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THE CHIEF JUSTICE'S SPECIAL AUTHORITY AND  
THE NORMS OF JUDICIAL POWER

THEODORE W. RUGER<sup>†</sup>

INTRODUCTION

This Essay explores an incongruity in the allocation and exercise of two different kinds of judicial discretion held by the Chief Justice of the United States. The paradigmatic type of discretionary authority that Article III judges (including the Chief Justice) possess is expressed through the mode of adjudication, and as such is constrained in important ways by procedural forms that accompany that kind of official action. Judges are constrained, to a greater or lesser extent, by formal “law,” but their discretion is additionally limited by the collective structures of the federal judiciary and also by the normative expectation that judges give express reasons for their decisions. In this sense the appointment of an Article III judge can be regarded as a form of license to exercise bureaucratic discretion for a lifetime, but to do so under certain well-defined rules. We tell judges to follow “the law,” to be sure, but we don’t rest our faith entirely on the law’s uncertain formal constraints. Instead, judges exercise power collectively, are limited to particular cases and controversies, and are obliged to give reasons for each important decision that they make.

So it is for most federal judges, including the Chief Justice in his primary role of deciding cases on the United States Supreme Court. Within the Court’s core adjudicative function, the Chief’s status as “*prima inter pares*”—first among equals—is a well-known and generally apt description of a type of special status that is highly visible, but also limited in important respects. The Chief Justice’s adjudicative power is structured and channeled in ways very much like the other eight Justices on the Court, and, in a more general sense, is much like the authority of any judge on a multimember appellate tribunal. The Chief Justice exercises independent discretion in a formal sense when

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he votes on cases, but is functionally dependent on the agreement of at least half of his peers to achieve his preferred result or rationale. This remains the case when he exercises the special privileges of his office, such as the opinion assignment power.

The above generally describes the Chief Justice's adjudicative role for the entire history of the office—even John Marshall's prominent influence depended on the compliance of half or more of his colleagues during his long tenure.<sup>1</sup> But in the past century, the Chief Justice's basic set of powers has expanded to include sweeping authority beyond the particular cases and controversies before the Court. Through gradual statutory and customary accretion, and spurred by innovative and acquisitive Chief Justices like William Howard Taft and William H. Rehnquist, the office has come to exercise a range of bureaucratic powers that extend far beyond the Supreme Court's walls, and influence the federal judiciary as a whole. Though the Constitution confers no special powers on the office—save that of presiding at presidential impeachment trials<sup>2</sup>—the Chief Justice currently presides over the important Judicial Conference, which helps set judicial policy, appoints key managerial personnel in the federal courts, and selects the judges who sit on various specialized federal courts.<sup>3</sup> The exercise of these and other broad powers, in turn, has potential to meaningfully influence the substantive outcomes of at least some federal court proceedings.

At a facial level, these two kinds of authority held by the Chief Justice appear quite different. When discharging the office's extramural, administrative duties, the Chief Justice is doing something quite different than the specific case resolution that is paradigmatic of an Article III judge's authority. Such power is not constrained by anything that looks like formal "law"—such as *stare decisis*, textual commands, or the like—and we would not expect it to be, for the functional power is not "judicial" in nature, but is more properly thought of as "executive" or "bureaucratic." But neither is such power cabined by the other procedural forms that accompany and channel adjudicative discretion, such as the norm of collective decision making and the expecta-

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<sup>1</sup> On Chief Justice Marshall and the Supreme Court's decisions during his tenure, see generally 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY, 1789-1835* (rev. ed. 1926); G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835* (abr. ed. 1991).

<sup>2</sup> U.S. CONST. art. I, § 3, cl. 6.

<sup>3</sup> For a comprehensive description of the Chief Justice's powers and responsibilities, see Peter G. Fish, *The Office of Chief Justice of the United States: Into the Federal Judiciary's Bicentennial Decade*, in *THE OFFICE OF CHIEF JUSTICE 1* (1984).

tion that decisions will be justified by stated reasons. The Chief Justice is empowered to exercise many of the office's most important powers—handpicking the judges who sit on the crucial Foreign Intelligence Surveillance Act (FISA) court,<sup>4</sup> for instance—without any need for collegial consensus, and without any stated reasons for so doing.

My central claim here is that this stark dichotomy in procedural form and normative constraint is inapt. The seemingly different kinds of power that the Chief Justice exercises in his adjudicative and extra-judicial roles are in fact quite similar in their most crucial aspect—both entail the application of official discretion to a discrete problem, with a particular set of alternative choices from which the official may choose. Both, in turn, raise the problematic specter of individualistic discretion in the hands of a single unelected official. To be sure, adjudicative discretion is constrained by formal “law” to an extent, but only to an extent, and judges, particularly those on the Supreme Court, retain significant ability to shape legal rules to choose among alternative results and rationales.<sup>5</sup> But we do not expect formal law to do all the work when it comes to limiting judicial discretion to its basic form; individual judges are also constrained by a set of complementary practices—such as collective decision making and explicit reason giving—that, although they accompany the legal process, are not the same as formal “law.” These norms are pliable enough to serve useful purposes in limiting official discretion in other governmental contexts beyond adjudication. I argue here that these structures can be, and ought to be, applied to cabin the Chief Justice's special authority in areas where the office's discretion is currently unbounded.

My Essay advances this argument in three basic parts. Part I is a discussion of adjudication within Article III, with particular discussion of two extralegal norms—collective decision making and reason giving—that have come to accompany the exercise of legal discretion in

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<sup>4</sup> See 50 U.S.C.A. § 1803(a), (b), (d) (West 2003) (giving the Chief Justice the power to designate eleven federal district court judges to serve for seven-year terms on the FISA Court, which reviews and decides government applications for surveillance warrants).

<sup>5</sup> Discussing the lack of clear legal constraint on Supreme Court Justices when deciding cases, Judge Richard Posner recently wrote that, in constitutional cases, the text and precedent is sufficiently vague that the Justices “hav[e] and exercis[e] discretionary power as capacious as a legislature's.” See Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 40 (2005). On the predictive force of formal legal rules in Supreme Court decisions, see Theodore W. Ruger, Pauline T. Kim, Andrew D. Martin & Kevin M. Quinn, *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1190-93 (2004).

the United States. I explain that both norms operate as constraining devices to limit individual judicial discretion, in addition to, and somewhat independent of, formal “law” itself. Because collectivity and reason giving are distinct from formal law, they are viable mechanisms applicable to other forms of official action outside the realm of adjudication. Part II explores the development of the Chief Justice’s special powers, and explains how the office’s authority developed without meaningful constraint from these presumptive Article III norms. Part III concludes with a discussion of how the adjudicative norms of collectivity and reason giving might be modified and applied to constrain various aspects of the Chief Justice’s special authority.

