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- law professor, "an erratic conformity to state procedure, an anachronistic survival of the separation between law and equity, and a failure to take advantage of the possibilities of judicial rule-making were hallmarks of the system." Wright, *Law of Federal Courts* (1963), p. 223. The effort to establish uniform rules was begun in 1911 and the progress of this movement well depicts the deference the federal courts have shown to the Congress in the important area of rule making. See Wright, *Law of Federal Courts* (1963) pp. 61-62.
17. For a discussion of some of the needs existing prior to the creation of the Federal Judicial Center, see Frank, *American Law: The Case for Radical Reform* (1969), pp. 19-32.
 18. Act of December 20, 1967, 81 Stat. 664.
 19. Senate Report No. 781, 90th Congress, First Session, p. 11.
 20. See Second Annual Report of the Federal Judicial Center, House of Representatives Document 91-181, 91st Congress, First Session.
 21. "Statement of National Commission on the Causes and Prevention of Violence," 1969, p. 10.
 22. S. 3062, 90th Congress, Second Session; S. 1509, 91st Congress, First Session. With particular relevance to the District of Columbia, see S. 1711, 91st Congress, First Session.
 23. See Hearings on the Judicial Reform Act before the Subcommittee on Improvements in Judicial Machinery, 90th Congress, Second Session, 1968.
 24. See Senate Report 91-262, 91st Congress, First Session.
 25. See Shartel, "Judicial Removal of Unfit District and Circuit Judges," 28 *Michigan Law Review* 870 (1930); Simpson, "Federal Impeachments," 64 *University of Pennsylvania Law Review* 803 (1916).
 26. 28 U.S.C., p 372.
 27. S. 3055, 90th Congress, Second Session.
 28. California Constitution, Article VI; West's *California Rules of Court* (1969) Rules 901-921.
 29. A new bill, S. 1506, 91st Congress, First Session, was introduced on March 12, 1969. The new bill's provisions regarding the problem of judicial removal and involuntary disability are the same as the previous bill.
 30. Hearings on the Judicial Reform Act before the Subcommittee on Improvements in Judicial Machinery, 90th Congress, Second Session, 1968, p. 111.
 31. A lucid discussion of the need for court reform may be found in Frank, *American Law: The Case for Radical Reform* (1969).

CONSTRAINTS AND CONFLICTS IN COURT ADMINISTRATION

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THE RECOGNITION OF COURTS as unique and complex institutions in our society is forcing all who are concerned with the administration of justice to reassess their conclusions about the way they can be administered. New Jersey, the first of the centrally administered systems, has not succeeded in solving all problems of court administration. In all fairness to New Jersey, the demands on the courts have far outstripped the capacity of the courts to expand, but the inability of the system to deal flexibly with the problem suggests that a deeper look be taken at the courts and their potential for administration. It may well be

that, as some have suggested, the courts are not manageable. More hopefully, they are not manageable without new concepts and clearer recognition of the underlying problems.

An examination of the uniqueness of the courts and the constraints and conflicts which their unusual role creates may help in the search for a better model or at least a helpful analog.

Resource Dependency

The courts, as presently organized, are almost totally dependent on political processes

for their resources. Though dependent upon both legislative and executive activity they must regularly judge such action. They act as the arbiter of disputes between individuals and the executive branch of government which may actually provide or at least have veto power over necessary court resources.

The courts in almost all states derive their routine support from many political sources. The sheriff, the county clerk, and the county commissioners, each separately elected, provide essential services to the courts. The salaries of judges are usually dependent upon the largess of legislatures, which in times of rising costs can punish the judges by inaction. County supplements to judicial salaries often leave the judges doubly at the mercy of separated political authority.

Responsibility for broad social problems is often placed on the courts with no resources for their effective resolution. The responsibility for sentencing convicted felons is invariably fixed on courts, with control of or support for presentence investigations placed in a county or state executive agency. The problems of child custody are regularly dumped on the courts, with no resources with which to evaluate critical decisions about custody. Mental health, juvenile neglect, alcoholism are all loaded onto the courts in differing ways, with no support provided to carry out the complex duties imposed.

The courts, perhaps the most critical institution in a government of laws, are complex beyond present rational comprehension, yet they have received almost no attention from students of administration. Long the private domain of the legally trained and licensed, the courts are today for the first time being examined from the viewpoint of effective administration. The principal result of this examination is to recognize the constraints in the court environment on traditional concepts of management.

The Adversary Theory

American courts, built on the English tradition, are lawyer dependent. Justice in the Anglo-American system of law is based upon the assumption that both the proper interpretation

of law and the approximation of the truth will best be accomplished when opponents present their positions to an impartial decider. Whether or not the assumption has validity, there is little likelihood that the system will be changed. Courts will continue to be dependent in their administration of justice upon the performance, the availabilities, the quality, and the attitudes of the American lawyer.

