Chapter 7
Governance: Management and Accountability

JUDICIAL governance involves the development and implementation of administrative policies that support the federal courts' adjudicatory activities. Although deciding cases is the independent act of one or more judges in a particular court, the management of judicial resources and formulation of administrative policy is essentially a cooperative process. Through that process the third branch preserves its own necessary autonomy, while at the same time reaffirming its fiscal and administrative accountability to Congress and the taxpayers.

The nature and mission of the federal courts require an approach to internal governance rather different than that of executive branch agencies and other more hierarchical institutions. Unlike other forms, *judicial* governance is derived from, and must adhere to, the following principles:

Separation of powers. Under Articles I and III of the Constitution, Congress is authorized to structure the federal courts, define their jurisdiction, and determine what resources will be allocated for their use. Although those prerogatives necessarily require some congressional policy making and oversight in judicial administration, the courts are a co-equal branch of government. It is essential that Congress consult with the courts in the exercise of its constitutional responsibilities vis-a-vis the third branch. And, to the extent practicable, Congress should allow those in whom the Constitution vests judicial power to govern the courts autonomously.

Key functions of judicial branch governance include:

- budget formulation and execution
- assignment of caseloads
- resource allocation and administration
- personnel management
- procedural rulemaking
- financial and property controls
- enforcement of ethical and legal standards
- program management
- data collection and dissemination
- interbranch, intergovernmental and public relations
- strategic planning
- research and education

Judicial independence and accountability. The federal courts are charged with the administration of justice under law. To do so effectively, they must be free from political pressure by other governmental entities, and from the heated public and political sentiments of the day. This adjudicatory independence requires a substantial degree

of administrative independence. At the same time, the courts are accountable to the public for the efficient administration of justice. Through internal coordination and review, the organs of judicial governance promote the responsible use of tax dollars and equitable, appropriate treatment of litigants, witnesses, jurors, and the public. Although tension may exist between the twin goals of judicial independence and efficient management, the latter, if pursued with careful deference to constitutional principles, can also enhance the courts' effectiveness as an independent branch within the federal government.

Decentralized authority. Under Article III of the Constitution, judicial power is vested directly in the respective courts of appeals, district courts, and other courts whose judges serve during good behavior with undiminished compensation. Because governance is ancillary to the adjudicative function, primary responsibility for establishing and executing administrative policy naturally resides with each court.

Broad participation. The governance process of the federal courts is broadly participatory because autonomous judges are the ultimate source of judicial branch authority. In such an environment, informed policy making requires full consideration of a wide range of opinions and options. Accordingly, the courts rely for national policy making on the 27-member Judicial Conference, which is in turn advised by 25 committees with a rotating membership of nearly 300. More than one federal judge in six plays a role in national judicial governance through membership on: the Judicial Conference or one of its committees; the Board or an advisory committee of the Federal Judicial Center; or an ad hoc advisory group for the Administrative Office of the United States Courts. Participation is also high at the regional and local levels through membership on circuit councils and conferences, committees attached to both, and governance mechanisms in the circuit, district, and bankruptcy courts. With substantial numbers of judges involved in this process there are opportunities, perhaps otherwise unavailable, for exchanging ideas and perspectives on legal as well as administrative issues from different parts of the country.

Functional, not proportional representation. Judicial governance bodies represent the interests of all judges. Membership in those bodies is based on the need to bring together institutional experience and opinion found at all levels of the judiciary. While individual members inevitably bring their own perspectives (as a trial judge, appellate judge, etc.) to the task, they are not intended to serve as agents of specific courts, circuits, or categories of judges. For that reason, judges from a smaller circuit have the same number of votes in the Judicial Conference as judges from a large circuit, and circuit judges serve on the Conference and councils without regard to their proportionate numbers in the larger judicial population.

Evolutionary development. Over time, the federal courts' governance institutions have developed sufficient administrative authority to meet effectively the evolving administrative needs of the courts in a rapidly changing society.[1] Although governance authority has tended to be concentrated in fewer hands over time, the degree of consolidation has, appropriately, been modest. It has been directed largely at rationalizing administration in an expanding

[1] The Judicial Conference, which began as a purely advisory body in 1922, acquired administrative authority in 1939 when the Administrative Office was created to act under its supervision. It has more recently delegated to its Executive Committee the authority to act for, and steer, the Conference on a day to day basis. Likewise, the circuit judicial councils, created in 1939 solely to supervise district docket management, have acquired greater responsibility to oversee judicial administration at the regional level.

judiciary, and at providing effective oversight against abuse and inefficiency. The concept of strong, centralized authority and autocratic leadership is foreign to the courts, inconsistent with the deliberative, consensus-oriented decision making appropriate to a judicial institution, and contrary to current management trends generally. Instead, the judiciary will continue to govern itself through the institutions that have served it well, but with an eye toward incremental improvements in structure and process.

The following recommendations are intended to provide the federal courts with the means to retain their unique character and perform their constitutional mission, while at the same time meeting their legal, ethical, and societal responsibilities.