#### I. CONSTRAINING DISCRETION WITH COLLECTIVITY AND REASON GIVING

The problem of constraining judicial discretion is a very old one, certainly predating the United States Constitution and evident in the early debates at the time of that document’s ratification. The Framers made a distinction between ideal judges exercising only “judgment,” and more lawless jurists applying their “will.”<sup>6</sup> Much like modern politicians, leaders of the time cast contemporaneous court decisions they approved of as representative of the former type, and ones they disliked as products of judges’ craven political “will.”<sup>7</sup> Central to the legitimization of judging was the idea that judges based their decisions on, and were constrained by, a set of legal forms and practices that differed from the stuff of ordinary politics. Judges themselves were keenly aware of this dynamic, and in the vivid language of the time described official discretion unburdened by legal forms as “naked”—and thus dramatically different from the ordinary and appropriate exercise of judicial authority.<sup>8</sup>

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<sup>6</sup> See THE FEDERALIST NO. 78, at 433 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[The judiciary] may truly be said to have neither FORCE nor WILL but merely judgment . . .” (emphasis in original)).

<sup>7</sup> See, e.g., LIBERTY SAVED, OR THE WARNINGS OF AN OLD KENTUCKIAN, TO HIS FELLOW CITIZENS, ON THE DANGER OF ELECTING PARTISANS OF THE OLD COURT OF APPEALS, AT THE NEXT AUGUST ELECTION, TO REPRESENT THEM IN THE NEXT GENERAL ASSEMBLY OF KENTUCKY 1 (Louisville, Ky., Wm. Tanner 1825) (“Had the judges the power of judging the laws, nothing could be law but their will . . .”).

<sup>8</sup> See *Luther v. Borden*, 48 U.S. (7 How.) 1, 51 (1849) (reasoning that certain political questions were to be assessed by “public policy alone” and represented a “mere naked power” inappropriate for judicial resolution); see also *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 236 (1839) (noting that a court, in appointing a clerk, operates outside

Law itself was (and is) the obvious first candidate to cover over the nakedness of raw judicial discretion. In all its facets—adherence to text, fidelity to precedent, and embrace of deductive logic—the application of formal law purports to channel judicial power into a decisional field that, if not absolutely objective and mechanistic, is at least a dramatically narrowed set of plausible choices and rationales. But history has shown that the strong-form argument for law's formal constraint on judicial discretion is overstated. In light of the weaker constraint that is revealed, it is not surprising that other customary norms have come to accompany the exercise of judicial authority by Article III courts. The two most deeply rooted, which I will explore here, are the practices of collective decision making and of express reason giving. These norms serve to channel individualistic judicial discretion in ways similar to legal rules, and in certain settings are probably as important, or more important, than “law” itself in constraining judicial behavior.

Judges, although formally independent, are intertwined with other judges in vertical and horizontal institutional structures, and are also confined in a more abstract sense by the requirement of giving explicit reasons for their decisions. I will briefly discuss the development of these adjudicative norms in the following few pages, although both are sufficiently entrenched and accepted that it is unnecessary to describe them at great length. Crucial for the argument I make later in the Essay, though, is the idea that, although the norms of collectivity and reason giving have come to accompany adjudication, they are not uniquely or exclusively suited for that mode of governmental discretion alone. Instead they are available procedural forms to regularize other types of bureaucratic authority, including the special extrajudicial power currently possessed by the Chief Justice.

#### A. *Collectivity Within the Article III Judiciary*

The current federal judiciary is a large and complex bureaucracy, with some twelve hundred life-tenured judges, about thirty thousand employees, and a budget of over five billion dollars.<sup>9</sup> The power of the federal courts is spread through various institutions and geographic locales. Within this structure, adjudication has become a

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the bounds of legal constraint and “exercises not a judicial, but . . . a merely naked power”).

<sup>9</sup> Judith Resnik & Theodore Ruger, Op-Ed., *One Robe, Two Hats*, N.Y. TIMES, July 17, 2005, at WK13.

quintessentially group endeavor. Virtually every decision a federal judge makes is dependent in some way on the express or implicit consent of other federal judges.<sup>10</sup> Sometimes this collective function is vertical and hierarchical, as in the review of a decision by a higher court. Sometimes it is horizontal, as in the requirement of majority decision making on a multimember panel or appellate court. Federal circuit judges face both of these constraints—vertical and horizontal—in each of their decisions. To be sure, much of this potential hierarchical review often goes unexpressed—as when a litigant does not appeal an adverse ruling—or is made more lenient through deferential standards of review, but the fact remains that a single federal judge rarely has absolutely unbounded authority on an issue before her.

This collective dynamic impacts judicial decision making in several ways. Most obvious is the hierarchical dynamic of potential subsequent review. All federal judges not on the Supreme Court must tailor their rulings to fit discernable circuit or Supreme Court precedent, or risk being overruled by a higher court. Under the reasonable presumption that lower court judges prefer not to be overruled, the existence of hierarchical review provides a strong incentive to dampen simple preference maximization by individual judges, and instead creates a norm of strategic institutional compliance by judges situated within Article III's hierarchy.<sup>11</sup> One leading explanation for the dramatically different kind of judging that Supreme Court Justices do relates to the fact that their decisions are not subject to this vertical hierarchical dynamic.

However, the norm of collectivity also applies internally to shape decision making on all of the federal appellate courts, including the Supreme Court. Whether undertaken in sets of three judges, nine judges, or some other number for en banc panel review, federal appellate judging is a collaborative enterprise. The corollary decision rule of majority consensus dramatically constrains most appellate judges from expressing their individual attitudinal preferences in actual case outcomes. This operational constraint applies with particular force to judges who are preference outliers, whose own views on

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<sup>10</sup> For examples of scholarly literature discussing the hierarchical structures of the federal judiciary, see Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 823-25 (1994); McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1641-48 (1995).

