, in the words of a Georgia court official, "judged up;" other administrative matters take priority. Even court administrators who reported encountering the most difficulty in creating judgeships--in Massachusetts, Minnesota, Pennsylvania, and Wisconsin--never spoke in crisis language. In none of the twenty-three states surveyed did judgeship creation appear to be as high a priority as it has been in the federal court system during the 1970s. Why this surprising finding? In part because other techniques for dealing with case pressure are available, especially when so much of state case loads are routine matters amenable to administrative or other nonjudicial solution. In part because judgeship

creation in the states is not always accompanied by necessary increases in support staff and facilities. (For example, additional judgeships in Bartow County, Florida, will only add to administrative problems, because the county has eighteen judges and only six courtrooms.) In part because court administration is more highly developed in many state trial courts than in the federal trial courts. And in part because most states add judgeships in small increments on a regular basis, not in large numbers after long periods of time.

III. A FRAMEWORK FOR CHANGE

The factors associated with effectiveness and independence in creating judgeships are both internal and external to the judgeship creation process, and are partly embodied in statute law and partly reflected in behavioral differences. Because the purpose of this report is primarily to suggest options for statutory change, little attention will be given to behavior patterns that would increase judicial branch effectiveness. Many of these patterns are already established, for example, ensuring regional representation on Judicial Conference committees, testifying at congressional hearings, providing adequate justification for judgeship requests, and being available for informal legislative inquiries. And other changes may merit attention: Should the judicial branch try to develop a formula to use in recommending judgeships? Should an annual review be made, similar to Georgia's well-respected annual judgeship survey? Should the omnibus bill procedure be abandoned in favor of a series of individual judgeship bills based on local interests?

The first priority in this report, however, is to consider specific alternative statutory proposals to change the judgeship creation process; the focus will therefore be on direct changes in the process itself. Following that, other areas for change will be explored, areas that are indirectly linked to judgeship

creation but in which change would have an important impact on the judgeship creation process. It is also likely that in discussing statutory changes, their behavioral consequences will have to be considered, thus allowing discussion of criteria for judgeships, effective legislative relations, and matters of legislative strategy.

Judicial Control by Statute

Following the American Judicature Society report's recommendations, and in light of the difficulties in the existing federal judgeship creation process, this report recommends first that the number of judgeships be determined by the judicial branch. That recommendation, however, begs all of the important procedural questions: Who in the judicial branch should determine the number of judgeships? Within what limits? With what mechanisms for congressional review or oversight? In short, advocating that discretion be conferred upon the judicial branch requires discussion of how that discretion may be structured, confined, and checked.⁹

Structuring Judicial Control

Where within the judicial branch should a statute place authority for judgeship creation? The best answer is the Judicial Conference of the United States. The principal alternative would be the Supreme Court of the United States, to which proce-

9. These three terms are derived from K.C. Davis, *Discretionary Justice* (1969).

dural rule-making authority has been delegated by statute. However, the argument for placing judgeship creation authority with the Judicial Conference may be supported in three ways. (1) It is already the body charged with developing overall administrative policy for federal district and appellate courts.¹⁰ (2) Supreme Court authority would eventually be delegated to the Judicial Conference and its committees, with the Supreme Court acting as a formal conduit to the Congress; that is how rule-making authority has been handled. Under those circumstances, the Chief Justice would have disproportionate power as the only member of both the Conference and the Supreme Court. (3) One of the leading students of federal rule making, Judge Jack B. Weinstein of the Eastern District of New York, has already argued that even procedural rules should be issued by the Judicial Conference rather than the Supreme Court. He supports his views in part by reference to the Supreme Court's limited expertise.¹¹ While that may be arguable, a much stronger case can be made for lack of Supreme Court expertise on the proper number of federal judgeships.

Another possibility would be to place authority for district judgeship creation with the judicial councils of each circuit, with appellate judgeship creation residing in the Judicial Conference. That would assure that judgeship requests would be

10. 28 U.S.C. § 331.

11. J.B. Weinstein, Reform of Court Rule-making Procedures (1977).

screened at a level above their point of origin, while decentralizing authority somewhat more than in the past. The proposal would also place an important administrative matter in the hands of the councils, a step in repairing the image of what Peter Fish has called the "rusty hinges of federal judicial administration."¹² Furthermore, it would not effect a major decentralization in practice, because the Judicial Conference's Court Administrative Committee, which presently screens judgeship requests, often relies on distinctive local arguments rather than comparative data from the Administrative Office of the United States Courts.

The traditional arguments about the need for an overall judicial branch policy on an administrative matter as important as judgeship levels can be used against the proposal to place authority for judgeship creation with circuit judicial councils. It would be better for the judicial branch to present an overall program to the Congress than to fragment the process and provide an opportunity for Congress to selectively ratify the decisions of more influential judicial councils. Furthermore, the congressional process militates against decentralized judgeship creation, just as state legislative processes in California, Ohio, and other states favor decentralization. Even local-interest legislation such as river and harbor appropriations are gathered into a single bill, and with the implementation of the Budget

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

Control Act of 1974, the Congress has taken major steps to discipline its distributive policy making.