Distribution of Authority

❒ RECOMMENDATION 40: **In the interests of administrative efficiency, accountable resource utilization, and effective external relations, the present distribution of governance authority among the national, regional (circuit), and individual court levels should be preserved. Governance structures and mechanisms should continue to strike a careful balance among individual judge autonomy, local court initiative and control, and coordination of effort.**

Implementation Strategies:

40a *The judicial branch should obtain funding for the operation of the courts solely through appropriations administered by the Administrative Office of the United States Courts and expended under the direction and supervision of the Judicial Conference of the United States. Appropriated funds should not be obtained directly by a circuit council or any other regional or local body.*

40b *The agencies of judicial administration at the national level should continue to decentralize administrative responsibility wherever appropriate, while maintaining sufficient oversight to ensure that courts are accountable for the proper use of the authority vested in them.*

For most of their history, the federal courts have been administratively autonomous—both individually and collectively—subject only to the common administrative support provided, in turn, by the Treasury, Interior, and Justice Departments, and occasional management oversight by the Supreme Court justices assigned to the respective circuits. In 1922, however, Congress established the Conference of Senior Circuit Judges (the forerunner of the present Judicial Conference of the United States), primarily as an advisory and coordinating body. In 1939, Congress transferred national administrative responsibility for the courts from the executive branch to a newly created Administrative Office of the United States Courts, which functions under the Conference's supervision. At the same time, Congress created a Judicial Council in each circuit, initially to monitor the district courts' dockets.

These national and regional bodies (and others added since) have evolved and grown to meet changing needs. The circuit judicial councils—through their statutory power to oversee regional judicial administration—and the Judicial Conference—through its control of the judicial budget and supervision of the Administrative Office—exercise significant authority to formulate and execute policies for the entire judicial

branch. The individual courts, however, remain autonomous in important ways and continue to have primary responsibility for their own administration.[2]

Most members of the judiciary believe that this allocation of authority has served the federal courts well and should be retained as a general matter. There is, however, less consensus on the appropriate structure for circuit-level administration and its relationship to individual districts. For that reason, judicial policy makers should continue to study regional and individual court governance with a view toward improving the balance of power and responsibility between those levels (see Recommendation 47 and Chapter 11 *infra*). Broad participation and consensus at each level, as well as deference by national and regional policy makers to localized initiative and control, are essential in a judicial system that constitutionally must honor the independence of individual jurists.

By the same token, national or regional coordination or direction is necessary to ensure efficiency and economies of scale, accountability in the discharge of the public trust, and effective relations with the other branches of government, the bar, and the general public. Budgetary policy is a key area in which national coordination is necessary to ensure that resources are adequately obtained and properly allocated: appropriations should not be obtained directly from Congress by a circuit council or any other regional or local judicial authority.

As a general rule, authority to make policy and spending choices should reside with those whose interests are most directly affected. This is consistent with the current management theory—articulated in the 1993 report of the National Performance Review—that "empowerment" of front-line managers and employees results in more efficient, less costly operations.[3] Put differently, decentralization provides the tools needed for appellate, district, and bankruptcy courts to administer themselves.

With increased authority, however, should come increased accountability. Through their respective functions and activities, the Judicial Conference and the national judicial support agencies should encourage court personnel to manage decentralized resources wisely, always with the aim of better serving the public.

The Administrative Office should continue to delegate to individual courts appropriate programmatic responsibility in the areas of budget execution and personnel classification and management, consistent with the broader interests of the judicial branch and the responsibilities that Congress imposes on the Administrative Office by statute or through the appropriations process. Likewise, the Federal Judicial Center should continue to encourage and, through technical and financial support, assist individual courts in making local education programs a key element of personnel management and organizational development.

Effective Organization and Operation

The success of the existing governance institutions is attributable in significant part to Congress's appropriate willingness to entrust to the courts responsibility for most operational details. This has allowed the organization and methods of judicial ad-

[2] Indeed, even though circuit councils may issue "necessary and appropriate orders for the effective and expeditious administration of justice within [the] circuit," 28 U.S.C. § 332(d)(1) (1988), that power is used only sparingly to remedy exceptional problems arising at the district court level.

[3] *See* CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS—REPORT OF THE NATIONAL PERFORMANCE REVIEW 69-72 (1993).

ministration to evolve and adapt to meet the changing needs of the federal courts. For that reason, the governance system should maintain its current flexible distribution of authority and responsibility, making only slight adjustments in the role and organization of various institutions to ensure adequate capacity for well-informed, coordinated, and timely action.

❒ RECOMMENDATION 41: **The Chief Justice of the United States should remain the head of the federal judicial system, retaining the traditional authority and responsibility of that office in matters of judicial administration.**

By statute and custom, the Chief Justice, in consultation with the Judicial Conference and others, structures federal judicial administration at the national level according to his or her management preferences. To create effective administrative and working relationships, the Chief Justice can allocate responsibility (other than statutorily prescribed functions) among the Director of the Administrative Office, the Director of the Federal Judicial Center, the Administrative Assistant to the Chief Justice, and the chair of the Judicial Conference Executive Committee.[4] This approach assures needed flexibility in judicial governance arrangements while preserving the Chief Justice's permanent role as head of the judicial branch.