<sup>11</sup> See Caminker, *supra* note 10, at 824-25 (outlining the paths of appellate control within the Article III judiciary); McNollgast, *supra* note 10, at 1641-48 (providing a statistical analysis of the factors influencing lower court compliance with precedent).

many cases would not command a majority of their colleagues. Such jurists are frequently faced with a choice of either conforming their views to a more moderate majority or voting in dissent without meaningful impact on outcomes. Through this dynamic, the collective function of appellate adjudication serves a moderating function, thwarting the expression of extreme views and forcing outcome-determinative voting toward an ideological center.

This collective dynamic produces other normatively desirable effects that go beyond a general preference moderation. Group voting is usually accompanied by group deliberation, and the deliberation that takes place on appellate tribunals may result in judicial outcomes that are better informed, better thought out, and better justified than would occur in an individualized setting. In stark contrast to many of the Chief Justice's administrative powers, appellate judges deciding cases must talk with each other, test and debate their initial inclinations, and ultimately reach majority consensus on the result of a case.

I pause here to make an important qualification: I do not claim that the collectivity described here is intrinsic to judging itself in an acontextual or platonic sense. It is possible to imagine a conception of judging that does not make this collective norm as central as it is to the current Article III judiciary. Indeed, for the early part of United States history, federal judges were dramatically more disparate, both geographically and decisionally, than they are now. Nothing in the text of Article III itself—which speaks only of “one supreme Court” and “such inferior Courts as the Congress may from time to time ordain and establish”<sup>12</sup>—demands the particular interconnectedness that has come to characterize the modern federal judiciary. Even the notion of appellate jurisdiction does not inherently require adoption of the current practice of blending preferences through appeals to different sets of judges.<sup>13</sup> The earliest federal appellate practice often entailed the original decision maker (the district judge) sitting and hearing the same matter a second time as a part of the circuit court.<sup>14</sup> Other practices further indicate that the norm of collective majority consensus was less important in the early United States. For instance, some leading Marshall Court opinions were, because of illness or geo-

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<sup>12</sup> U.S. CONST. art. III, § 1.

<sup>13</sup> See Caminker, *supra* note 10, at 826-28 (indicating that an appellate structure is still possible with completely autonomous courts).

<sup>14</sup> Ellen E. Seward, *The Seventh Amendment and the Alchemy of Fact and Law*, 33 SETON HALL L. REV. 573, 586 n.80 (2003).



graphic absence of some Justices, issued by a minority of the entire Supreme Court.<sup>15</sup>

To describe such historical anomalies, however, serves primarily to underscore how deeply the norm of collectivity is entrenched in the current federal judiciary. Though district judges occasionally do sit by designation on circuit courts today, a district judge hearing and opining on an appeal from her own trial ruling would today be regarded as highly inappropriate. The Marshall Court's occasional practice of issuing key constitutional rulings by submajority was assailed even in its day,<sup>16</sup> and the Court reformed the practice soon thereafter.<sup>17</sup> In modern Supreme Court practice, the Justices are empowered to issue rulings endorsed by fewer than five votes, but such plurality or submajority outcomes typically carry diminished precedential force. In sum, as the federal judiciary has grown in size and scope over the past two centuries, it has become more collective and interconnected in its decisional norms.

An important adjunct to the norm of collectivity in current Article III practice is the idea of random or automatic systems for case selection and panel assignment.<sup>18</sup> I have said that the federal judiciary is a collective institution, but it does not make decisions in a single collective body as a legislature would. Judicial authority is applied in the first instance by particular district judges sitting individually, or particular sets of three appellate judges. But even here the collectivity norm applies derivatively in the practices of random and rotating case and panel assignments. Random assignment or panel selection across a group of heterogeneous judges is a sort of probabilistic aggregation of the collective judiciary's preferences—litigants will get a particular judge, or group of judges, who may differ from others, but *ex ante* the probability pool stretches across a larger group. To be sure, individual variation among judges can, once the case or panel assignment is made, produce substantial disparity in outcomes of actual cases. But this is an after-the-fact manifestation of individual judicial differences,

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<sup>15</sup> See Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186, 193 n.41 (1959).

<sup>16</sup> See *id.* at 194 ("An opinion is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge . . .") (internal quotation marks omitted) (quoting Thomas Jefferson)).

<sup>17</sup> *Id.* at 195.

<sup>18</sup> For a discussion of current assignment practices generally, see J. Robert Brown, Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX. L. REV. 1037, 1069-78 (2000).

and in any event is subject to aggregate review (by appellate courts or en banc panels) that often smooths out such variation.

B. *The Normative Constraint of Reason Giving*

Federal judges exercise their discretion in collective structures; they also typically give express reasons for the decisions that they make. The practice is so well established that the discussion here can be brief, and I seek to make two related points. First, the requirement of giving reasons is an important component of the judicial process, and one that exerts at least some constraint on the individual discretion of judges. Second, although the “giving reasons” requirement is intimately connected with “law” in our legal system, it is not exclusively part of the adjudicative function, and is capable of channeling and regularizing official behavior by judges and others in different decisional settings. As such, it is a device fit for consideration as a potential “export” to other fields of individualistic official discretion, such as much of the Chief Justice’s special authority.

Many legal scholars, perhaps most notably Frederick Schauer, have explored the theory and practice of reason giving, and the manner in which it impacts judging,<sup>19</sup> and I do not intend to offer a full and fresh exploration of that topic here. In general, this literature explores the manner in which giving reasons serves to channel and constrain judicial discretion in the future. As Schauer explains, there is something fundamental about legal reasoning that makes the expression of such reasons at least a weak constraint on judges in future cases. The norms of judging demand a reason that is broader than the particular case at hand<sup>20</sup>—one cannot decide a case in favor of John Doe on the unique ground that “I think John Doe should prevail here.” Some reasons of greater breadth must be given, and the greater breadth will sweep in at least some future cases which will presumptively be decided in like fashion. By considering this universe of potential future cases at the time of the original decision, judges will discard at least some rationales for ruling in John Doe’s favor, on the thinking that other less desirable future outcomes might be compelled—or at least presumptively suggested—by such a rule. To be

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<sup>19</sup> See Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 656-59 (1995) (discussing the advantages and disadvantages of institutions that require decision makers to give reasons).

<sup>20</sup> See *id.* at 638-43 (“[R]easons are typically propositions of greater generality than the conclusions they are reasons for . . .”).

sure, there is no blunt enforcement mechanism against life-tenured judges who are inconsistent in their rulings, but reputational and collegiality concerns held by many judges render the reason-giving norm at least a partial constraint on raw discretion.