Once the locus of authority is determined by statute, the structuring of judicial branch discretion requires that a process of judgeship creation be clearly stated. It would be preferable to have that process established by judicial authorities--presumably the Judicial Conference--rather than entrenched in statute. But it would also be valuable for the Conference to indicate to Congress before passage of a bill delegating judgeship creation authority just how it intends to structure its new discretionary authority.

For example, the Conference might recommend that its committee meetings to consider judgeship proposals be as open to the public as congressional committee meetings. In this way, delegation of authority to create judgeships would not turn an "open" function into a "closed meeting."

The Conference might clarify and formalize the process it would use. What committee would hear judgeship requests? How would the committee's members be chosen? For what terms? What prior screening would the committee require of local districts, circuits, and the Administrative Office? If a judgeship request were rejected at one of those screening points, would the advocate be able to obtain review of that decision? Who would be allowed to appear before the committee?

The Conference would also need to consider an appropriate timetable for the judgeship creation process. For example, the

process could be an annual one, following the example of Iowa, Kansas, and New Hampshire, incorporating the annual review used effectively by court systems in legislative control states such as Georgia. The annual process would need to be synchronized with both the availability of caseload data for use by the Conference committee and the congressional budget cycle.¹³ While authorization for new judgeship appropriations could be handled with the "such sums as may be necessary" provision found in previous omnibus judgeship bills, necessary budget information would be governed by the Budget Control Act deadlines. That act requires the president to submit the budget on or before the fifteenth day after Congress meets--about mid-January for the fiscal year beginning October 1. This deadline would require that the Judicial Conference approve new judgeships at its fall meeting for inclusion in the following January's budget submission for the fiscal year beginning the following October 1--a lag time of some eleven months. On the other hand, if the Administrative Office and the appropriate Conference committee could estimate probable judgeship needs before mid-January, perhaps final Conference action would not be required until the late winter meeting, reducing the lag time to about seven months. In the recent past, the Judicial Conference has strived to complete its recommendations at its fall meeting, so that action would be

13. For a description and analysis of the new budget process, see Fisher, Congressional Budget Reform: The First Two Years, 14 Harv. J. Legis. 413 (1977).

taken before national election results were known. However, if judgeship creation became an annual process (and were confined as recommended below), there would be no need to synchronize Conference recommendations with the electoral cycle; it would be more important for the judgeship creation process to adhere to the new congressional budget cycle.

In some states, statutory and even constitutional provisions have been used to structure the judgeship creation process. However, such provisions are characteristic of states that still require legislative action to create judgeships; therefore, they would be applicable to the existing federal judgeship process but not to the process proposed above. For example, Alabama statutes require any bill creating a judgeship to be forwarded to the judicial branch for comment, and require the judicial branch to report its recommendations within three weeks. That provision would be useful in the present federal judgeship creation process, because it would legitimize existing nonstatutory consultation between judicial and legislative branches, and remove the basis for occasional charges by legislators that the judiciary violates the separation of powers by expressing views on pending legislation. The Florida Constitution structures the judgeship creation process by requiring the supreme court to certify to the legislature any new judgeships it deems necessary, and requires the legislature to consider the court's recommendations. Those provisions seem unwise for the federal courts. First, mandating "consideration" by the Congress has little meaning; it is too

vague even to require a vote by a standing committee. Second, requiring the judicial branch to take administrative action (especially if the requirement were embodied in a statute) would either be unnecessary in a responsible court system, or be grounds for external interference in a court system that neglects its administrative responsibilities. In summary, the existing federal judgeship creation process could benefit from statutory clarification of the judiciary's opportunity to comment on pending bills (especially in light of federal criminal code provisions, 18 U.S.C. § 1913, prohibiting use of public resources to contact members of Congress). The process would gain little from adoption of Florida's language, and the judicial branch would be mandated to take action that is already within its discretionary authority.

Confining Judicial Control

If the Judicial Conference were given discretion to create judgeships--that is, to establish the number of district and appellate judgeships--what limits should be placed on that discretion? What guidelines should be adopted, either by the Judicial Conference or in legislation? Three methods will be discussed here: (1) a formula; (2) a maximum number; and (3) the creation of temporary judgeships only.

Formulas. As state experience suggests, formulas can be useful but also hazardous. Simple formulas can be persuasive, but inadequate to fill judgeship needs. More sophisticated formulas can provide better guidance, but have lower credibility in

the legislature. Beyond that, however, the best indicators of future judgeship needs may also be the most subject to manipulation by those with an interest in what the data show. And the adoption of sophisticated quantitative formulas is not without an impact on the distribution of power and influence within a court system.

