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The Office of Chief Judge of a Federal Court of Appeals

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ever, or if the offense indicates that the accountant exercised no care in making his judgment, the sanction could include either censure or suspension. This approach is in accord with proportionality principles established by the Supreme Court.[112] The result would be a balance between the Commission's duty to protect the investing public[113] and the accountant's need to make numerous decisions based on judgment.[114]

CONCLUSION

The SEC has a critical role to play in preserving honesty and integrity in the nation's financial markets. Toward this end, disciplinary rules should be employed to prevent the incompetent, dishonest or reckless accountant from practicing before the Commission. In recent years, however, the Commission has employed the "improper professional conduct" standard of its Rule 2(e) to place its own gloss on professional standards of reasonableness. As a result, the accountant does not know what behavior will constitute actionable conduct.

To limit the vagueness problems of the current improper professional conduct rule, the SEC should substitute a more specific standard. Such a standard would be provided by an approach permitting discipline of accountants who have negligently applied accounting rules but limiting the sanctions available to the Commission when the accountant has violated a rule that requires professional judgment. This standard strikes an appropriate balance between the SEC's duty to protect the investing public and the accountant's need to exercise his judgment without fear of jeopardizing his business reputation.

Michael J. Crane

112. *See* Solem v. Helm, 103 S. Ct. 3001, 3006-08 (1983) ("The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence [and] has been recognized explicitly in this Court for almost a century."); *cf., e.g.*, Edmund v. Florida, 458 U.S. 782, 788 (1982) (death penalty excessive for felony murder when defendant did not take life, or intend that a life be taken or that lethal force be used); Weems v. United States, 217 U.S. 349, 366-67 (1910) (sentence of 15 years at hard labor disproportionate for crime of falsifying a public document). *But cf.* Rummel v. Estelle, 445 U.S. 263, 284-85 (1980) (life imprisonment sentence for third felony conviction not unconstitutionally disproportionate).

113. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195 (1976); SEC v. Southwest Coal & Energy Co., 624 F.2d 1312, 1318 (5th Cir. 1980).

114. See *supra* notes 16, 101-06.

ARTICLES

THE OFFICE OF CHIEF JUDGE OF A FEDERAL COURT OF APPEALS

*WILFRED FEINBERG**

INTRODUCTION

THE office of chief judge of a federal court of appeals is a peculiar sort of job, in many ways an invisible post on an invisible court. The Supreme Court is subject always to the glare of publicity and often so are trial judges, particularly when they preside over a notorious case. But for some reason, no one outside the legal profession seems to know very much about the courts of appeals, a state of knowledge often shared even by fellow lawyers. As I have noted elsewhere, this is both a blessing and a bane.[1] The blessing is that we can go about our business, relatively undisturbed by the distractions that accompany media attention. The bane is that it is important for the body politic to understand the workings of the courts, particularly those that in the federal system operate as a court of last resort in approximately ninety-nine percent of the cases they decide,[2] and are, in Judge Friendly's phrase, the "work-horses of the

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1. *See* Feinberg, *The State of the Second Circuit*, 38 Rec. A.B. City N.Y. 363, 366-67 (1983).

2. In statistical years 1981 through 1984, the courts of appeals decided a total of approximately 50,000 cases after submission of briefs. *See* Admin. Office of U.S. Courts, 1984 Annual Report of the Director of the Administrative Office of the United States Courts, A-2, table B-1 [hereinafter cited as 1984 Annual Report]; Admin. Office of U. S. Courts, 1983 Annual Report of the Director of the Administrative Office of the United States Courts 220, table B-1 [hereinafter cited as 1983 Annual Report]; Admin. Office of U.S. Courts, 1982 Annual Report of the Director of the Administrative Office of the United States Courts 190, table B-1; 1981 Annual Report of the Director of the Administrative Office of the United States Courts 346, table B-1. In the same 1981-84 period, the Supreme Court decided fewer than 850 cases on certiorari from state courts and inferior federal courts. *See The Supreme Court, 1983 Term*, 98 Harv. L. Rev. 1, 311-12, tables II, III (1984) (194 cases decided on certiorari); *The Supreme Court, 1982 Term*, 97 Harv. L. Rev. 1, 299-300, tables II, III (1983) (209 cases on certiorari); *The Supreme Court, 1981 Term*, 96 Harv. L. Rev. 1, 308-09, tables II, III (1982) (230 cases on certiorari); *The Supreme Court 1980 Term*, 95 Harv. L. Rev. 1, 342-43, tables II, III (1981) (212 cases on certiorari).