These basic points explain much of the criticism of judicial decisions that are *not* grounded in reasons that are at least somewhat broader than the particular matter at hand. The Supreme Court's *Bush v. Gore* decision is problematic not just because it was doctrinally defective in its basic rationale, but also because the plurality opinion sought to confine its reasoning to one, and only one, case.<sup>21</sup> Similarly, a major concern about various circuit courts' "no-citation" rules for unpublished opinions<sup>22</sup> goes to the potential change in judicial behavior arising from the freedom to decide cases without giving durable reasons.<sup>23</sup> The concern is not primarily about subsequent litigants who are unable to benefit from potentially useful authority, but about the original litigant, whose case is decided by judges applying reasons they know will not resonate beyond the case at hand. As such, the judges are doing something different than ordinary appellate judging, and are arguably less constrained because their "unpublished" reasons are transitory. The common theme of both of these examples is a concern that the judges who don't give express reasons are free to exercise more free-ranging discretion in particular cases, because the stakes are lowered through time—the original decision does not decide future cases. With that temporal cheapening comes a type of decision making that is more disposable, and thus perhaps more subject to individualistic whim or preference.

### C. *Beyond Adjudication*

Because reason giving is an integral part of the formal adjudicative process in a system grounded in part on *stare decisis* principles, it is possible to equate reason giving with law giving itself. But, although the two processes overlap, they are not identical, and the act of giving

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<sup>21</sup> See 531 U.S. 98, 109 (2000) (noting that the Court's equal protection holding "is limited to the present circumstances").

<sup>22</sup> The Supreme Court has issued a rule which, unless Congress intervenes, will invalidate "no-citation" rules as they apply to unpublished opinions issued on or after January 1, 2007. Tony Mauro, *Court Endorses Use of Unpublished Opinions*, LEGAL TIMES, Apr. 17, 2006, at 15.

<sup>23</sup> See, e.g., Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 221 (1999) (noting critically that judges "are perfectly free to depart from past opinions if they are unpublished").

reasons has independent force in constraining official discretion that does not depend on the context of adjudication. As Martin Shapiro has explained with respect to administrative action, the act of giving reasons has potential to constrain the discretion of bureaucratic officials in various and subtle ways.<sup>24</sup> Shapiro characterizes giving-reasons requirements as “a form of internal improvement for administrators,” which create a “mild self-enforcing mechanism for controlling discretion.”<sup>25</sup> Decisions coupled with express reasons are likely to be better thought out, more sensitive to opposing views, and more “reasonable” than they otherwise might be.

This insight that a giving-reasons requirement improves bureaucratic decision making forms an important part of the administrative law infrastructure in the United States. In general, agency action is considered more persuasive—and thus more entitled to deference from other institutional actors—if it is accompanied by a well-argued statement of reasons.<sup>26</sup> This idea is formally codified in the Administrative Procedure Act’s process of notice-and-comment rulemaking, which mandates specific explanation of a proposed change, followed by comments, followed by more written explanation and response.<sup>27</sup> Though less pervasive within the executive branch, collective decision-making structures are also occasionally used as a means for controlling individualistic official discretion. For example, many of the agencies where “independence” from political officials is deemed most important (like the Federal Trade Commission and the Federal Communications Commission) make key decisions by a vote of a multimember commission much like an appellate judicial tribunal.<sup>28</sup> My aim here is not to describe these bureaucratic devices in detail, but simply to underscore that they are applied, with potentially desirable effects, in a range of areas beyond traditional adjudication. That the

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<sup>24</sup> Martin Shapiro, *The Giving Reasons Requirement*, 1992 U. CHI. LEGAL F. 179, 180-81.

<sup>25</sup> *Id.*

<sup>26</sup> *See, e.g.*, *California Hotel & Motel Ass’n v. Industrial Welfare Comm’n*, 599 P.2d 31, 37 (Cal. 1979) (“[R]equiring an administrative agency to articulate publicly its reasons for adopting a particular order, rule, regulation, or policy induces agency action that is reasonable, rather than arbitrary, capricious, or lacking in evidentiary support.”).

<sup>27</sup> 5 U.S.C. §§ 553, 556-557 (2000).

<sup>28</sup> *See, e.g.*, 16 C.F.R. § 4.14(c) (2005) (“Any [Federal Trade] Commission action, either at a meeting or by written circulation, may be taken only with the affirmative concurrence of a majority of the participating Commissioners . . . .”); 47 C.F.R. § 0.201(d) (2005) (“The Commission, by vote of a majority of the members then holding office, may delegate its functions either by rule or by order . . . .”).

Chief Justice's special powers are not "adjudicative" in nature need not ipso facto render them off limits to the application of collectivization and reason giving.

## II. THE RISE OF THE CHIEF JUSTICE'S UNITARY AUTHORITY

My contention throughout this Essay is that two fundamental norms that accompany adjudication can, and should, be extended to circumscribe several of the bureaucratic functions currently exercised by the Chief Justice. I will explore several specific proposals for doing so in a later section. However, the fact that so much of the Chief Justice's current power is so individualized and unconstrained compels a brief summary of the rise of this authority. What emerges from this history is a story of an office carefully and strategically constructed in the early twentieth century—and fortified thereafter—under a particular conception of individualized executive administration that is both outdated and ill-advised.

Few clues, much less commands, about the appropriate scope of the Chief Justice's powers are provided by the Constitution itself. Probably no major constitutional office is as textually unspecified. The position of Chief Justice appears nowhere in the Constitution's Article III, and only once in the entire document—in the part of Article I providing for presidential impeachments with the Chief Justice presiding.<sup>29</sup> Nor was there significant discussion of the role of the Chief Justice at the convention or in ratification debates. We know that the Framers contemplated a Supreme Court with a Chief Justice, but very little other content is present in the relevant discussions.<sup>30</sup> And for more than a century after the establishment of the office, the Chief Justice had very little power over the organization or operation of the broader federal judiciary—federal district courts were generally independent not just from the other branches of government but also from each other.<sup>31</sup> Writing in the early twentieth century, Felix Frankfurter and James Landis summarized the history by declaring that "neither Congress nor the profession thought much about [the] ele-

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<sup>29</sup> U.S. CONST. art. I, § 3, cl. 6.

<sup>30</sup> For a general discussion of the Framers' debates about the Appointments Clause, but not specifically the Chief Justice, see MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS* 15-44 (2000).