Population, the most straightforward variable that affects the need for judgeships, has been applied in some state court systems, but would require too much qualification if adopted by the federal courts. There are substantial differences from district to district in the ratio of cases to population. For example, certain major coastal, commercial, and border centers may generate federal court work out of proportion to their population (for example, Manhattan, Philadelphia, San Diego, and San Francisco). The District of Columbia's more extensive jurisdiction draws cases far out of proportion to its population.

Case filings could be used instead, so that judgeships could be increased or decreased in proportion to the increase or decrease in federal district or appellate court case filings. Use of case filings raises a variety of issues. First, the base number of federal district judgeships is so high that a modest percentage increase in filings would generate a large number of new judgeships. For example, a 4.8 percent increase in federal district court filings would trigger an additional twenty-five district judgeships, a high number for a single year and hardly a meaningful basis for confining judicial branch discretion. At

the appellate level, an 8.8 percent increase in filings would generate twelve new appellate judgeships. What if the Judicial Conference is unwilling to add that many judgeships, preferring to retain some vestige of collegiality within existing circuit boundaries, because it is without authority to alter those boundaries to more evenly distribute judicial positions? If the formula were contained in a statute, Congress could appropriate funds for the judgeships and the president could appoint judges to fill them, over the opposition of the judicial branch. Thus, if a formula as volatile as case filings were adopted, it might be appropriate to create judgeships biennially rather than annually and to delegate discretion to the Judicial Conference to create fewer judgeships than the formula allows.

Use of a case filings formula might also lead to reduction in the number of judgeships, especially if diversity jurisdiction of the federal courts is restricted by passage of pending legislation. That should not present difficulties in principle, because the Judicial Conference would then simply designate which judgeships would lapse upon their next vacancy. Because it would take a period of years for most positions to lapse, the judicial branch would not find itself with a sharply reduced complement of judges to process the existing backlog just because new filings have fallen. The situation would grow more complex, however, if a decline in filings were followed by an increase in the next year. The Judicial Conference would be under pressure to reinstate judgeships eliminated the previous year, but might also be

faced with sharp increases in particular districts. The same problem would occur--and would be more difficult to deal with--if an overall national decrease occurred in the same year as an increase in particular districts (for example, if changes in diversity jurisdiction uniformly reduced the civil case load, but new criminal laws sharply increased criminal case loads at border points). In that situation, the Judicial Conference would require specific authority to reallocate judgeships between districts and circuits, by declaring one judgeship temporary (or abolishing a vacant judgeship, which could be politically sensitive if the president, a senator, or a nominating commission was already considering new appointees).

Critics of caseload formulas commonly raise two objections. First, automatic increases in judgeships as filings increase provide no incentives to improve efficiency--to increase the productivity of individual judges or to shift appropriate functions to magistrates or administrative staff. The availability of new positions will deflect pressure for changes in how the courts are run. This objection could be dealt with by adjusting a caseload formula--for example, by providing that judgeships would be increased by a percentage equal to half of the percentage increase in filings. Thus, a 4 percent increase in filings would yield a 2 percent increase in judgeships. At the same time, decreases in filings could be given full weight, and reallocation of judgeships from district to district could be authorized. These steps might force the federal courts to look to other ways of coping

with caseload increases, but they are incentives rather than solutions.

A second criticism is that case filings are reactive rather than "unobtrusive" measures; that is, case filings are subject to manipulation by those with a vested interest in what they show.¹⁴ The manipulation of measurement criteria may not be as serious with case filings as with other indicators. For example, if judgeships were created on the basis of accumulated backlog, courts wishing to increase their size could simply allow backlog to accumulate sufficiently to secure additional judgeships. Case filings, however, can also be manipulated.

The major argument in Lockhart's Florida study is that existing caseload measures, even the weighted case load whose reputation is so substantial in California, are reactive measurements, and are therefore inappropriate criteria for assessing judgeship needs.¹⁵ From his study using regression analysis to evaluate a variety of unobtrusive measures, he has concluded that the two best predictors of judgeship needs in Florida are population and sales tax revenue. Perhaps a similar study could yield other measures for federal judgeship needs, but this has already been explored in the Federal Judicial Center's forecasting study,¹⁶ and it is not clear that any variables examined there

14. See generally E. Webb, D. Campbell, R. Schwartz, & L. Sechrest, Unobtrusive Measures (1966).

15. J.W. Lockhart, supra note 8, at 34-35.

16. Federal Judicial Center, District Court Caseload Forecasting: An Executive Summary (1975).

would meet the twin criteria of unobtrusiveness and accurate fit.

The weighted case load raises additional questions. It is sufficiently complex and subject to reanalysis that whoever determines the case weights would exercise substantial control over the results. Therefore it is feared by those who would be affected by it (whether in the legislative or the judicial branch). For example, the Florida Conference of Circuit Judges unanimously passed a resolution in 1977 endorsing a population formula for establishing judgeships.¹⁷ A weighted caseload system developed at some cost prior to 1977 was abandoned earlier, in part because the suspicions it engendered among local trial judges reduced its validity to a point where it was no longer useful. Local trial judges saw it as a power play by the central court administrative office.