federal appellate process."[3]

My focus here, however, is not on the courts of appeals, as important as they are, but on the position of chief judge of one of these courts, the lead workhorse, so to speak. That job is also an invisible one. Few federal judges, let alone lawyers, can name all of the chief judges of the various federal courts of appeals. Similarly, few people are aware of what the chief judges of these courts do and of how and why they do it. Little has been written on this subject.[4] This Article is designed to dispel some of that ignorance and to educate. It also offers a few modest suggestions for improving the chief judge's role as court administrator.

I. History

General MacArthur, in his famous speech to the joint houses of Congress in 1951, said "old soldiers never die; they just fade away."[5] Not long before, the reverse effect apparently occurred with the office of chief judge; it seems to have just "faded in." The position was formally created with little fanfare by the revisions of the United States Code in 1948, when the term "chief judge" in the context of a court of appeals was apparently used for the first time in a federal statute.[6] The chief reviser of the Code indicated that this was a mere change in nomenclature, like the contemporaneous change in the name of the court on which a chief judge sits, from circuit court to court of appeals.[7] Most of the few commentators who took note of the change thought it of no moment.[8]

3. Letter from Henry J. Friendly, Senior Circuit Judge, United States Court of Appeals for the Second Circuit, to A. Leo Levin, Executive Director, Commission on Revision of the Federal Court Appellate System (April 22, 1975), *reprinted in* 2 Hearings Before the Commission on Revision of the Federal Court Appellate System: Second Phase 1311, 1313 (1975).

4. The creation of the office of chief judge was attended by little comment. See sources cited *infra* note 8. In early 1980, the Federal Judicial Center conducted a survey of how chief judges operated and subsequently published the results. *See* R. Wheeler & C. Nihan, Administering the Federal Judicial Circuits: A Survey of Chief Judges' Approaches and Procedures (Federal Judicial Center (1982)). Research has uncovered no other article-length treatment of the subject. Judge J. Edward Lumbard, a former chief judge of the Second Circuit, did discuss the job in a section of his reminiscences. *See* Colum. U. & N.Y.B. Foundation, A Conversation with J. Edward Lumbard 62-79 (1980) [hereinafter cited as A Conversaton with Lumbard]. By contrast, an interesting and provocative book-length examination of the office of the Chief Justice of the United States was published just last year. *See generally* The White Burkett Miller Center of Public Affairs at the U. of Va., The Office of Chief Justice (1984). For a brief history of the office of chief judge of the district courts, see R. Wheeler, Desk Book for Chief Judges of United States District Courts A-1 to -5 (Federal Judicial Center (1984)).

5. D. MacArthur, *Saying*, in J. Bartlett, Familiar Quotations 771 (15th ed. 1980) (Address to a Joint Meeting of Congress, April 19, 1951).

6. *See* Act of June 25, 1948, ch. 646, § 45(a), 62 Stat. 869, 871 ("The circuit judge senior in commission shall be the chief judge of the circuit.").

7. Barron, *The Judicial Code: 1948 Revision*, 8 F.R.D. 439, 441 (1949).

8. *See id.*; Galston, *An Introduction to the New Federal Judicial Code*, 8 F.R.D. 201, 202 (1949). *But see* Maris, *New Federal Judicial Code: Enactment by 80th Congress a Notable Gain*, 34 A.B.A. J. 863, 865 (1948) ("The revision recognizes that an administrative head is needed in each circuit, and accordingly creates the office of Chief Judge of the Circuit, to be held by the Circuit Judge senior in commission.").

At the time, the federal intermediate appellate bench was small. There were eleven circuit courts manned by fifty-eight circuit judges.[9] I use the word "manned" advisedly; there were no women at all on those courts, a situation that happily has changed dramatically. Today, only four courts of appeals can be so described.[10] In the text that follows, I use the masculine gender to refer to a chief judge only for convenience, not out of conviction or preference. Although it happens that the present chief judges may be so described with accuracy, that will—happily—change in the years to come.