<sup>31</sup> FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 218 (1928).

ments of organization and administration” of the federal judicial system.<sup>32</sup>

This would change during the era of World War I, and the driving force behind many of the changes in federal judicial organization was William Howard Taft. Whether in or out of public office, Taft throughout his career was a tireless judicial reformer—he characteristically proclaimed that he “love[d] judges” and “love[d] courts.”<sup>33</sup> Much of his reformist zeal was in response to Progressive attacks on the judiciary, and he sought to defend the central role of the federal courts by “provid[ing] them with adequate machinery for the prompt and satisfactory dispatch of business.”<sup>34</sup> Taft envisioned the federal courts as an integrated bureaucracy, and proposed a series of measures to promote such structural cohesion. By connecting and corporatizing what had previously been a disparate set of largely independent decisional nodes, Taft helped to create a new federal court system that “ran counter to all the traditional conceptions of American judicial organization.”<sup>35</sup>

Taft envisioned a newly integrated and hierarchical federal judiciary, but it was his conception of the head of that structure that is most relevant here. Central to Taft’s idea of structural integration and reform in the judiciary was the implementation of what he called the “executive principle”—the idea that a single head would direct the operations of the federal courts.<sup>36</sup> Taft sought to transfer to the federal judiciary the “ordinary business principles in successful executive work, of a head charged with the responsibility of the use of the judicial force at places and under conditions where the judicial force is needed.”<sup>37</sup> This new unitary executive power was, in Taft’s view, to be embodied in the person of the Chief Justice.

Much of the Chief Justice’s current discretionary authority is traceable to this crucial choice made by Taft and like-minded reform-

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<sup>32</sup> *Id.* at 217.

<sup>33</sup> Daniel S. McHargue, *President Taft’s Appointments to the Supreme Court*, 12 J. POL. 478, 478 (1950). Taft followed this expression by saying that courts and judges were his “ideals on earth of what we shall meet afterward in Heaven under a just God.” *Id.*

<sup>34</sup> William H. Taft, Chief Justice of the United States, *Adequate Machinery for Judicial Business*, Address to the Judicial Section of the American Bar Association (Aug. 30, 1921), in 7 A.B.A.J. 453, 453 (1921).

<sup>35</sup> FRANKFURTER & LANDIS, *supra* note 31, at 219.

<sup>36</sup> ALPHEUS THOMAS MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 99-100 (1964).

<sup>37</sup> William H. Taft, *The Attacks on the Courts and Legal Procedure*, 5 KY. L.J., 3, 16 (1916).

ers of the era: to centralize this “executive principle” in a single office—the Chief Justice—rather than to diffuse it more broadly among a collective of federal judges. It is perhaps unsurprising that Taft regarded this individualized executive authority as the most efficient and effective mechanism, given his own service as President. It is also clear that his reforms were heavily influenced by other contemporaneous examples of unitary executive power. He admired “business principles” of organization, which at the time contemplated a hierarchical structure headed by a strong chief executive officer.<sup>38</sup> Taft’s vision of federal judicial reform was also influenced by two comparative examples with a more robust chief executive pedigree—the British system with its powerful Lord Chancellor, and the Chicago Municipal Court, whose chief judge had extensive administrative authority to allocate judges and assign cases.<sup>39</sup>

This individualistic conception of executive power in the judiciary was implemented in specific statutes during the early twentieth century. For instance, in 1910 when Taft and fellow reformers proposed a new specialized Commerce Court (to review decisions of the Interstate Commerce Commission), they chose to grant the Chief Justice alone the power to select the federal judges who would serve temporary terms on that tribunal.<sup>40</sup> In a different proposal infused with the new individualistic executive principle, Taft sought the appointment of a number of federal district judges “at large,” who would hold no fixed geographic seats but would be sent throughout the country to hear cases at the sole direction of the Chief Justice.<sup>41</sup> The potential impropriety of such novel powers centralized in the Chief Justice’s person was not lost on several vocal critics in Congress, who vigorously opposed both measures on grounds of undue centralization. Speaking against the Chief Justice’s individual authority to select Commerce Court judges, Senator LaFollette assessed the discretion to pick special court judges as “too important a matter to leave . . . to one man, the Chief Justice.”<sup>42</sup> Senator Shields was more strident in his critique of the “at-large judges” bill, claiming it would cast “the Chief Justice as

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<sup>38</sup> *Id.*

<sup>39</sup> *See id.* at 14, 17.

<sup>40</sup> *See* Commerce Court (Mann-Elkins) Act of 1910, ch. 309 § 1, 36 Stat. 539, 539-42; *see also* George E. Dix, *The Death of the Commerce Court: A Study in Institutional Weakness*, 8 AM. J. LEGAL HIST. 238, 239 (1964) (describing the creation and subsequent dissolution of the Commerce Court).

<sup>41</sup> *See* Taft, *supra* note 37, at 16-17 (discussing the benefits of the ability to redeploy federal judges to meet shifting regional needs).

<sup>42</sup> 45 CONG. REC. 7347 (1910).

commander in chief” and grant the office “political influence and power over the judiciary of which a designing man could avail himself.”<sup>43</sup>

Though the “at-large judges” bill was defeated, Congress did pass several other statutes that form the template for the modern powers of the Chief Justice’s office.<sup>44</sup> Opposition voices, like LaFollette’s, which proposed constraining the Chief Justice by collectivizing the selection authority in the entire Supreme Court, never attained a majority position. The structural preference, driven by Taft’s conception of a strong, efficient chief executive, was to centralize administrative authority in the Chief Justice alone. This choice, made by earlier Congresses and repeated by others, forms the basis of much of the authority currently held by the Chief Justice.

As I have explained above, I share the belief of the earliest congressional critics that such centralization is a fundamentally misguided choice, and one not required by the administrative functions that the Chief Justice was given to perform. Though “executive” in nature, most of the administrative activities that the Chief undertakes—selecting special court judges, picking individuals for the committees of the Judicial Conference, and proposing policy changes—do not require the kind of immediate, decisive, and unitary action that would argue for individualized executive authority in other contexts, the most obvious of which is the presidency. The next section explores some alternative structures that would pragmatically discharge these functions while avoiding the potential for abuse of discretion that inheres when this authority is given to the Chief Justice alone.

What is notable in the history are two other mistakes that have served to compound the original fallacy of individualistic executive power as applied to the judiciary. The first is a mistaken assumption that was used to justify the original choice to vest power individually in the Chief Justice. Proponents of strong unitary authority in the Chief Justice maintained that something unique in the officeholder’s character would render the post a safe repository of individualistic and unconstrained power. Defending the Chief Justice’s individual authority to appoint Commerce Court judges, Senator Carter rebuffed concerns by replying that

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<sup>43</sup> 62 CONG. REC. 4855, 4863 (1922).