The current system is adaptable, and it works well. It is unnecessary to establish an additional high-level management position—such as a "chancellor," "associate justice for administration" or "executive judge"—to oversee judicial administration. Existing institutions can be structured, as needed, to ensure prompt, effective decision making. Creation of a permanent statutory office with a new and fixed mandate would only reduce the system's flexibility and undermine regional and local administrative autonomy.

❒ RECOMMENDATION 42: **Consistent with the authority conferred by Congress, the Judicial Conference of the United States should continue to develop policy and exercise oversight with respect to matters of judicial branch administration in which a unified national approach is necessary and appropriate. The Conference should continue to focus attention on broad-scale policies and critical issues.**

The Judicial Conference of the United States consists of the Chief Justice, the chief judge of each circuit, a district judge representative from each circuit, and the chief judge of the Court of International Trade. Its structure and function complement the unique nature of the judicial branch. The primary role of judicial governance is to ensure that judges receive the support they need to perform their constitutional duties. A large, broadly representative Conference, supported by an effective committee structure and administrative staff, is the best suited to preserving broad-based judicial control and involvement in carrying out that role.

It should be kept in mind, of course, that the Judicial Conference meets only twice a year. No body with that schedule can or should be expected to provide day-to-day administrative oversight and control of a complex organization. For that reason, the Conference will need to focus its attention on providing broad policy direction for ju-

[4] *See* RUSSELL R. WHEELER & GORDON BERMANT, FEDERAL COURT GOVERNANCE 49 (Federal Judicial Center 1994).

dicial branch administration and addressing issues of strategic importance to the federal courts.

This does not mean that Conference procedures and internal organization should remain static. In 1986-87, the Chief Justice commissioned a Committee to Study the Judicial Conference that reviewed the decision-making process and committee organization and recommended a series of significant modifications in how the Conference transacts its business. Among the recommendations adopted by the Conference was a policy requiring internal review of the Conference committee structure every five years.

It is important that these periodic studies continue, and that they focus not only on committee operations but also on the manner in which the Conference itself makes decisions. In an age of increasingly complex and technical problems, it is essential that Conference members have sufficient, accurate information—from committee reports and other sources—to evaluate policy alternatives and make well-informed decisions. Also, with increasing judicial participation in Conference activity,[5] the effectiveness of the Conference as a deliberative body will be tested. Use of executive sessions and greater limitations on staff participation should be studied as possible means of preserving the Conference members' ability to debate issues in a relatively small, collegial forum.

❒ RECOMMENDATION 43: **The leadership role of the Judicial Conference's Executive Committee should be enhanced.**

Implementation Strategies:

43a *The Executive Committee should be allowed a more active role in steering the Conference and acting on its behalf.*

Because the size of the Judicial Conference makes a more frequent meeting schedule impractical, a smaller body is needed to make timely decisions and manage relations with the Congress and the executive branch in rapidly changing areas of policy development. In recent years, the Executive Committee has assumed that role, becoming the arm of the Conference primarily responsible for acting on the judiciary's behalf when time-sensitive issues arise between semiannual sessions.

Given the increasing number and range of administrative issues confronting the federal courts, it is appropriate that the Judicial Conference focus on fundamental or long-term policies and matters on which a full airing of views is needed, leaving more routine matters to the Executive Committee. Indeed, this reallocation of responsibility should be expanded so that the Conference can utilize its limited meeting time more effectively. For example, the Executive Committee could assume a more proactive role in determining both the content of the Conference agenda and the manner and order in which it is considered. In addition, many of the ministerial and routine matters now placed on the "consent" calendar at Conference sessions could be formally delegated to the Executive Committee.

More broadly, the Conference might wish to consider greater system-wide leadership for this body. For example, Executive Committee members could serve as policy advocates and emissaries who encourage courts to exercise decentralized budget and personnel management authority to improve

[5] See Implementation Strategy 44b and Recommendations 45 and 50 *infra*.

and enhance services to court users and other aspects of judicial administration.

With expanded authority, the Executive Committee's ability to make prompt and sound decisions will become even more essential. That ability will depend in large part on the expertise of its members. The full Judicial Conference—from which the Executive Committee ordinarily is drawn—typically includes judges with wide ranging experience and expertise. However, there are policy areas in which special knowledge of current issues and problems may be critical. Accordingly, the Executive Committee may find it helpful to continue the practice of including in its deliberations, where appropriate, the chairs of Conference committees responsible for the programs or activities under discussion.

43b *Consideration should be given to at least partial reduction in the chair's judicial workload, so as to offset the time required for performance of administrative duties.*

An expansion of Executive Committee responsibility would naturally impose greater time demands on its members, especially the chair. It is not clear, at present, whether the judge chairing the Executive Committee in fact needs a special measure of docket relief. In time, however, the administrative duties of that position may grow to the point where at least some relief from judicial duties will be needed.[6]

❒ RECOMMENDATION 44: **The Judicial Conference should continue to rely on a broad committee structure for policy development. It should strengthen the committees' ability to provide sound advice and needed information.**

Implementation Strategies:

44a *Membership in Conference committees should continue to rotate periodically, to provide new and diverse perspectives while at the same time preserving the insight, experience, and legislative contacts that come with long-term committee service.*

In setting policies on the tenure and composition of committee membership, the Conference should balance the need for fresh perspectives against the value of continuity and experience. Before 1987, committee members served indefinite terms, severely reducing the number of judges who could become involved in national judicial administration. A key element of the reforms adopted that year was establishment of a fixed three-year term for committee appointments and an overall six-year limit on service by an individual judge on any committee. Although exceptions to the limits have been made on rare occasions, these norms have been credited with the much broader degree of judge participation in Conference work in recent years.