In 1948, the largest circuit courts had an authorized complement of seven judges and the smallest had three,[11] the bare minimum to constitute a panel. Only 2,758 appeals were filed in all the circuit courts in 1948;[12] 381 of those were in the Second Circuit.[13] Criminal appeals nationally numbered only 359;[14] the Second Circuit had forty-one.[15] There was no right to assigned counsel in criminal appeals and no national mechanism for such appointments.

With numbers so small and with administrative matters for the court as a whole so few, the title of chief judge might almost have seemed out of place. The fundamental tenet of federal judges is that all members of a court are equal. In 1948, whatever privileges or precedence may have accrued because of seniority were regarded as stemming primarily from custom and tradition, regardless of statute.

Much has happened in the intervening three and one-half decades. There are now 168 judges authorized for all of the thirteen courts of appeals.[16] This figure represents the total of the twelve regional courts—including one covering the small but highly significant region of the District of Columbia—and the Court of Appeals for the Federal Circuit,[17] the newest circuit court. This court was born in 1982,[18] only a year after

9. There were 59 authorized court of appeals judgeships in 1948. *See* Act of June 25, 1948, ch. 646, § 44, 62 Stat. 869, 871. At the end of the year, apparently just one of these judgeships was vacant. *See* Judges, United States Courts of Appeals and District Courts, 168 F.2d vii-xiv (1948).

10. As of December 31, 1984, the Courts of Appeals for the First, Fourth, Seventh and Eighth Circuits had no female members.

11. *See* Act of June 25, 1948, ch. 646, § 44, 62 Stat. 869, 871. The Eighth and Ninth Circuits each had seven authorized judgeships, while the First and the Fourth Circuits each had three. *Id.*

12. Administrative Office of the United States Courts, 1948 Annual Report of the Director 118, table B-1 (1948) [hereinafter cited as 1948 Annual Report].

13. *Id.*

14. *Id.*

15. *Id.*

16. *See* 28 U.S.C.A. § 44(a) (West Supp. Sept. 1984).

17. *See id.*

18. *See* Federal Courts Improvements Act of 1982, Pub. L. No. 97-164, § 127, 96 Stat. 25, 37.

the Eleventh Circuit came into being as a spin-off from the Fifth.[19] The largest court of appeals, the Ninth, has twenty-eight judges authorized; the smallest, the First, has grown from three to six.[20] In the statistical year ending June 30, 1984, 31,490 appeals were filed in the circuit courts nationwide, 2,945 in the Second Circuit.[21] Appeals from convictions in criminal cases comprise a significant portion of this number,[22] and those who cannot afford to retain counsel have the right to have counsel appointed for them and paid by the federal government.[23]

The federal judicial system as a whole has become a much larger operation, of which the courts of appeals are, of course, an integral part. A sizeable infrastructure of personnel has come into being. The Administrative Office of the United States Courts was created in 1939 to assist the courts in coping with the countless problems of budget, supplies, pay scales and personnel management that are inevitably part of a system that now employs thousands of people.[24] Another institution—The Federal Judicial Center—was created in 1967 to be a research arm and to assist in the continued education of the increasing numbers of federal judges.[25] A President in a single four-year term may now appoint over 200 federal judges, as President Carter did; President Reagan appointed over 165 in his first term.[26]

With this quantuum leap in scale and in scope, it was inevitable that the position of chief judge would change from its scarcely noted formal beginning in 1948. Indeed, had the job not existed, we would have had to create it. When a court goes from an authorized complement of six judges—as the Second Circuit was in 1948[27]—to thirteen judges, the present number,[28] plus four or five senior judges, the decisions as to who sits with whom, and when, and how the cases are distributed to these various panels become more complicated. Similarly, when a court of appeals, to help it cope with its caseload, needs to import judges who can be spared elsewhere—this is one of the little known efficiencies of the federal judicial system—someone has to decide whom to invite and for what period. Of course, it is not written in granite that such decisions, and others like them, must be made by a judicial officer, and indeed many are not. Today's circuit executives, like yesterday's hospital administrators,

19. Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (codified at 28 U.S.C.A. § 41 (West Supp. Sept. 1984)).
20. *See* 24 U.S.C.A. § 44(a) (West Supp. Sept. 1984).
21. 1984 Annual Report, *supra* note 2, at A-2, table B-1.
22. *See id.*
23. *See* 18 U.S.C. § 3006A (1982).
24. *See* Administrative Office Act of 1939, ch. 501, 53 Stat. 1223 (codified at 28 U.S.C. §§ 601-611 (1982)).
25. *See* Pub. L. No. 90-219, 81 Stat. 664 (1967) (codified at 28 U.S.C. §§ 620-628 (1982)).
26. Telephone interview with Marian Ott, Staff Assistant to the Director, Administrative Office of the United States Courts (Oct. 18, 1984).
27. *See* Act of June 25, 1948, ch. 646, § 44(a), 62 Stat. 869, 871.
28. 28 U.S.C.A. § 44(a) (West Supp. Sept. 1984).

constitute an important new profession.[29] But by common consent it appears to be accepted that some things, though administrative in nature, should be done by a judge. The job of chief judge had the virtue of *being there*, and into this receptacle custom and Congress have poured a potpourri of duties, which I will describe shortly.

As the position of chief judge has taken on added significance, Congress has occasionally and almost reluctantly scrutinized it and defined it more carefully. In 1958, aware of situations in which a chief judge had refused to relinquish the post although he should have,[30] Congress imposed an age limit of seventy.[31] A few years ago, there was an attempt to remove this restriction, but it was unsuccessful.[32]

In 1982, Congress created a further age limitation: no one over the age of sixty-four could become chief judge.[33] In addition, a chief judge's term was limited to seven years.[34] At the same time, Congress reaffirmed the concept that seniority determines the choice of chief judge.[35] There are problems with this, of course. Seniority and administrative skill do not necessarily accompany each other. My own judgment, to paraphrase Winston Churchill, is that seniority is the worst way to select a chief judge, except for all the other ways. Also, to my astonishment, it seems to work.[36]

II. DUTIES

The chief judge of a modern federal court of appeals is the head of what are essentially two institutions. First, he is the chief officer of the entire circuit, ultimately responsible for its operation. Most people do not know, or do not appreciate, that the judiciary is an institution requir-

29. The office of circuit executive was created in 1971 by the Circuit Executive Act, Pub. L. No. 91-647, 84 Stat. 1907 (1971) (codified at 28 U.S.C. §332(e), (f) (1982)).
30. *See* 1956 Annual Report of the Proceedings of the Judicial Conference of the United States 312 (Report of the Proceedings of a Special Session of the Judicial Conference of the United States (March 13 and 14, 1956)); S. Rep. No. 1780, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. Code Cong. & Ad. News 3256, 3257-58, 3260.
31. Act of Aug. 6, 1958, Pub. L. No. 85-593, 72 Stat. 497.
32. *See* 125 Cong. Rec. 6949 (1979).
33. *See* 28 U.S.C. § 45 (a)(1)(A) (1982). This change followed a comprehensive study of the operation of the courts of appeals by a commission headed by Senator Roman L. Hruska. *See* Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change (1975) [hereinafter cited as Hruska Commission Report].
34. *See* 28 U.S.C. § 45(a)(3)(A) (1982). The limitation of the term to seven years does not apply to chief judges serving as such on the effective date of the act (October 1, 1982). *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 203, 96 Stat. 51, 53.
35. *See* 28 U.S.C. § 45(a) (1982).
36. It is interesting to note that while the Hruska Commission, see *supra* note 33, initially suggested that chief judges be selected by the Chief Justice of the United States, *see* Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change, A Preliminary Report 108-09 (1975), it ultimately recommended retaining selection by seniority, *see* Hruska Commission Report, *supra* note 33, at 147.

ing administration and that the chief judge is the chief administrator of the circuit. A number of these duties are statutory. The chief judge is also the head of the court of appeals, and many of the duties here, although not all, are governed by tradition rather than by statute.

The administrative duties of a chief judge fall into three general categories: those that affect only the operation of the court of appeals itself, which may be called "internal duties"; those that relate to the functioning of the federal judicial system as a whole, which may be called "systemic duties"; and those relating to the public, which may be called "external duties." Of course, these categories tend to overlap somewhat, but they are a useful basis of description.