<sup>44</sup> See Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U. PA. J. CONST. L. 341, 359-67 (2004) [hereinafter Ruger, *Judicial Appointment Power*] (listing such examples throughout the twentieth century).



John Jay, John Marshall, and all the great departed Chief Justices of the Supreme Court of the United States might well turn in their graves in contemplation of this the first reflection proposed to be cast in the legislative halls of the United States upon the Chief Justices of this and succeeding times.<sup>45</sup>

Senator Hale from Maine opposed LaFollette's collectivizing reforms because he "hope[d] and believe[d] that no amendment that in any way raises any possible question about the supreme fitness of the Chief Justice of the United States to administer this law as it now is will receive the approval and sanction of the Senate."<sup>46</sup>

Such justificatory accounts are prevalent even today. Chief Justice William Rehnquist, who exercised the broad powers of the chief justiceship as vigorously as any officeholder in history, was widely acclaimed for his fair and evenhanded administrative style. His replacement, John Roberts, was confirmed by a large margin after he disclaimed any ideological agenda and agreed to enforce legal rules as a baseball umpire would.<sup>47</sup> Taken together, the effect of this sentiment then and now is to blunt the ordinary concern about the grant of so much undivided power to one individual.

Whether or not this sanguine assessment of Chief Justices' behavior is historically accurate is a debatable question. In other work, I have attempted empirically to assess the temporary appointment choices of the most recent Chief Justices, and a mixed picture emerges.<sup>48</sup> On the one hand, both William Rehnquist and Warren Burger selected judges appointed by Presidents from both parties who reflected a reasonable measure of ideological diversity.<sup>49</sup> Chief Justice Rehnquist's choices for the FISA Court over almost two decades corresponded very closely with a random set of federal judges produced from the same relevant background pool.<sup>50</sup> On the other hand, there is evidence that both Rehnquist and Burger stocked the most impor-

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<sup>45</sup> 45 CONG. REC. 7348 (1910).

<sup>46</sup> *Id.* at 7349.

<sup>47</sup> See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States) ("Judges are like umpires. Umpires don't make the rules, they apply them.")

<sup>48</sup> Ruger, *Judicial Appointment Power*, *supra* note 44, at 390-402; Theodore W. Ruger, *Chief Justice Rehnquist's Appointments to the FISA Court: An Empirical Perspective*, 100 NW. U. L. REV. (forthcoming 2006) [hereinafter Ruger, *Chief Justice Rehnquist's Appointments*].

<sup>49</sup> See Ruger, *Judicial Appointment Power*, *supra* note 44, at 393; Ruger, *Chief Justice Rehnquist's Appointments*, *supra* note 48, at 31-32.

<sup>50</sup> Ruger, *Chief Justice Rehnquist's Appointments*, *supra* note 48, at 23.

tant special tribunals, such as the Special Division of the District of Columbia Circuit that chooses independent counsels, with conservative Republican appointees.<sup>51</sup>

From the point of view of constitutional structure, however, all of this empirical investigation and speculation is largely beside the point. The Constitution allocates power in accord with the Madisonian presumption that it is subject to abuse (e.g., *The Federalist No. 51*), and rarely gives pockets of absolutely unreviewable authority to any one officeholder, particularly outside the executive branch. Against this baseline assumption, the Chief's individualistic authority is particularly incongruous, and the historical and current defenses of such power that are grounded in characterological assumptions against abuse are particularly misguided.

The two original mistakes described here—a preference for individualistic concentration of power and a character-driven presumption against its abuse—have been compounded during the course of the past century by a curious path dependence on the part of Congress. Once proponents of a strong Chief Justice as chief executive won the earliest congressional debates in the Taft era, subsequent Congresses extended and perpetuated this unitary executive model without significant debate, culminating in the current array of discretionary authority held by the Chief. Throughout the later twentieth century, Congress employed the model of individual Chief Justice power—in appointing judges, staffing Judicial Conference committees, and hiring key administrative personnel—without meaningfully questioning the potential problems with such undivided authority.<sup>52</sup> But such a concentrated executive model is not the only option available, and I now turn to alternative structures that would better serve to constrain the Chief Justice's power while still permitting the workable exercise of the office's administrative functions.

### III. ALTERNATIVE STRUCTURES AND POTENTIAL REFORMS

My central claim in this Essay is that the vesting of too much individualistic authority in the Chief Justice is inappropriate because the power is unconstrained by many of the central features of judicial decision making that are normally associated with the exercise of Article III authority. Though we would expect the Chief Justice's administrative discretion to be unconstrained by "law"—for these are not "legal"

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<sup>51</sup> See Ruger, *Judicial Appointment Power*, *supra* note 44, at 393-94.

<sup>52</sup> See *id.*, at 358-59, 366-67.

decisions in any normal sense of that word—the Chief Justice’s power is also unconstrained by norms of collective decision making and reason giving. These structures could, in most cases, easily be transported and implemented to channel the exercise of judicial administrative authority. In this section, I will address the manner in which several of the most important functions currently exercised solely by the Chief Justice could be reconfigured to take advantage of these other structural devices.

To examine how some of the Chief Justice’s nonadjudicative roles might be reformed, it is useful to first classify the office’s tasks into several general types. A first class of functions arises from the Chief Justice’s special managerial role within the Supreme Court itself. The Chief makes opinion assignments when in the majority, organizes the conference of Justices, presides at oral argument, and makes numerous decisions that bear on the day-to-day functions of the Court. My project here is largely unconcerned with these internal powers, although for a reason that only underscores my general critique of the Chief Justice’s external authority. Despite the Chief Justice’s unquestioned leading role within the Supreme Court itself, almost every feature of the office’s internal managerial power is ultimately exercised under a consensual norm that is at least potentially subject to majority override from five of the Associate Justices. So, for instance, opinion assignment falls to the Chief Justice only when she is in the majority. The allocation of Justices to various circuits (which can be important for death penalty appeals and other emergency stays), although organized by the Chief Justice, is a duty given by statute to the Court as a whole.<sup>53</sup> The same dynamic would apply to key changes in oral argument procedure, such as the introduction of television cameras into the Supreme Court chamber. The Chief Justice’s special role within the Court is no doubt important, but it is less problematic precisely because of the general structural constraint. Indeed, the fact that even the Chief Justice’s leadership authority within the Court is formally constrained within a collective structure only underscores the incongruity of the several individualistic powers the Chief exercises over the broader judiciary.