This dependency carries with it several corollary constraints. The resolution of disputes will depend upon the availability of groups of people at a given time and place. At the very least two lawyers must get together to settle a case. To perform the elaborate ritual of a jury trial there must be a judge, at least two lawyers, witnesses, court reporter, clerks, bailiffs, jurors, and the parties. In a criminal case the complexity is substantially increased by the large portion of indigent defendants requiring court-appointed counsel and the usual understaffing of the prosecutor's office.

Traditional adversary theory requires the judge to play a passive role. The lawyers move cases as they are available (or delay them as they believe it will be to their or their client's best interest). Under this traditional view, the lawyers are to be left alone and allowed to delay the justice process for reasons sufficient to themselves.

A developing judicial attitude recognizes that the justice process cannot be left to the convenience or special interest of the lawyers involved. Recognizing that the adversary, witness-oriented process diminishes in effectiveness with the loss of memory and the disappearance of witnesses, many judges today resist the traditional deference to lawyers in moving their cases to conclusion.

Lawyers and Judges as Soloists

From the commencement of an attorney's career in the law he is trained as a soloist. His law school emphasizes individual work to the almost complete exclusion of any team or organization work. The practice of law whether in a prosecutor's office or with a private law firm is highly individual. While this tends to develop persons who are individually very thorough, it does not prepare them for mem-

bership in an organization. As judges they value their independence, recognize its importance to impartiality in decision making, but have no awareness of their duty to the judicial organization. In defending their own independence they tend to protect the individual freedom of all judges in the system, even when such freedom is destructive of necessary administrative action.

Judges, of course, come from the legal profession and, for the most part, come from an extensive practice of law. They bring with them the general antipathy toward administration of the soloist legal profession.

The professional independence manifests itself in court organizations by preventing strong administration. Almost invariably judges left to their own devices will rotate the office of "chief" judge or give the position to the senior judge. Though there are rare instances where the judges have elected a strong administrative judge to manage their affairs, these instances are sufficiently rare to be noted as exceptions.

The Jury System

Though closely related to the adversary process, the jury system provides a special constraint on court management. Deeply rooted in tradition, the jury trial and the grand jury indictment will be essential elements of American justice for the foreseeable future.

The existence of a right to a trial by jury results in the necessity of having a basically continuous hearing in a given case and the administration of a program aimed at finding impartial jurors.

The difficulty involved in trying a case with a cohesive team of jurors over any protracted period of time is obvious to any observer of contemporary American justice. Sickness, death in the family, jobs, and many other factors interfere with the continuity of any team of 12 persons. Many judges routinely swear 14 jurors in cases that will last as little as five days. Juror fees are uniformly less than poverty-level pay. Trial must, therefore, be before jurors who can afford the time or who must sacrifice income to perform this civic duty.

The problems involved in getting impartial jurors in sufficient numbers are even greater

than keeping a jury in a protracted trial. To get a hundred jurors to the court house, literally hundreds must be summoned, examined, given an opportunity to be excused, and processed to a trial room for screening by the lawyers. Jurors selected from too narrow or broad an area may be challenged as unrepresentative of the community. Inability to read and write may disqualify some. Excessive excuses of certain economic groups may defeat the requirements of a fair cross section of the community.

To maintain an adequate supply of jurors for the cases that must be tried usually involves the maintenance of a pool where hundreds may wait for days without being utilized. The human waste and social cost of a poorly run system has only recently been exposed. The alternative to the pooling of jurors is to waste judicial manpower which in many cities is so short as to be the critical element in court congestion.

Jurors are not employees of the court. Their incentives for performance are different from those of employees generally. If the jury system is to produce justice it must be managed in its own context as a unique feature of an unusual institution.

Selection and Tenure of Judges

The principal actors in the court system are the judges. Their willingness to take responsibility, their motivation to work, their understanding of their organizational role all contribute to the way the courts are run. Needless to note, the way judges are selected and the security of their office affects the performance of the judicial establishment.

Most judges are selected politically. The degree to which partisan politics is involved varies widely from partisan nomination in the federal courts (never less than 90 per cent of the judges named from the President's party) to nonpartisan ballots where the party of the candidate is often unknown. The Missouri plan of nonpartisan selection has gained in the Midwest in recent years, but even under such a plan of blue ribbon commission nomination the judge must stand for retention after a term of years. Whether politically appointed or politically elected, the political source of the ap-

pointment often expects to help select personnel for the court or causes the judge to apply the bureaucratic principle that if you do nothing the electorate will have nothing against you.

There is some evidence that in administrative matters tenure of office is substantially more important than the method of selection. Administration of the courts has been weakest in states where the electorate regularly turns out incumbent judges, and has been strongest where judges have either traditional or constitutional life tenure. There is some indication that Missouri plan-type judges, dependent as they feel they are on the good will of lawyers, may be less effective in managing their cases than judges dependent on the election process for retention in office. Where lawyers are the basic court congesting problem, the influence of the bar on retention clearly affects the operation of the court calendars.