A. *Internal Duties*

In the Second Circuit, it is the responsibility of the chief judge to select and organize the composition of the panels of three judges. I do that twice a year, several months in advance. This allows each of us to plan well ahead of time working schedules and other professional commitments, such as attendance at Judicial Conference committee meetings, moot courts and so on.

Such scheduling also has other less obvious but important benefits. For example, some time ago, after a decision in a highly controversial case, a lawyer for the unsuccessful appellant wrote the Clerk of the Court, sending a copy of his letter to me, questioning how it was that the case was heard by a panel that the writer obviously thought was unfriendly to his point of view. The facts were that I had designated the panel several months before without any knowledge of what cases it would hear, and that much later the Clerk's office had assigned the appeal to that week and to that panel in the usual way without regard to the composition of the panel. The Clerk's response to that effect apparently ended the matter.[37]

Selecting the panels well ahead of time is not as simple as it sounds. First, we must calculate how many panels we will need to handle the probable volume. In the statistical year ended June 30, 1984, we had 51 panels. Then, we make an attempt to have each of the judges sit with as many other judges as practicable. Also, the most senior active judge presides on each panel, and in composing the panels we try to have all the judges preside a few times. Thus, the most junior active judge can and does preside, if sitting with a senior judge of the court and a visiting judge.

Presiding, like rank, has its privileges. The presiding judge assigns the opinions, if he is in the majority. But presiding also has its burdens. The presiding judge customarily prepares the bulk of the written summary orders for the week.[38] The chief judge, who is by definition the most

37. Letters (available in files of *Fordham Law Review*).

38. A summary order is used in the Second Circuit if the decision of the panel is unanimous, and each judge believes that an opinion would serve no jurisprudential purpose. *See* 2d. Cir. R. § 0.23.

senior judge, always presides when he sits. Last year, in addition to writing my share of published opinions, I prepared some 110 summary orders. These are sometimes two or three single-spaced typewritten pages in length and impose a heavy burden on the presiding judge. I have had more than one of the newer judges tell me that they regard presiding much as did the fellow who was being ridden out of town on a rail and "wouldn't be doing this if it weren't for the honor of the thing!"

Moreover, scheduling requires taking into particular account the needs and desires of the senior judges, who literally work for nothing[39] and, by definition, should not be subjected to more stress and strain than they are voluntarily willing to assume. They are a precious resource whose welfare and health must be every chief judge's concern.

In addition, scheduling requires an estimate of how many visiting judges will be needed in the next six-month period. The chief judge, often with suggestions from his colleagues, decides whom to invite and initiates the necessary steps; if the visitors come from outside the circuit, the permission of the Chief Justice of the United States must be obtained.[40] When the visiting judges sit it is important to obtain their perceptions, based on their different backgrounds, on how well or how poorly our court operates, as well as their suggestions for improvement. Finally, last minute changes in the composition of a panel because of recusals, illness or other unforeseen contingencies almost always end up with the chief judge, who may find it necessary to obtain a substitute on short notice.

Another substantial portion of a chief judge's time is devoted to monitoring the flow of cases through the appellate process. A court of appeals is like a pipeline in which the intake at one end is called a filing and the outflow at the other is called a termination. Terminations, however, are not all of the same sort. Some require the expenditure of significant judicial time by panels of the court. Roughly half of our appeals fall into this category.[41] But the other half is disposed of in a number of ways: by settlement through our Civil Appeals Management Program (CAMP),[42] by dismissal for failure to meet court-imposed deadlines, by voluntary dismissal and so on.

The pipeline in a court of appeals is quite lengthy. The median time

39. Article III judges who take senior status continue to receive their full salary whether or not they continue to hear cases. *See* 28 U.S.C. § 371(a) (1982).

40. *See* 28 U.S.C. §§ 291(a), 292(d) (1982).

41. *See* 1984 Annual Report, *supra* note 2, at A-2, table B-1 (1,224 cases decided after hearing or submission; 1,399 cases disposed of without hearing or submission; remainder consolidated).

42. The general purpose of CAMP is to cull from the appellate docket those cases that might be settled without the further expenditure of judicial resources, and where settlement is not possible, to bring more closely into focus those questions needing resolution. *See generally* Kaufman, *The Pre-Argument Conference: An Appellate Procedural Reform*, 74 Colum. L. Rev. 1094 (1974).

nationally from the filing of a notice of appeal at one end of the pipeline to termination at the other is almost one year.[43] In the Second Circuit, the median time is just over six months.[44] But whether the time span is six months or one year or something in between, obviously someone must be watching carefully to make sure that the flow does not get unduly delayed at one point or another.