Why has the weighted case load been so effective in California? First, because it is advisory rather than mandatory. And second, because it has only been used to provide data supporting additional judgeships; it has not functioned to hold down court demands but to legitimize them. Therefore, it has not concentrated power to create judgeships in a central statistical agency. Its acceptance by the California judiciary has increased to the extent that its effectiveness in confining discretion over new judgeships has been limited. Similarly, in the federal sys-

17. J.W. Lockhart, supra note 8, at 8 and app. E. (In Florida, the circuit court is the general jurisdiction trial court.)

tem, there has been no negative response to current efforts to revise case weights. Here again, however, the weighted caseload data are not authoritative but advisory; they are also subject to interpretation by Judicial Conference committees composed entirely of judges.

In summary, it may be difficult to use any formula that is nonreactive, simple, and responsive to judicial needs as a method for confining judicial branch discretion in judgeship creation.

Numerical Maximum. Rather than use a technique as flexible as case filing formulas, judicial branch discretion could be confined by setting an annual maximum on the number of judgeships that could be created by Judicial Conference action. Table 1 shows that in the past thirty years, 327 district judgeships and 73 appellate judgeships have been created--a total of 400 positions, or over a dozen per year. The average annual rate of judgeship creation has also been higher in the 1960s and 1970s than in the 1940s and 1950s. Thus, if Congress allowed the judicial branch to create up to twelve judgeships per year, that delegation of authority would result in less growth in the federal courts than present arrangements. At the same time, the Judicial Conference could allocate the judgeships to meet highest priority needs, so that those needs would not grow more intense over a four-to-eight-year period until they would eventually require the creation of perhaps three judgeships when one, created when case pressure first became intense, could have proven adequate.

TABLE 1

NUMBER AND SOURCES OF FEDERAL JUDGESHIPS, 1948-1978

<u>Year(s) or Act</u>	<u>Number of District Judges</u>		<u>Number of Circuit Judges</u>	
	<u>Total</u>	<u>Increase</u>	<u>Total</u>	<u>Increase</u>
1948 Judicial Code	186	---	59	---
1949 Omnibus Bill	207	21	65	6
1950 (three bills)	211	4	65	0
1954 Omnibus Bill	234	23	68	3
1957 (one bill)	235	1	68	0
1958-59 (Alaska and Hawaii statehood)	238	3	68	0
1961 Omnibus Bill	303	65	78	10
1966 Omnibus Bill	333	30	84	6
1968 Circuit Judge Omnibus Bill	333	0	97	13
1970 Omnibus Bill	396	63	97	0
1978 Omnibus Bill	513	117	132	35

NOTE: The figures in this table are based on 28 U.S.C.A. §§ 44, 133, which do not include temporary judgeships until they are made permanent. Note that the table does not reflect the number of sitting judges (that number is equal to the statutory authorization, plus temporary and senior judges, less unfilled vacancies). The table is adapted from C. Baar, When Judges Lobby: Congress and Court Administration 576 (1969) (unpublished Ph.D. dissertation, Univ. of Chicago).

The fixed maximum number has the same general advantage for the court system as the various formulas discussed earlier: it provides the Judicial Conference with a quota of judgeships, which could be allocated at the point and time of need, avoiding the long delays produced by the present requirements for legislative action. The fixed maximum number may be better than any formula in confining the discretion of the Judicial Conference, because it would avoid unexpected consequences that would encourage Congress to intervene once more. Congress would define expected results. In turn, the judiciary could reduce its lead time under the Budget Control Act, because the number of judgeships requiring inclusion in the budget would be known even before the location of those judgeships was determined.

The weakness of a fixed maximum is that it would not be responsive to decreases in federal court workload; this would be especially relevant if a major shift occurs in diversity jurisdiction. That weakness could be overcome by combining a formula for years in which filings decrease with a fixed maximum for years in which filings increase. However, such a combination might overly confine judicial branch discretion, requiring the Judicial Conference to ask Congress to enact judgeships beyond the predetermined number, a step that would be considerably more embarrassing under a judicial control statute than it would be today. A workable compromise might be to authorize a fixed maximum number of new judgeships when filings increase, and no change when filings decrease. If filings are seen to decrease over a

number of years--an unlikely prospect in light of past performance--further congressional action would be warranted.

If a fixed maximum number of new judgeships were stated in the law, and the law were passed soon enough after the 1978 omnibus bill that a new accumulation of judgeship needs would not have developed, the maximum number could feasibly be set at anywhere from six to ten positions per year. If a new procedure for judgeship creation is not considered until much later, the new procedure would best be considered in conjunction with the regular omnibus judgeship bill. At that time, it might be wise for the Judicial Conference to request a limited number of new judgeships to meet the most pressing needs that may have accumulated since 1978, and then ask for authority to create a fixed maximum number of judgeships each year thereafter, perhaps eight per year. In that way, the judicial branch could argue that it would attempt to exercise its delegated authority in a sufficiently timely and rational manner that the overall growth of the federal courts would be reduced.