Long tenure in office without any effective removal procedure causes managerial side effects which may counterbalance in part the contribution of long tenure to judicial independence. In any group of human beings, no matter how carefully selected, a certain number of inadequate persons will emerge. A certain number of alcoholics appear in the judicial population as do other psychological and physical disabilities. In some instances very good lawyers are inadequate judges for the very reason they were good lawyers, i.e., their conscientious and thorough attention to detail. In a judge this may manifest itself as indecision.

Most human systems are able to absorb these inadequate people without large dysfunctional effects. In the judiciary, however, an inadequate judge in a small court is disastrous and in a large court leads to administrative structuring that often impedes effective administration. The small court will have to absorb far too much work in a few judges. In the large court the judges often organize to permit the lawyers to avoid the inadequate judge by judge shopping techniques which consume great amounts of judge time and effort. Since the alternative is to expose the inadequate member of their society, the administrative cost is accepted as an unarticulated necessity.

Statutory Division of Labor

There is no rational explanation for the division of labor among the various levels of courts. The labels on courts such as Circuit Court, Court of Common Pleas, Orphans Court, Superior Court, Supreme Court are more indicative of their historical antecedents than they are of the work which is allocated to them.

There are at least 56 court systems within the United States. Each state has a system, the several territories have different systems, the District of Columbia has a system, and the federal system operates independently though interrelated to all. The term "District Court" is used to label the lowest courts in some systems, the court of general jurisdiction in other systems, and the intermediate court of appeal in another system. "Circuit Courts" are appellate courts in some and general jurisdiction in other systems. "Superior Courts" are usually courts of general jurisdiction but may be the lowest or have limited appellate jurisdiction. The only valid generality about the distribution of jurisdiction among the courts is that it was accomplished without a rational view to the management of a court system.

Though there are clearly areas of the law and of justice which require more or less skill on the part of judges, the distribution of labor along traditional lines has not taken this into account. The critical legal problems of today are probably in the area of the relation of a tenant to his landlord, consumer credit, or juvenile behavior. The jurisdiction over these matters has traditionally been allocated to courts with lower-paid and lower-status judges. They are often staffed with excellent judges but they are seldom staffed or financed to perform the tasks assigned to them. Because their jurisdiction has been allocated to them by statute or even by constitutional provisions, there is little capacity in these courts to deal effectively with these critical areas of legal development. From an administrative point of view, the barriers to flexible administration are virtually unsurmountable.

Attempts have been made in recent years to develop a model court structure with tiers of judges who could be transferred freely from

one area to another. The culture, however, is resistant. There is a strong feeling among judges that the redistribution of jurisdiction may somehow reduce the importance of the court on which they sit.

The status system in the judiciary is very real and should be tampered with only after considerable analysis and experimentation. Most judges become judges because they want the status this affords them in the legal profession. They leave higher paying jobs to take on heavy responsibility. Any reduction in the perceived status of the position might well reduce the number of persons willing to take on the difficult burdens of judging.

The Illinois reforms seem to have accomplished the increase in administrative flexibility without reducing the status of individual judges. There the lowest court, the magistrates, were made subject to the control of the court of general jurisdiction with authority in the general court to assign all the original "jurisdiction of the court as appropriate." If the traditional allocation of work can be broken down in the operation of the trial court, there is now no statutory impediment to the change.

Court Organization

The distribution of jurisdiction among courts has been purposeless. The organization of the courts for management purposes is, with notable exceptions, nonexistent.

The federal courts have a central administrative office with basic control functions over the expenditure of funds and the supervision of a judicial salary plan. The authority to administer is in 11 circuit councils which have no staff for the performance of even routine ministerial tasks.

State court administration varies widely, but generally there is no central authority for the administration of the courts. Many states pretend to have central administration where judges can be assigned away from their home district, but in fact exercise this authority without adequate information and, therefore, without design.

New Jersey was the first state to have central administration of the courts, and has developed it to its highest form. Colorado and Connecticut have recently provided for central controls and administration, but most court systems operate without any plan or organization, relying upon appellate processes for the small amount of coordination achieved.

Court organization at the local or county level exists only in Illinois and New Jersey. In Illinois all of the trial courts are unified into a single Circuit Court with an administrative judge in charge. In New Jersey an assignment judge appointed by the state chief justice has supervisory authority over his entire district, including all levels of trial courts. With these principal exceptions, the courts handling inter-related matters on a routine basis are totally fragmented, with neither authority nor staff for integration of efforts.

Change Possibilities

The constraints on management and the conflicts inherent in the system present a discouraging picture. The courts are institutions in search of a managerial model. The existence of the American justice, adversary, jury, judicially independent system will depend upon the ability of those seeking the model to find it.

The problem is like the one which faced hospitals a half a century ago and like the one that faces university administration today. The professionals who dominate the system must be respected and their role defined, but organization and management must be brought to the courts or they will continue to lose ground in their effort to provide individual justice in individual cases.

Efforts are now being made to draw in persons from many disciplines to find the answers and to preside over their introduction into the courts. As Arthur Vanderbilt noted, "reform of the administration of justice is not sport for the short winded." Only now by joining the efforts of lawyers with public administration is progress beginning.