The responsibility for all this, in the first instance, lies with the clerk and the staff in the clerk's office. But ultimately, it rests with the chief judge. If the weekly flow of cases to the panels is not even, so that some panels receive the usual twenty-four while only fifteen are ready for the next panel, the chief judge will hear about it. If the panels do not receive the briefs in sufficient time before the argument, the chief judge will hear about that, too—in no uncertain terms. In addition, the chief judge receives and studies a number of periodic reports dealing with filings, cases routed to CAMP or to our pro se clerks, cases calendared for argument, and cases argued but not yet decided sixty days after argument—all designed to minimize undue stops and starts and delays.

This system does not always run smoothly. Nothing does! Yet, by and large, because of the hard work and dedication of the judges and staff of the court, it works tolerably well. The aim is to prevent the growth of lengthy backlogs by trying to terminate in a year approximately the same number of appeals as have been filed. In the year ended June 30th, 1984, 2,945 appeals were filed and 2,952 were terminated;[45] in the year before, the figures were slightly lower but roughly in the same proportion.[46]

There are countless other matters affecting the internal operation of the court to which a chief judge devotes time: planning for and presiding over periodic meeting of the active judges at which all of the above matters, and others, are discussed (there are approximately five of these meetings a year); supervising the filling of the most important staff positions, such as the recent selection of our new Clerk of the Court; acting as a clearing house for the inevitable suggestions (the quaint wording still persists) for a rehearing in banc; supervising the voting—not too frequent in our circuit—when at least one judge requests a poll on an in banc hearing and—even less frequently— shepherding the in banc hearing to its conclusion when a majority of the court votes for it.

When I look at the number of in banc hearings in other circuits, I realize how important a chief judge's position on their utility can be. The tradition in the Second Circuit, a tradition that goes back to Learned Hand, is that in bancs are not encouraged. My view, and that of my predecessor, Irving R. Kaufman, is that for the most part in bancs are not a good idea: They consume an enormous amount of time and often

43. Report of the Circuit Executive, United States Court of Appeals for the Second Circuit 1983, at 5, Figure 2 (1984).
44. *Id.*
45. 1984 Annual Report, *supra* note 2, at A-2, table B-1.
46. See 1983 Annual Report, *supra* note 2, at A-2, table B-1.

do little to clarify the law.[47] I firmly believe that a chief judge can play a significant role in reducing the number of in bancs.

Finally, the chief judge acts as the ultimate chief cook and bottle washer on a host of other matters that may require his intervention, such as problems arising in connection with appointment of counsel for indigents in criminal appeals, delay by court reporters in furnishing transcripts in cases on appeal, switching of sitting by judges, and allocation of chambers, present and future, a matter exacerbated at Foley Square by the need to squeeze the judges of both the Southern District and the court of appeals into one fifty-year-old building.

Although the duties I have described up to now have grown considerably with the tremendous increase in the court's filings and the not-so-tremendous increase in its judges, these duties do not differ significantly from those of four decades ago. It is in the next two categories—systemic and external duties—that enormous changes have occurred.

B. *Systemic Duties*

Each chief judge of a court of appeals is a member of the Judicial Conference of the United States[48] and twice a year attends its meeting in Washington, D.C. Each meeting ordinarily lasts two days and is now usually followed on the third day by a meeting of only the chief judges. The Conference is composed of the thirteen circuit chiefs and one district judge representative from each circuit, and is presided over by the Chief Justice.[49] The Conference sets policy on a wide variety of subjects affecting the operation of the federal judiciary nationwide and its relationship with the other branches of government.