At the same time, the six to ten judgeships would become scarce resources in the hands of the Judicial Conference, and competition among districts and circuits might become more vigorous. That pressure would force the Judicial Conference to develop its own more objective criteria for judgeship needs, because it would have to say no (or at least, wait until next year) rather than negotiate trade-offs and alliances similar to those that could occur when Congress dealt with open-ended omnibus

bills. In effect, the Congress would be imposing a discipline on the judgeship creation process similar to the discipline imposed by the congressional budget process.

Temporary Judgeships. A final method of confining discretion would be to delegate authority to the Judicial Conference to create temporary judgeships, but not permanent judgeships. Omnibus judgeship bills would still be necessary from time to time to ratify (that is, to make permanent) the judgeships created by the Judicial Conference on a temporary basis. This proposal provides a superficial appearance of continued congressional control. That control is superficial because the Judicial Conference would be in a position to reinstate a temporary judgeship when one it created became vacant. Provision for temporary judgeships would only confine discretion if it were combined with a formula or fixed maximum provision, and if it contained language prohibiting the reinstatement of a temporary judgeship. Such language would then discriminate against large multijudge courts with more rapid turnover--unless it was written to allow a sliding scale based on the number of permanent judgeships in the district or circuit, or included a proviso that the temporary judgeship could not lapse before a certain date. By this point, the whole matter may become more complex than necessary.

The discussion of confining discretion is premised on the notion that a delegation of authority to the Judicial Conference to create judgeships should not be open-ended. Structuring the discretion with appropriate procedures does not reduce the open-

ended nature of the grant of authority. Confining discretion might be in the public interest, might give Congress more assurance that the delegated authority would not be abused, and might impose additional discipline on the Judicial Conference's exercise of its new responsibility. But these same goals might also be achieved not by confining discretion but by taking steps to check that discretion.

Checking Judicial Control

The principle of checking discretion suggests that the authority to whom discretion is delegated should be subject to review even if its discretion is already structured and confined. The most common check adopted by the Congress for use in the federal government is some form of legislative veto power over the exercise of delegated authority. Louis Fisher, probably the leading expert on the legislative veto, recently wrote that "[s]everal hundred statutory provisions currently require the president and executive officials to report administration proposals to Congress, on the understanding that Congress (within a specified number of days) may disapprove the intended action."¹⁸ The legislative veto approach has also been applied to the judicial branch rule-making process, so that either house of Congress may, by majority vote within ninety days, veto procedural rules submitted to it by the Supreme Court and such action prevents the

18. See Fisher, A Political Context for Legislative Vetoes, 93 Political Sci. Q. 241 (1978).

rules from taking effect.¹⁹

The legislative veto may take a number of forms: (1) simple resolution, or one-house veto; (2) concurrent resolution, in which a veto requires action by both houses; (3) joint resolution, in which a veto requires a majority vote of both houses and presidential signature; or (4) committee veto, in which a joint committee of Congress (or perhaps single-house committees) can disapprove the exercise of delegated authority. The committee veto was used as early as 1867,²⁰ but is rare today.

While simple and concurrent resolutions are well-established forms of congressional control, constitutional questions about their proper scope and application are still raised. Those constitutional questions usually center on the scope of presidential power, and the extent to which the use of simple and concurrent resolutions--neither of which require presidential approval--trenches on executive authority. Fisher cites a recent and perhaps highly relevant example:

Attorney General Bell regards the legislative veto in the [executive] Reorganization Act as a permissible exception, and the only exception, to the regular procedure of having Congress pass legislation and present it to the president. All other legislative vetoes, according to his analysis, unconstitutionally trench upon the president's own veto power. Bell justified this single exception because the decision to initiate a reorganization plan remains with the president. The freedom to present a plan is treated as an equivalent to the presidential veto; in each case the deci-

19. J.B. Weinstein, supra note 11, recommends extending the time period for legislative review of procedural rules to six months.

20. Fisher, supra note 18, at 243.

sion to exercise power is one for the president alone. The argument seems a bit strained, suggesting that the Justice Department is capable of marshaling whatever evidence is needed to obtain for the president the desired reorganization authority.²¹

It seems highly improbable that an attorney general would, as Fisher's reference clearly implies, question the validity of the legislative veto in judicial rule making. The only way to distinguish Bell's argument from that case would be to find that the rule-making statute of twenty years ago gave presidential consent to that procedure. If the attorney general were to extend that reasoning to a statute delegating judgeship creation authority to the Judicial Conference, no problem would arise. But Bell's reasoning suggests that a delegation of legislative authority that would allow evasion of the president's veto power is at least suspect.

It would be ironic if a statute delegating judgeship creation to the judicial branch were opposed by the executive branch as a limit on the president's veto power, because judgeship creation is an area where the president would retain a de facto veto. Whatever action the judiciary and Congress take to create judgeships, the president retains discretion to fill--or not to fill--those positions. Thus, judgeship creation is one field where delegation of authority to the judiciary along with a legislative veto does not "trench upon the president's own veto power." In practice, the president retains an effective check.