The difficulty with any rule of this kind is that it deprives the organization of valuable service and expertise at the same time that it provides a needed infusion of new and different ideas. Whether a particular limit on committee service is the appropriate one depends, in large part, on the context. If the work of a particular

[6] Docket relief can be provided in more than one way. For example, inter- and intra-circuit assignments could be used to bring visiting judges to the chair's home court so that the chair could devote a greater amount of time to Executive Committee work. Alternatively, Congress could authorize a temporary judgeship for the chair's home court, either in all cases or whenever the Chief Justice certifies the need to relieve the chair of some or all judicial duties. A similar approach is already taken whenever a full-time judge assumes an "office of federal judicial administration"—presently defined as the Director of the Administrative Office, the Director of the Federal Judicial Center, or the Administrative Assistant to the Chief Justice. *See* 28 U.S.C. § 133(b) (Supp. V 1993).

committee exposes a member to a substantial "learning curve" or involves lengthy projects (the federal rules process is a good example but by no means the only one), the appropriate balance between continuity and renewal may be found in longer terms for its members or chairs, or in the occasional waiver of the overall committee service limit.

44b *The Conference should afford the committee chairs a meaningful role in relevant Conference debates and an opportunity to meet together at least once a year.*

Because of the familiarity and expertise they acquire with their committees' subject areas, Conference committee chairs are a valuable resource that should be utilized more effectively. Although the chair of a committee whose report is on the Conference discussion agenda typically is invited to make an oral presentation at the Conference session, there are other situations (*e.g.*, not involving a proposal of that specific committee) when it would be helpful for Conference members to hear the views of a committee chair on an issue generally within his or her committee's area of concern.

It is not uncommon for issues to arise that cut across the jurisdictions of more than one Conference committee. Proposals to authorize electronic or facsimile filing of court documents—which fall within the respective bailiwicks of the committees responsible for court administration, rules of practice and procedure, and automation—are only a recent example. Staff-level coordination can help considerably in avoiding duplication of effort or misunderstanding among the committees. But regular meetings of the committee chairs also would be useful to promote information sharing on common issues and an awareness of matters under consideration elsewhere. These gatherings should not, of course, become a policy-making forum in lieu of the Conference or any particular committee.

❒ RECOMMENDATION 45: **The number of judges participating in the Judicial Conference and its committees should not increase in proportion to growth in the judiciary overall.**

At present, 17 to 18 percent of all life-tenured and fixed-term judges serve on the Judicial Conference and its committees. To maintain a decentralized, consensus-oriented process for administrative decision making, the judicial branch should preserve and, indeed, expand on this wide degree of participation in governance structures.[7] However, if the Article III judiciary were to increase in size to 2,700 judges but keep its current proportion of judges holding governance appointments, the size of the Conference organization would increase from approximately 300 to around 475 judges. Although a governance process with that number of participants might still be manageable, at some point the problems of coordination and effective discussion will outweigh the benefits of large-scale participation.

❒ RECOMMENDATION 46: **The Administrative Office of the United States Courts and the Federal Judicial Center should retain their separate institutional status and respective missions. The officially adopted policies of the Judicial Conference represent the view of the judicial branch on all matters and should be respected as such by the Administrative Office and the Federal Judicial**

[7] See Recommendation 50 *infra*.

Center when dealing with members of Congress or the executive branch.

The functions of the Administrative Office and the Federal Judicial Center are sufficiently distinct to merit the retention of two separate organizations. Although these agencies must work cooperatively and in a coordinated fashion, maintaining distinct but mutually supportive agencies for administration and policy support and education and research, respectively, will be important in years to come. When shortages occur in funding and other resources, it will be necessary to ensure that research and education are not sacrificed for the sake of day-to-day operational needs.

In carrying out their respective functions, both of these agencies must operate within the policy framework established by the Judicial Conference. As the Chief Justice explained in his year-end report for 1994, the Conference is "the body established to speak for the federal judiciary" in its dealings with the other branches of the federal government.

❒ RECOMMENDATION 47: **The basic organization and authority of governance institutions at the regional and individual court levels should be retained.**

As noted under Recommendation 40, there is general consensus in the judiciary on the need to maintain a three-tiered system of judicial governance (national, regional, and individual court), with an emphasis on decentralized control. There is, however, far less agreement among judges, and particularly between circuit and district judges, as to the appropriate role of regional authority vis-a-vis local courts, and the balance required between local court autonomy and regional coordination. Although the *basic* governance structure is sound, the powers and composition of regional governance bodies should be studied carefully to assess the degree to which refinements or more extensive changes are appropriate (see Chapter 11 *infra*).