Without going into too much detail, it is almost impossible to describe the broad range of subjects considered, most of which come to the Conference by way of an extensive committee report presented in person by the Committee chairman. Let me mention just a few taken from published reports of recent proceedings. The Report of the Committee on Court Administration proposed regulations under which district courts could determine whether electronic sound recordings would be a viable alternative to shorthand, stenotype or other methods of recording trial proceedings.[50] That committee's report also addressed, among other things, various pay and personnel practices affecting court reporters and law clerks,[51] court space requirements[52] and the procedures to be followed in evaluating the need for additonal judgeships in both the district

47. *See* Kohn, *Circuit Judges, Lawyers Fault Rehearings by En Banc Courts*, N.Y.L.J., Sept. 17, 1984, at 1, col. 1.
48. These meetings are required by statute. *See* 28 U.S.C. § 331 (1982).
49. *See id.*
50. Report of the Proceedings of the Judicial Conference of the United States 47-49 (1983).
51. *Id.* at 49-50.
52. *Id.* at 54-55.

courts and the courts of appeals.[53] The Judicial Ethics Committee reported on the almost 1,900 financial disclosure reports filed by some 950 "judicial officers" and some 900 "judicial employees."[54] The Advisory Committee on Codes of Conduct reported on various inquiries and responses.[55] There were also reports from the Committees on the Administration of the Bankruptcy System and the Federal Magistrates System.[56] At the meeting I attended in September 1984, there were twenty-eight agenda items and reports. One of these was a report, which received attention in the press, concerning the televising of federal court proceedings.[57]

Before the Conference, each member receives extensive, bulky committee reports and other material that will be considered at the meeting. It usually takes me a couple of days simply to read this stack of documents. Until I became wiser, it took me even longer to recover from carrying it all with me to Washington, D.C. After my second meeting, it dawned on me that duplicates of all the materials were always placed at my designated spot at the Conference table, and I learned to read it all *before* I went to the airport.

The meeting of chief judges after the Judicial Conference is devoted to matters that concern mainly the circuit courts and is a valuable way of exchanging information and learning from each other. The chief judges also form committees to follow up on the work of the semi-annual meetings.

Closer to home, we have meetings of the Second Circuit Judicial Council, the administrative mechanism for the circuit, at least twice a year. These, like the meetings of the Judicial Conference of the United States, are commanded by statute.[58] Only recently, Congress passed the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980,[59] which changed the composition of the Council to require the inclusion of district as well as circuit judges.[60]

The Second Circuit Council is now composed of all the active circuit judges and one district judge from each of the six districts in the circuit.[61] The Act required the adopton of new local rules and procedures, which

53. *Id.* at 61.
54. *Id.* at 63.
55. *Id.* at 64.
56. *Id.* at 69-79.
57. *See Made for Television*, Nat'l L.J., Oct. 8, 1984, at 12, col. 1.
58. *See* 28 U.S.C. § 332 (1982).
59. Pub. L. No. 96-458, 94 Stat. 2035 (codified as amended in scattered sections of 28 U.S.C.).
60. 28 U.S.C. § 332(a)(1)(C) (1982).
61. *See* United States Court of Appeals and Judicial Council for the Second Circuit, In re Restructuring the Judicial Council of the Second Circuit pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (1980) (May 7, 1984) (modifying previous order dated March 4, 1981) (available in files of *Fordham Law Review*).

were drafted and are now in effect.[62]

The Council's agenda, except for consideration of judicial misconduct complaints,[63] is a microcosm of the Judicial Conference of the United States. The Council considers such matters as the needs of the various districts in the circuit for new district judges, bankruptcy judges and magistrates, certifying of support staff for senior judges, and approval of district court plans and procedures in compliance with various statutes, such as the Criminal Justice Act,[64] the Speedy Trial Act,[65] and the Jury Selection and Service Act.[66] The chief judge plans for the meetings, presides at them and supervises the transaction by mail of essential business between the meetings.

Other chief judge duties involve administration of the Criminal Justice Act, an enlightened statute that transforms into reality the constitutional guarantee of the right to counsel for indigent defendants in criminal cases.[67] The Act provides hourly rates of compensation to be paid by the government for court-appointed counsel in both the trial and appellate courts.[68] Unfortunately, in light of inflation the rates have been much too low for several years.[69] The statute also fixes maximum amounts, which may be exceeded only when the appointing judge certifies that certain statutory standards have been met and the chief judge of the circuit approves.[70] Last year, over 420 vouchers were presented to me for approval; they require scrutiny and occasionally raise issues that warrant an opinion by the chief judge.[71]

In recent years, the operation of the bankruptcy system has been a constant object of the chief judge's attention. The Bankruptcy Reform Act of 1978[72] designated the chief judge as the last step in a complicated process whereby bankruptcy judges were reappointed to interim terms for a period ending in 1984.[73] After a committee, composed of local representatives of a law school, a bar association and the practicing bar, had considered all objections and had nevertheless recommended reappointment, the chief judge still had to decide whether to accept the recommendation.[74] The right to exercise such a veto power raised delicate and difficult issues.