These broader powers outside of the Supreme Court can also be classified, and only certain types present meaningful problems. The Chief Justice has a number of roles that are almost purely ceremo-

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<sup>53</sup> See 28 U.S.C. § 42 (2000) (“The Chief Justice of the United States and the associate justices of the Supreme Court shall from time to time be allotted as circuit justices among the circuits by order of the Supreme Court.”).

nial—such as swearing in the President and serving on the Board of the Smithsonian Institution.<sup>54</sup> These functions do not implicate substantive policy choices and so are not fit for inclusion in any reform proposal. The Chief Justice's central role in presidential impeachment trials might occasionally involve the meaningful exercise of official discretion, but such events are exceedingly rare and, in any event, the presiding role is textually committed by the Constitution to the Chief Justice alone.<sup>55</sup>

What remains are two general types of power. Both are meaningful exercises of official discretion, with possible relevance for the organization and operation of federal courts, and occasionally for the outcomes of particular cases and rulemaking procedures. One general kind of power the Chief Justice holds is appointive: the Chief Justice selects the members of various committees of the Federal Judicial Conference, which in turn make key judicial policy proposals.<sup>56</sup> Additionally, the Chief Justice selects the federal judges who will serve limited terms on several important specialized tribunals, which in turn make key decisions on subjects such as government surveillance, large-scale litigation, and the investigation of the President's conduct.<sup>57</sup> This appointive power is indirect, in that the Chief Justice does not directly make first-order policy or legal decisions. But because the Chief Justice usually knows the subjects that his appointees will address, he can skew the substantive outcomes of the committees and tribunals thus formed by strategic appointment decisions. This potential for abuse makes this appointive discretion a proper subject for constraint within the general norms of judicial decision making. Moreover, these appointive choices are not the kinds of executive decisions that demand unitary treatment for reasons of expediency—witness the fact that the Constitution divides the initial appointment of federal judges and other officers between the President and Senate.<sup>58</sup>

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<sup>54</sup> 20 U.S.C. § 41 (2000).

<sup>55</sup> U.S. CONST. art. I, § 3, cl. 6.

<sup>56</sup> See Fish, *supra* note 2, at 104-06 (describing the Chief Justice's responsibilities as the head of the Judicial Conference); Peter Graham Fish, *Crisis, Politics and Federal Judicial Reform: The Administrative Office Act of 1939*, 32 J. POL. 599, 621 (1970) (explaining the growth of the Judicial Conference's influence); Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74 S. CAL. L. REV. 269, 283-93 (2000) (describing the mechanics of policy making through the Judicial Conference).

<sup>57</sup> See Ruger, *Judicial Appointment Power*, *supra* note 44, at 359-67.

<sup>58</sup> U.S. CONST. art. II, § 2, cl. 2.

With this in mind, the most obvious application of the background norms of judicial discretion to this problem would be to collectivize decision making among a broader group of judges. Such collective administrative mechanisms have competed historically with the Taftian vision of centralization in the judiciary, often in the form of rejected counterproposals but very occasionally as actual policy devices. Early opponents of the Chief Justice's Commerce Court selection authority proposed vesting the selection of judges in the Supreme Court as a whole.<sup>59</sup> One unenacted version of the bill that became the Ethics in Government Act contemplated that the District of Columbia federal district judges together, not the Chief Justice alone, would select a panel of judges, who in turn would select and oversee independent counsels.<sup>60</sup> Underlying these proposed mechanisms is the concern expressed here—that the selection of special judges entails a discretionary policy choice that is inappropriately vested in a single official.

Other collective decisional structures have occasionally appeared in enacted law. The United States Sentencing Commission contains some members who are active Article III judges chosen by the President, but the President chooses from a short list of judges who are originally selected by the entire Judicial Conference, not by the Chief Justice alone.<sup>61</sup> Likewise, Congress established one historical special judicial tribunal—the Railroad Reorganization Court—that was comprised of active judges chosen by the Multidistrict Litigation Panel.<sup>62</sup> That this collective body chose Henry Friendly to lead that court is suggestive—if in a highly anecdotal sense—of the quality of judges potentially selected through such collective mechanisms.<sup>63</sup>

It is possible, indeed probable, that in such collective structures the Chief Justice would nonetheless take a leading role—just as he does within the Court in what are formally group decisions—in re-

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<sup>59</sup> See 45 CONG. REC. 7347 (1910) (statement of Sen. LaFollette) (arguing that designation of Commerce Court judges “should be made by the entire membership of the Supreme Court instead of by a single member of that body”).

<sup>60</sup> See Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 MICH. L. REV. 601, 609 & n.26 (1998) (describing Senator Birch Bayh Jr.'s proposal).

<sup>61</sup> 28 U.S.C. § 991(a) (2000); see also *Mistretta v. United States*, 488 U.S. 361, 412 (1989) (upholding the structure and appointment procedures of the Sentencing Commission).

<sup>62</sup> See Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 BYU L. REV. 377, 426.

<sup>63</sup> See Henry T. Greely, *Quantitative Analysis of a Judicial Career: A Case Study of Judge John Minor Wisdom*, 53 WASH. & LEE L. REV. 99, 115 n.63 (1996).

cruiting candidates and perhaps making initial choices for approval or disapproval. But the looming prospect of override would remain, thus providing a constraint on the Chief Justice's strategic behavior that does not presently exist. To the extent that such an appointive choice had import, if the Chief strayed dramatically from the preferences of the rest of the judges involved, it is probable that dissenting judges would make their views known either through internal discourse or formal objection.

The installation of such group decision making would undoubtedly add time and some administrative burden to the process of selecting special court judges and Judicial Conference committee members beyond what exists in the current unilateral system. But these efficiency losses seem to be a marginal cost for appointments that only occur occasionally and almost always predictably at fixed times. A different concern is that disagreement might emerge with respect to particular appointments, which in turn might undermine the legitimacy or perceived objectivity of the resultant official action by the appointees. This is, in a sense, a microcosm of the debates about judicial power generally—some assert that too much scrutiny of judges' underlying preferences risks undermining the legitimacy of the judicial enterprise. But after a century or more of strongly expressed legal realism in the legal academy and overt dissensus on the Supreme Court, the courts are still highly regarded institutions relative to other parts of the federal government.<sup>64</sup> Moreover, in this administrative context, collectivity and transparency can be viewed as independent variables—the choices could be collectivized but essentially private—and overt dissent need not be publicized, as it is in the context of judicial opinions.