Implementation Strategies:

47a *Circuit judicial councils should continue to provide administrative coordination and oversight to all courts within the respective regional circuits.*

The judicial circuits are an essential component in the machinery of federal judicial administration. As the courts face a future of increasingly scarce resources, it will become more, not less, important to have a regional mechanism—the circuit judicial council—in which collective needs and interests of all courts (appellate and trial, large and small, urban and rural, overworked and underworked) can be weighed before resources are allocated. Because the appellate and trial courts face different problems and issues, proposals have been made to eliminate circuit judge involvement in regional oversight and coordination of district court administration.[8] On the other hand, some observers believe that their participation affords judicial council deliberations a broad perspective and detachment that are very useful in confronting difficult issues. With that in mind, the role of circuit judges in judicial councils should be reassessed as part of an overall examination of the circuit-district relationship (see Chapter 11 *infra*).

47b *The chief judges of the courts of appeals and district courts should con-*

[8] See, *e.g.*, Report of the Judicial Conference Committee on Court Administration and Case Management to the Judicial Conference Committee on Long Range Planning (Feb. 1993 & Jan. 1994).

tinue to be selected on the basis of seniority subject to statutory limitations on age and tenure.

Currently, chief circuit and district judges rise to those positions based on seniority in their courts, subject to statutory age and length of service limitations. The value of this system lies in the certainty it provides, and in ensuring equal opportunity and avoiding the divisiveness of an electoral process. Although many judges consider the seniority system flawed because it does not ensure administrative ability, the alternative methods suggested to date (*e.g.*, merit selection or election by the court) also meet with skepticism. Given that the current system has generally worked well in practice, this plan does not propose to abandon it. The better approach is to continue studying possible alternatives to the seniority model (see Chapter 11 *infra*), and to concentrate on training and technical assistance to chief judges so that they can effectively discharge their increasingly complex administrative responsibilities.

❒ RECOMMENDATION 48: **To assist the governance process and enforce its decisions, the judicial branch should continue to develop and enhance the capabilities of court administrators and managers.**

The need for staff support of court operations has expanded to an even greater degree than additional judge power requirements: judges now constitute less than 9 percent—as compared with nearly 25 percent in 1970—of the total judicial branch workforce. Accordingly, the key to successful administration of the federal courts lies more than ever in strong, effective court managers (circuit executives, clerks of court, etc.) and in adequate funding for administrative as well as adjudicative functions. As discussed in greater detail in Chapter 8,[9] an expanded, concerted effort by the federal courts to recruit, train, and retain the services of highly qualified, competent administrators will enhance the judges' ability to perform their constitutional functions. It will also foster the efficient, responsible use of judicial branch resources required in an era of tight budgets and close public scrutiny.

❒ RECOMMENDATION 49: **All judicial governance institutions should continue to develop and integrate long range planning capabilities into their policy-making processes.**

In its 1990 report, the Federal Courts Study Committee recommended that the Judicial Conference and the circuit judicial councils undertake or enhance their respective capacities for long range—as opposed to short-term or operational—planning. In addition to this national plan, successful planning efforts are continuing by Judicial Conference committees and have taken root at the circuit and district court levels. The judicial branch is well served by continuing national planning efforts in, among other areas, the automation, judicial security, and space and facilities programs. The long range planning process in the Ninth Circuit Court of Appeals is a landmark effort that has begun implementation. Successful planning efforts have occurred, with training and technical assistance from the Administrative Office[10] and the Federal Judicial Center, in several individual courts and judicial branch programs. As described more

[9] See Recommendations 74 and 77 *infra*.

[10] In support of the Long Range Planning Committee's charge to promote and encourage planning within the judicial branch, the Administrative Office of the United States Courts has published a *Judicial Branch Planning Guide* and a *Planning Handbook for Federal Courts* that have been used by local planning committees.

fully in Chapter 11, a continuing planning process is essential—not only to establish formal goals or objectives, but also to ensure well-informed, coherent day-to-day decision making. Planning should continue and be expanded at all levels as an integral part of the governance process.

Participation

Judicial governance should represent all judges. It is essential that the different perspectives and experiences of trial and appellate judges, and of life-tenured and fixed-term judges, be reflected in the decision making process. Over the years, the membership of federal court governance bodies has become steadily broader and more inclusive. Nevertheless, there is room for improvement.

❒ RECOMMENDATION 50: **There should be broad, meaningful participation of judges in governance activities at all levels.**

Implementation Strategies:

50a *District judges should be afforded the opportunity to participate effectively in national and regional governance. To that end—*

*(1) district judge members of the Judicial Conference should be afforded a term of service comparable to the average tenure of chief circuit judges (*i.e.*, five years); and*

(2) each circuit judicial council should have an equal number of district judge and circuit judge members, including the chief circuit judge.

District judges have participated in the Judicial Conference since 1957, and in circuit judicial councils since 1980. However, the rules governing their membership in these bodies continue to place them at a disadvantage vis-a-vis circuit judges. For example, an inequality between district and circuit judges can be found in the tenure of Conference members: although district judge members have a statutory term of three years, the circuit judges are represented on the Conference by their chief judges who may serve for up to seven years.