21. Id. at 244.

Should the legislative veto be part of a statute delegating judgeship creation authority to the Judicial Conference? Under certain circumstances, it should definitely be included. For example, if the number of judgeships is not limited to a fixed maximum, but left open-ended or attached to a fluctuating measure of need, a legislative veto would be necessary; otherwise the judicial branch would be exercising substantial authority with little if any supervision. If a fixed maximum number is adopted, a legislative veto might be unnecessary, because discretion is already confined to a greater degree. State experience, especially in Kansas, suggests that the appropriations process would be an adequate limitation in either case. At the federal level, however, discretion over the number of judgeships has always been held by the Judiciary Committees of the House and Senate, not by the Appropriations Committees. Therefore, if judgeship creation is delegated to the judicial branch, it would be more appropriate and consistent for oversight to fall under the Judiciary Committees, through the legislative veto.

The one-house veto would probably be the most effective check. If a concurrent resolution approach is adopted, the judicial branch could find itself with additional judgeships that were voted down by one house of Congress. The joint resolution approach also does not seem worthwhile. It could involve the president, but only after both houses passed veto resolutions. If either house refused to veto the proposed judgeships, the joint resolution would never reach the president's desk.

The simple resolution would normally require a majority vote to veto judgeship proposals. Should a larger majority be required under any circumstances? Florida's constitution requires legislative action to create judgeships, but has a proviso that a two-thirds majority is necessary if the legislature wishes to create or abolish more judgeships than the supreme court recommends.

Whether an extraordinary majority should be required for any legislative veto depends upon the scope of the congressional veto power. If the Congress can only accept or reject the Judicial Conference package as a whole, a simple majority would suffice. If Congress has authority to modify the Judicial Conference proposal, then an extraordinary majority may be appropriate.

Authority to modify Judicial Conference proposals by simple resolution raises more difficult problems, however. Would "modification" be limited to disapproving some but not all of the proposed judgeships? If so, modification authority would be proper, and either house could eliminate judgeships unilaterally. If "modification" means that Congress could add judgeships not included in the Judicial Conference proposal, or eliminate judgeships retained by the Conference, that authority would almost surely be unconstitutional, with or without an extraordinary majority, because the president would be excluded from the process. Congress and the president could not delegate judgeship creation to the judicial branch, only to have Congress create judgeships without approval of the Judicial Conference or oppor-

tunity for presidential veto, under the guise of modifying Judicial Conference recommendations. Fisher fears just such a result would occur if bills currently pending were "to make all departmental regulations subject to legislative veto."²² By disapproving selected administrative regulations, "Congress could selectively 'amend' an act without allowing the president to participate," concludes Fisher.²³ If a similar result were allowed to occur in judgeship creation, not only would the attorney general's fears be realized, but the public interest would not be well served.

A different form of congressional check could be suggested by analogy to the current congressional budget procedure. Following a similar format, the Judicial Conference could create judgeships in two stages. At the beginning of a legislative session, the Conference could present Congress with a target figure for the total number of desired judgeships, developed on the basis of total national projections rather than simply by adding up individual requests. Congress would be required by joint resolution to approve, reject, or modify the target figure, and the president would have authority to accept or veto the resolution. Once the overall figure was established, the Judicial Conference could then determine which specific districts and circuits would gain (or lose) judgeships. These "administrative

22. Id. at 248.

23. Id. at 250.

details" would then become law without further congressional action or opportunity to veto--although the Congress would retain the option of making specific judgeship changes by legislative action.

This two-stage method would check judicial discretion but direct congressional attention to consideration of the overall size of the federal judiciary rather than the condition of the docket in any single district. It is thus similar to Weinsteins's recommendation that in reviewing procedural rules made by judges, Congress should deal with principles and not redraft details.²⁴ The two-stage method has a certain attractiveness, but fails on two grounds: (1) judgeships are a relatively low priority item on which to spend so much required congressional time every year; and (2) Congress is frequently more interested in specific details than in general principles and may feel that its checking would be more effective if focused on individual district or circuit judgeships.

In summary, a legislative check is appropriate and probably necessary under most conditions in which Congress would delegate judgeship creation authority to the Judicial Conference. But the legislative veto can take more than one form, can have broad or limited scope, and could raise sensitive issues of presidential power in the legislative process.

24. J.B. Weinstein, supra note 11, at 147-48.

Changing Judgeship Creation IndirectlyJudicial Selection

Examination of state court practices and analysis of the political circumstances that have hindered judgeship creation in the federal courts leads to an inevitable conclusion: the ability to create judgeships is enhanced when judicial selection procedures do not exacerbate executive-legislative conflict. Congressional and presidential concern about the effect that delegating judgeship creation to the Judicial Conference will have on the selection of judges will probably be an important factor in determining the success or failure of such a proposal in Congress. And if the federal judicial selection process were different, the current problems with the federal judgeship creation process might not even exist.