If concerns about collective decision making remain, an alternative solution would be to remove all allocative discretion, while still drawing on the collective body of the federal judiciary, by making temporary service on the Judicial Conference committees and special courts automatic, or random, or both. The chief judges of the twelve federal circuits are selected in this manner—a statutory seniority provision triggered by both age and length of service operates to automatically select new circuit chief judges when a vacancy arises.<sup>65</sup> Applied to the special federal courts and Judicial Conference

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<sup>64</sup> See James L. Gibson et al., *The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535 (2003).

<sup>65</sup> 28 U.S.C. § 45(a) (2000).

committees, judges with a particular level of service tenure would be automatically eligible for random assignment to one of the specialized courts or committees. Complete randomness might be problematic due to the inability to take advantage of particularized substantive expertise, and if so a hybrid system might apply so that *some* specialized judicial service was automatically triggered. However, *which* forum a particular judge would serve in would be determined by the Supreme Court, or the Judicial Conference judge, or some other group decision maker.

It is perhaps less obvious how the other decisional norm I discuss above—the practice of reason giving—might be adapted to the Chief Justice’s formation of Judicial Conference committees and specialized tribunals. Under current law and customary practice, the Chief Justice currently gives no public reasons for most of his bureaucratic actions. A statutory reform that would require a statement of reasons for every single judge assigned may create more problems than it solves. Such a rule might have a salutary impact on the provision of information, but if presidential nomination statements are any guide, the reasons the Chief Justice would give with respect to individual candidates would probably be so platitudinous as to be unhelpful and obfuscatory. More desirable would be a requirement or customary practice whereby the Chief Justice would publicly issue a written general framework for the exercise of his appointment authority over the Judicial Conference committees and specialized courts. Such a general plan could be assessed and revised, perhaps coupled with an opportunity for comment from the public and particular groups. The Chief Justice could articulate general characteristics, such as seniority of service or particularized experience, that would qualify judges for consideration for various special tasks.

Though not tightly binding, such general guidelines could operate to produce a mild form of “internal improvement” in the Chief Justice’s choices, perhaps promoting a degree of consistency and regularity over time in a manner that is absent under current practice. Moreover, the appointment framework that the Chief Justice would promulgate would have a discursive effect, promoting critique and debate, and leading to the possibility of changed practices or revisions from the Chief Justice or future Chief Justices.

For instance, the Special Division of the District of Columbia Circuit that was empowered to choose independent counsels sat for

twenty-two years, from 1978 through 2000.<sup>66</sup> In that period, Chief Justices Burger and Rehnquist appointed eleven circuit judges to that tribunal, seven appointed by Republican Presidents and four by Democrats. More striking though is the ongoing composition of the panel: for over twenty of the twenty-two years, the special division was comprised of two Republican appointees and one Democrat appointee.<sup>67</sup> Such regularity suggests strategic behavior by Burger and Rehnquist, but they were not required to give reasons for their choices and they did not do so. Had they been under a reason-giving obligation they no doubt would not have cast their appointment criteria in the partisan terms I do here, but they would have had to articulate some general principle. This in turn might have cabined their discretion somewhat and led to appointment choices made with more scrutiny and rationale. Such transparency would also serve a monitoring function, and the public and the legal academy could assess the Chief Justice's specific appointment choices and measure them. Perhaps a more explicit monitoring would also occur—assessing the Chief Justice's choices for ideological balance and other factors. Observers of the judiciary could evaluate the Chief Justice's actual appointments over time for congruity with these stated goals.

#### CONCLUSION

As these disparate policy proposals suggest, I am more concerned about the problem I have described than about the particular shape of the solution. Significant aspects of the Chief Justice's discretionary authority are currently unconstrained by any collective structure or reason-giving obligation, and so almost any effort to channel or regularize that discretion would work an improvement on the current system. Because they have been proposed and debated, and in some instances successfully applied, reforms that would spread the discretion currently held solely by the Chief Justice among a larger group of judges—the Supreme Court or the Judicial Conference, for instance—are a more obviously salutary fix. Application of the reason-giving norm to these powers is more complicated and uncertain, though potentially beneficial enough to warrant further discussion.

Irrespective of the particular shape of any reformative change, several institutional actors are situated to bring about reform. Con-

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<sup>66</sup> See John Q. Barrett, *Special Division Agonistes*, 5 WIDENER L. SYMP. J. 17, 44-47 (2000).

<sup>67</sup> See *id.*



gress is responsible for much of the special authority possessed by the Chief Justice. To a great extent Congress made the modern chief justiceship by statute during the twentieth century, and could similarly unmake, or at least dramatically modify, the particular statutory powers the office possesses over the federal judicial bureaucracy, which I have discussed here. Doing so would require Congress to depart from its unthinking path dependence, and its generally sanguine view of the Chief Justice's behavior, which it has displayed throughout the twentieth century since the Taft era. I am pessimistic about reform emanating from this quarter, as the Senate Judiciary Committee declined a rare opportunity to expressly discuss many of the issues explored here with the new Chief Justice nominee, John Roberts, during the confirmation hearings last summer.

Even absent statutory change, however, it is possible that Chief Justice Roberts or some successor could achieve some reform by changing the customary manner in which the powers are exercised. A Chief Justice could seek assent from Supreme Court colleagues even where not statutorily required. The Chief Justice could make a practice of publicly expressing the general criteria that would guide various features of her authority, and could transparently report the policy choices as she made them. Pressure for reform could also emanate from the broader federal judiciary, although so long as the chief justiceship is occupied by an individual whose leadership is broadly respected, as was William Rehnquist's, structural change is unlikely to occur.

Ultimately, however, we are left with an allocation of power that is conceptually problematic but unlikely to be corrected in the foreseeable future. There are, to be sure, more dramatic and more important controversies raging about the proper division of authority among various actors in the federal government. Underlying these larger debates, however, is a principle that is central to this essay's critique of the Chief Justice's power: the idea that too much power concentrated with a single official is dangerous and incongruous. Such concentration is particularly unattractive where, as here, there exist no good reasons for the continual individualization of power beyond the naïve assumption that each Chief Justice is too ethical to abuse it. Federal judicial authority has flourished under a regime of decision making that incorporates collectivity and reason giving, and these norms should be extended to embrace many of the special powers currently held by the Chief Justice alone.