Many district judges with experience in national leadership believe that the three-year terms disadvantage district judge members. Because in fact most chief circuit judges serve between four and five years, a five-year term for district judge members of the Conference is appropriate, notwithstanding the fact that extending the term will reduce the number of district judges who can serve on the Conference over time. A longer term would make the district judge member a more effective participant in the decision making process—thus better reflecting the district judge perspective and improving the overall quality of Conference deliberations.

Despite the fact that the work of circuit judicial councils, as a practical matter, is focused primarily on trial-level administration, circuit judges continue to represent a majority on those bodies. In 1990, Congress amended the council statute to include "an equal number of circuit judges and district judges of the circuit," but allowed the chief circuit judge to remain as presiding officer.[11] Although the governance relationship between circuits and districts remains under study (see Chapter 11 *infra*), circuit judges should continue to participate in council business,[12] but on an equal footing with the

[11] *See* Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, § 323, 104 Stat. 5104, 5120 (codified at 28 U.S.C. § 332(a)(1) (Supp. V 1993)).
[12] See Implementation Strategy 47a *supra*.

district judges. In other words, the chief circuit judge should be counted *among* the "equal" number of circuit judge members on the council.[13] This is consistent with the above-mentioned principle of sound management—that those closest to problems should have the authority and responsibility for developing solutions.

50b *Senior judges should be afforded a greater opportunity to participate in governance. To that end—*

(1) senior judges should be expressly authorized to serve on the Judicial Conference;

(2) senior judges should be authorized to serve on the Board of the Federal Judicial Center;

(3) senior judges should be authorized to serve on circuit judicial councils; and

(4) individual courts should take appropriate steps to include senior judges in local governance mechanisms.

As discussed further in Chapter 8,[14] senior circuit and district judges provide an invaluable resource to the federal courts. They should be treated with the respect and consideration befitting their experience and dedication to the law and public service. Although they serve on Judicial Conference committees and, occasionally, on local court committees, both statute and prevailing practice often exclude senior judges from governance activity.[15] This not only deprives senior judges of a voice in making policies that apply to them, it also deprives the governance process of views acquired through years of judicial service. To rectify this problem, both law and practice should be amended to guarantee senior judges who remain substantially active a role in national and regional governance.[16]

Unlike most governance mechanisms discussed in this plan, many important mechanisms in individual courts (*e.g.*, boards and committees) are not founded by statute or national rule, and thus are not amenable to national prescription. Nevertheless, each court is encouraged to establish goals for broader senior judge participation that parallel those suggested here for national and regional bodies.

50c *Non-Article III judges should be afforded the opportunity for meaningful participation in governance. To that end—*

(1) the Board of the Federal Judicial Center should include a magistrate judge as well as a bankruptcy judge; and

(2) individual district courts should take appropriate steps to involve

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[13] This plan does not suggest any change in the role of the chief circuit judge as presiding officer of the judicial council.

[14] See Recommendations 59, 63, and 64 *infra*.

[15] Thus, the legislation excluding all but "circuit and district judges in regular active service" from membership on circuit judicial councils, 28 U.S.C. § 332(a)(3) (Supp. V 1993), and requiring active status for circuit and district judge members of the Federal Judicial Center's Board, 28 U.S.C. § 621(a)(2) (1988), should be amended to make senior judges eligible to serve as circuit or district judge members of those bodies. Similarly, the statute that governs representation in the Judicial Conference, 28 U.S.C. § 331 (1988), should be amended to clarify that senior district judges certified under 28 U.S.C. § 371(f) (see note 16 *infra*) may serve as district judge members of the Conference. (While senior judges are not expressly excluded from Conference membership, the statutory language is open to differing interpretations.)

[16] Those senior judges who continue to carry 25 percent of an active judge's workload, and are accordingly certified to receive salary increases payable to judges in regular active service (28 U.S.C. § 371(b)(1), (f) (Supp. V 1993)), should be considered substantially active.

bankruptcy judges and magistrate judges in local governance.

Governance of the judicial branch is principally the responsibility of judges who enjoy life tenure and undiminished compensation under Article III of the Constitution. There is, however, an appropriate role in the governance process for fixed-term judges of courts in the judicial branch of government.[17]

These judges perform many similar duties to the Article III judges. They also have relevant, and sometimes unique, perspectives that can inform and enrich the decision-making process. This is especially true at the local court level, where many decisions affect all judges equally, and in the research and educational activities needed to aid and enhance the performance of judicial duties. Involvement of fixed-term judges will enhance communication and problem-solving among all judges. With respect to magistrate judges, it will likely lead to their more effective utilization (see Recommendation 65 *infra*) and add to their productivity. Greater bankruptcy judge participation in governance will better integrate the bankruptcy courts into the judiciary generally.

In recent years, fixed-term judges have become involved, to an increasing degree, in the governance process at the national level (as members of most Judicial Conference committees and the Federal Judicial Center Board[18]), the regional level (as regular observers in many circuit councils), and the local level (as participants in court meetings and members of court rules committees and other administrative or planning bodies). These efforts should be continued and, where appropriate, expanded. Although this plan does not seek to specify when, and under what conditions, fixed-term judges should participate in national, regional, or local governance activity, it is important that their views be heard, and perspectives taken into account, whenever decisions are made on the many administrative, fiscal, and policy issues relating to their work.