Would any change in the judicial selection process have a positive impact on judgeship creation? That is, would a different selection process result in more regular and timely creation of judgeships by legislative action? The answer is yes, regardless of whether the selection process becomes more partisan or less partisan, as long as more limits are placed on the discretion of the executive branch. State-by-state findings suggest that systems of merit selection can reduce executive-legislative conflict, but so can partisan systems such as popular election (as in Michigan) and election by the legislature (as in South Carolina), as long as the governor's appointment power does not bring about a conflict with the legislature.

The principal change in judicial selection processes in the federal courts today is the evolution of merit selection. The transformation is an incremental one. As nominating commissions take on increased responsibility, and the president's discretion is increasingly confined and structured, executive-legislative conflict is likely to decrease. However, because it is likely to be some time before any significant proportion of a president's judicial appointments are distributed to members of the party out of power,²⁵ the stage will still be set for a conflict between a president of one party and a Congress of another.

An alternative approach to limiting presidential discretion in selecting judges would be to give more discretion to the Congress. Thus, for example, if state congressional delegations were given a larger role in selecting judges, the Congress might be more likely to create judgeships on a regular basis, knowing that the president would go along with congressional recommendations.

In light of that argument, the best selection system might involve merit-based nominating commissions whose members are selected by a state's senators (and perhaps congressmen as well). That system would distance the process from the president at the same time that it would structure and confine the discretion allowed by the appointment authority under Article II.

25. President Carter made a smaller percentage of nominations from the opposition party than any of his three predecessors in office. See Goldman, A Profile of Carter's Judicial Nominees, 62 Judicature 246, 248 (1978).

The present paper does not advocate any particular selection system. On balance, selection systems are probably more important than the method used to create judgeships; they should not be developed only to facilitate judgeship creation. The purpose of discussing selection systems has been to analyze the effects of changes in those procedures on the likelihood that the federal courts can obtain needed judgeships in timely fashion.

Court Reorganization

Any statute that delegates judgeship creation authority to the judicial branch must deal with the implications for the distribution of judgeships and the organization of district and appellate courts. State court systems that have authority to create judgeships also have authority to shift judgeships and to alter boundaries of judicial districts. (Kansas is again the clearest example, but also note South Dakota practice and Michigan constitutional language.) State courts and legislatures have recognized the close connection between manpower needs and internal court organizational constraints; in both areas, delegating authority to the judicial branch can enhance flexibility and efficiency and allow responsible and timely attention to administrative detail. In the federal system, manpower needs have often been linked to organizational changes; omnibus judgeship bills frequently include provisions for altering district lines and places of holding court. Yet this report has separated these matters. In practice, such a separation would sometimes be difficult to maintain and, in any event, would hinder Judicial Con-

ference efforts to increase efficiency and service of the federal courts.

The first question that must be addressed in the context of federal court organization was raised earlier: Should the proposed statute delegate only the authority to create new judgeships, or also the authority to eliminate existing judgeships? If it does both, the Judicial Conference would have the authority to redistribute judgeships throughout the federal court system. It would have a power similar to that exercised in South Dakota, where the supreme court can hold hearings upon the occurrence of a vacancy, and shift the vacant judgeship from one judicial circuit to another.

In practice, this authority would not be so wide-ranging. First, a legislative veto provision would probably be effective in curtailing any tendencies to abolish existing judgeships. Second, the present composition of the Judicial Conference and its committees, and the Conference's method of operation, are geared to a system of consensus politics. The shifting of judgeships from one district to another would require a higher degree of central power than exists in the federal court system today. It is unlikely that the Judicial Conference, with two representatives from every circuit, would routinely approve the elimination of a district's judgeship.

The second question is whether the Judicial Conference should also be delegated authority to alter district and division boundaries, and expand and contract places of holding court. Any

action taken under that authority could also be subject to legislative veto, in whole or in part. However, authority over geographical organization would be more difficult to confine than authority over judgeship creation, which can be confined by formulas or fixed maximums.

Congressional response to such delegation would be mixed. On one hand, members of Congress have worked for long periods to expand federal court services to their areas and have met vigorous resistance from sitting judges and the Judicial Conference.²⁶ On the other hand, the Ninety-fifth Congress resolved the impasse over splitting the Fifth Circuit by delegating to the judiciary broad authority to govern circuit operations. The best proposal might be to confine Judicial Conference authority over court organization to (1) the adjustment of district and division boundaries, (2) the elimination of places of holding court only when judicial business originating in that area drops below a designated number of filings, and (3) the creation of places of holding court when judicial business originating in that area reaches a designated level.