Administrative Autonomy

❒ RECOMMENDATION 51: **Administration of federal court facilities, programs, or operations should be primarily the responsibility of the judicial branch.**

[17] The United States Court of Federal Claims presents an anomaly. Unlike bankruptcy judges and magistrate judges, the fixed-term judges of that court serve on a tribunal established under Article I, not Article III, of the Constitution. 28 U.S.C. § 171(a) (1988 & Supp. V 1993). Although the Court of Federal Claims is lodged within the judicial branch for administrative purposes, *see id.* §§ 176, 178, 460, 604, 610, that arrangement derives largely from the fact that an Article III body, the former United States Court of Claims, previously had exercised much of the present Article I court's jurisdiction. *See*, *e.g.*, 28 U.S.C. §§ 792, 2503 (1976 & Supp. V 1981). In a real sense, however, the judges of the present court are the legal successors of the fixed-term trial judges of that court, *not* the judges whose tenure and compensation were protected under Article III (and whose legal successors are judges of the Court of Appeals for the Federal Circuit). *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, §§ 165, 167(a), 96 Stat. 25, 50.

The other Article I courts—the United States Tax Court, United States Court of Veterans Appeals, and United States Court of Military Appeals—either exist as independent entities or receive administrative support from the executive branch. Absent a change to Article III status, future planning should include consideration of whether the Court of Federal Claims would be better served by an administrative arrangement similar to that of other Article I courts.

[18] Although the Federal Judicial Center Board already includes a bankruptcy judge, 28 U.S.C. § 621(a)(2) (1988), similar provision should be made for a magistrate judge. Magistrate judge participation in the Board is consistent with the basic principles stated above, and with the general policy of comparable treatment for bankruptcy judges and magistrate judges in administrative matters, including salaries and resource allocation.

Implementation Strategies:

51a *Administrative oversight and policy-making responsibility for the following programs should reside with the institutions of judicial governance or agencies operating under their supervision:*

- *judicial space and facilities program;*
- *court and judicial security program; and*
- *bankruptcy estate administration (*i.e.*, the U.S. trustee system).*

The federal courts are a constitutionally created, co-equal branch of government. They should and must operate will all reasonable autonomy. It is incongruous and inappropriate that they should be required to rely on the executive branch for administrative support in any area. This principle dates back to 1939, when Congress established the Administrative Office to handle many of the functions previously performed by the Justice Department.

There are today three significant areas—buildings,[19] judge and courthouse security,[20] and bankruptcy estate administration—in which the executive branch retains substantial responsibility for programs or activities directly related to judges, litigation, or other court operations. Transfer of that responsibility to the third branch will not adversely affect Congress's legislative oversight or budgetary authority regarding these three program areas. Rather, it would remove executive branch control over areas that should logically and appropriately be within the purview of judicial branch administration and policy making.

In seeking to establish programmatic oversight of security matters within the judicial branch, this plan does not recommend a change in the institutional status of the United States Marshals Service, a bureau within the Department of Justice. However, the Service's "primary role and mission [is] . . . to provide for the security and to obey, execute, and enforce all orders of the United States District Courts, the United States Courts of Appeals and the Court of International Trade."[21] On occasion, concerns have arisen about the relative priority of marshals' duties relating to court and judicial security vis-a-vis their other law enforcement responsibilities. To ensure that the Marshals Service can fulfill its primary responsibility (particularly in an era of limited resources), the Judicial Conference and its committees should be responsible for reviewing, and developing when necessary, policy relevant to court security matters. Among other things, the Conference should have final oversight authority with respect to preparation and execution of the courts' security budget.

Transfer of oversight authority for bankruptcy estate administration was among the measures recommended nearly five years ago by the Federal Courts Study Committee.[22] Placing the U.S. trustee system under judicial branch control would eliminate separation of powers issues and avoid po-

[19] See Chapter 8, Recommendation 71 *infra*. For the past five years, the Judicial Conference has sought legislation to obtain authority, independent of the General Services Administration (but subject to congressional authorization and oversight), "to determine and execute the judiciary's priorities with respect to space and facilities management." REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 81 (Sept. 1989). Although coordination of effort with GSA has improved since that time, the need for judicial (rather than executive) branch control over the assessment of need, and the design, construction, and management of judicial space and facilities ultimately remains.

[20] See Chapter 8, Recommendation 61 *infra*.

[21] *See* 28 U.S.C. § 566(a) (1988).

[22] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 77-78 (1990).

tential conflicts of interest in cases where the federal government, represented by the Justice Department, is a creditor. It would also be considerably less expensive to operate, and would minimize duplication of function and case management conflicts between the U.S. trustees and the bankruptcy courts.[23] At the very least, the parallel bankruptcy administrator program in the judicial branch should be permitted to continue in those districts that currently operate outside the U.S. trustee system or may in the future elect to do so.

51b *Responsibility for developing and presenting to Congress requests for funding of the federal courts and agencies of judicial administration should remain solely within the judicial branch.*

For the first 150 years of the federal court system, the executive branch (ultimately the Department of Justice) was responsible for managing the financial affairs of the lower courts, including the preparation of budget estimates.[24] The obvious separation of powers issue prompted the transfer of that responsibility, in 1939, from the Attorney General to the Director of the newly created Administrative Office.