Neither of these issues--the redistribution of judgeships or the readjustment of boundaries and court sites--goes very deeply into matters of court organization. Others have suggested more

26. For an extensive case study, see C. Baar, When Judges Lobby: Congress and Court Administration (1969) (unpublished Ph.D. dissertation, Univ. of Chicago), which describes the decade-long effort to bring a federal court to San Jose and Oakland, Cal., and to improve court services in San Diego and Sacramento.

fundamental changes that would have major impacts upon judgeship needs in the federal courts. For example, the late Chief Judge John Biggs of the Third Circuit suggested some years ago that all district courts be abolished and replaced by a single pool of federal trial judges who could be distributed across the country as judicial business required.²⁷ Under that system, it is likely that the total number of judgeships could be reduced, partly because the federal courts would not be as closely tied to local communities. Compare this with the court system of the Province of Ontario, where all general jurisdiction trial court judges sit in the capital city and travel on circuit to other court centers, and limited jurisdiction trial court judges sit in specific counties but, as a matter of policy, are appointed from the bar of a different county. Under such a system, the federal courts would probably grow more remote from local political and legal elites, and perhaps from the general public as well. But it might be able to operate with a higher degree of efficiency, uniformity, coherence, and collegiality. Whatever the outcome of such a radical reorganization, one thing is certain: adoption of a policy of judicial control of judgeship creation would smooth out the existing system well enough to allow its survival for an even longer period, and further delay consideration of broad-scale organizational change.

27. Interview with Judge Biggs (Jan. 1967).

The Role of Federal Courts in the Federal System

The focus on judgeship creation has come from the need to have judicial positions sufficient to handle case filings. This logic is based on the traditional conception of the courts as passive recipients of case input brought by government, business, and the public. But the theory of judicial passivity neglects important considerations of organizational dynamics and judicial purpose. Students of organizational behavior know that the volume of demands on an organization vary not only with the clientele's needs, but also with the ability of the organization to process the demands to the satisfaction of the clientele. For the federal courts, this means that if an increase in the number of judgeships can reduce delay, litigants seeking expeditious justice will increasingly turn to the federal courts rather than their state or private competitors. As property tax restrictions increasingly squeeze the resources of local government, and methods are developed to create needed federal judgeships, the federal courts may become more attractive to litigants. The attractiveness of federal courts may also be related to different outcomes that may occur there. A personal injury lawyer expects a higher settlement for his client before a federal rather than a state jury. Federal and state prosecutors divide offenders according to different criteria from place to place, so that an interstate car theft may be prosecuted in the state courts in one locality and the federal courts in another.

If the federal courts can improve their effectiveness, they

may become more attractive and the increase in their business will alter over time their role in the federal system. Even now, perhaps two-thirds of federal court business could be brought in the state courts, including not only diversity jurisdiction, but also the tremendous number of federal questions that could be litigated in state courts, and the criminal acts that violate both federal and state laws. The federal courts may therefore have acquired too wide-ranging a role in the American federal system.²⁸

The desirable number of federal judgeships should be determined by what federal courts should be doing. The proper scope of federal judges' work should be determined not simply by counting filings, but by considering whether those cases are best heard in federal courts. If they are, judgeship creation can and should proceed on the basis of the preferred policy options outlined in this report. If, however, many cases are best heard in state rather than federal courts, or in arbitration or conciliation hearings rather than formal litigation, then it is imperative for federal government policy makers to develop policies that reflect those preferences. Many of these policies are outside the realm of the federal judicial branch. They involve prosecutorial policies of the Department of Justice and local United States attorneys. They involve legislative authority for

28. Ernest C. Friesen, former director of the Administrative Office of the United States Courts, made this argument in an interview in December, 1978.

extensive diversity jurisdiction and the handling of a wide variety of federal questions.

Effective methods of judgeship creation would allow the federal courts to absorb more cases and put off to a later date the full consideration of the role of federal courts in the federal system. Yet no proposals for the fine-tuning of the present system should deflect policy makers from considering the larger issues regarding the scope and effectiveness of the federal judicial system.

Summary of Recommendations

This report has suggested a number of possible options for changing the process by which federal judgeships are created. The following list summarizes the major recommendations of this report.

1. Authority to create federal court judgeships should be delegated to the Judicial Conference of the United States.

2. The Judicial Conference should develop explicit and public procedures for the exercise of this new authority.

3. Judgeship creation should be limited to no more than eight additional positions per year.

4. The Judicial Conference should have authority to shift judgeships from one district or circuit to another, by ruling that the next vacancy in a designated district or circuit not be filled.

5. No additional judgeships should be created in a year in which overall federal case filings have declined, provided that judgeships can be shifted as proposed in item 4.

6. Congress can veto in whole or in part the actions taken by the Judicial Conference under the authority conferred above, by simple resolution passed within ninety days of Conference submission of its recommendations to the House and Senate.

A number of other recommendations have been considered in this report, some of which may also be worth including in proposed legislation--for example, authority to alter district and division boundaries. Furthermore, adoption of the six recommendations above may have implications requiring further statutory provisions. For example, after a period of perhaps three years in which case filings have declined, a mechanism could be provided for reducing the total number of federal judgeships.

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 six 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.