In the legislative history of the Administrative Office Act, the authors noted the importance of relieving the executive branch of responsibility for the federal courts' budget:

> [T]he result of the provisions of the bill as now written, it is expected, will provide, first of all, the separation of the Department of Justice from immediate and actual and intimate participation in the monetary affairs of the courts, so that it will not be necessary for a judge to importune the Attorney General before getting a typewriter, or an addition to his library, . . . or some other matter of that kind . . . .[25]

Although Congress requires the President to include in the annual budgets both estimated expenditures and proposed appropriations for the entire federal government, the spending estimates and funding requests for the judicial and legislative branches are to be submitted to Congress "without change."[26] Thus, with respect to the judicial budget, "neither [the Office of Management and Budget] nor the President exercise any discretion . . . [and] inclusion of th[o]se items in the annual budget is merely a ministerial act."[27]

As the federal government continues to chart its course through an era of fiscal austerity, the judicial branch must maintain its independence from fiscal oversight or control by the executive branch. Although statutory law already reflects this principle, there have been and may continue to be efforts by the executive branch to protect the funding of other federal programs at the expense of the courts. If the courts are to

[23] Final Report and Recommendations of the Long-Range Planning Subcommittee of the Committee on the Administration of the Bankruptcy System of the Judicial Conference of the United States 18-19 (June 1, 1993).
[24] Until the early part of this century, the Supreme Court not only prepared its own budget requests—a function it still performs today—but also submitted them directly to Congress. Although Congress, in 1921, required the Court to forward its estimated expenditures and proposed appropriations to the President for submission as part of the budget for the entire Government, the President was enjoined to include those items in the budget "without revision." Budget and Accounting Act, ch. 18, § 201(a), 42 Stat. 20 (previously codified at 31 U.S.C. § 11(a)(5) (1976)). This arrangement was later extended to the entire judicial branch (see note 26 *infra* and accompanying text).
[25] S. Rep. No. 426, 76th Cong., 1st Sess. 3 (1939).
[26] Budget and Accounting Act, as amended, 31 U.S.C. § 1105(a)(5), (b) (1988 & Supp. V 1993).
[27] Matter of W. Wasserstein, No. B-198507, B-198507 L/M, 1980 WL 16612 (Comp. Gen. 1980) (applying the same restriction to OMB and presidential involvement with legislative budget requests).

perform their constitutional mission, these efforts must be resisted.

Accountability

❒ RECOMMENDATION 52: **The judicial branch should continue to develop and enhance a mechanism for effective coordination and review in budget formulation and execution.**

Independence from executive branch oversight and control in the budgetary process carries with it important obligations of fiscal responsibility, accountability, and efficiency in all court and judicial support operations. By establishing an "Economy Subcommittee" under its Committee on the Budget,[28] the Judicial Conference has acknowledged the importance of a permanent, analytical and systematic means of developing final budget estimates—one akin to that provided by the Office of Management and Budget in the executive branch. In the years ahead, the Conference and its committees should continue to scrutinize thoroughly funding requests from the various components of the judicial family, before they are submitted to Congress.

The mechanism by which that scrutiny is exercised must, of course, respect the principles of collegial decision making and local autonomy that characterize judicial governance generally. Indeed, budget formulation is a challenge in an institutional culture where decentralized budget execution is the norm. If a rural district and an urban district spend their resources in two markedly different ways, yet each delivers superior judicial services to the people of those districts, should one approach be favored over the other in the courts' budget submission to Congress? A single judicial budget should be submitted which, in the main, treats every court session the same, according to the kind of work involved, when measured against nationwide benchmarks for such work.

❒ RECOMMENDATION 53: **The existing mechanisms for judicial discipline should be retained. In particular, the impeachment process should continue to be the sole method of removing Article III judges from office.**

Impeachment is the only means set forth in the Constitution for removing an Article III judge from office and barring that individual from the further exercise of judicial power. While the constitutional regime favors a judiciary of substantial independence, removal through impeachment is an explicit qualification on judicial independence, and one of a number of permissible mechanisms to make a judge accountable for his or her actions.

Recent impeachment proceedings that proved burdensome to Congress prompted an extensive study of the impeachment process by the National Commission on Judicial Discipline and Removal. Without endorsing all its recommendations, this plan concurs in the Commission's central recommendation—that impeachment should remain the sole method for removing life-tenured federal judges from office. While cumbersome, the impeachment process has proven itself effective in removing from office judges who fail to honor their oaths, while at the same time insulating honest members of the judiciary from political attack.

As the Commission recognized, there are significant individual and institutional constraints on federal judges, apart

[28] REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 42 (Sept. 1993).

from impeachment, that assure their accountability and fidelity to their oath of office. Foremost among these constraints are the character and self-discipline of individual judges, as well as the combined effect of the requirement to provide written, reasoned opinions, the doctrine of stare decisis, and the "watchful eye" of the bar. Institutional constraints include: peer pressure among judges sitting in a court; the Code of Conduct for United States Judges; formal disciplinary mechanisms under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980; and congressional oversight under that Act. These formal and informal constraints guarantee the everyday accountability of federal judges yet ensure that impeachment is an exceedingly rare event.