Last summer chief judges all over the country were in the middle of the confusion over the status of bankruptcy judges occasioned by the de-

62. *See id.*
63. See *infra* notes 80-87 and accompanying text.
64. Criminal Justice Act of 1964, 18 U.S.C. § 3006A (1982).
65. The Speedy Trial Act of 1979, 18 U.S.C. §§ 3161-3165 (1982).
66. Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1877 (1982).
67. *See* 18 U.S.C. § 3006A(a) (1982).
68. *Id.* § 3006A(d).
69. But see *infra* notes 109-11 and accompanying text.
70. *See* 18 U.S.C. § 3006A(d)(2)-(3) (1982).
71. *See, e.g., In re* Gross, 704 F.2d 670, 672-73 (2d Cir. 1983).
72. Pub. L. No. 95-598, 92 Stat. 2549.
73. *Id.* §404, 92 Stat. at 2683.
74. *Id.* §404, 92 Stat. at 2683-84.

lay in passing the Bankruptcy Amendments and Federal Judgeship Act,[75] and had to attempt to steer an intelligent course and to answer questions from judges, lawyers and the public.[76] The new Act now vests in the courts of appeals the power to fill for new fourteen-year terms all the bankruptcy judgeships in the circuit,[77] so that the chief judge is again in the thick of it.

Finally, with overall responsibility for operation of the circuit, the chief judge watches the statistics of each of the district courts. When a district court needs additional assistance, he must approve temporary switching of judge-power within the circuit,[78] as when a Southern District judge helps by trying cases in the District of Connecticut, or he must request the Chief Justice of the United States to approve a similar intercircuit transfer.[79]

C. *External Duties*

Finally, a chief judge has many responsibilities in dealing with those outside the judicial system proper but who use it or are concerned with it: the bar, the litigants, the public, the press. By far the largest time demands stem from the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980,[80] which became effective in October 1981, and required creation and adoption of an entirely new set of local rules and procedures.[81] The Act allows any person to file a complaint charging that a judicial officer "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or . . . is unable to discharge all the duties of office by reason of mental or physical disability."[82] The Act represented a compromise, after many years of controversy, between those who felt that there had been no effective way of dealing with the occasionally senile, dishonest or ill judge and those who regarded the system in effect prior to 1981 as sufficient and appropriate for the purpose.[83]

The Act covers any complaint of misconduct against any of the some 130 judicial officers anywhere in the circuit—magistrates, bankruptcy judges, district judges and circuit judges.[84] Each complaint, after filing, must go to the chief judge, who has limited options. First, he may dismiss the complaint as frivolous or outside the scope of the Act or as directly related to the merits of a ruling, or mark it closed because corrective action has been taken.[85] Second, if he does not take this course, he *must* convene a statutory committee, composed of equal members of district and circuit judges, and himself.[86] Such a committee, if convened, then investigates and reports to the Circuit Council, which in turn has a variety of options under the statute, ranging from dismissal of the complaint to recommendation to the Judicial Conference of the United States for impeachment.[87]

75. Pub. L. No. 98-353, 98 Stat. 333 (1984).
76. *See* Wermiel & Taylor, *Makeshift U.S. Bankruptcy Court System Hobbles Along Amid Dispute About Law*, Wall St. J., Aug. 19, 1984, at 37, col. 5; Riley, *Bankruptcy Uncertainty Continues*, Nat'l L.J., July 30, 1984, at 3, col. 1.
77. *See* 28 U.S.C.A. § 152(a)(1) (West Supp. Sept. 1984).
78. *See* 28 U.S.C. § 292(b) (1982).
79. *See id.* § 292(d).
80. Pub. L. No. 96-458, 94 Stat. 2035 (codified as amended in scattered sections of 28 U.S.C.).
81. *See* 2d Cir. R. § 0.24.
82. 28 U.S.C. § 372(c)(1) (1982).
83. *See* S. Rep. No. 362, 96th Cong., 2d Sess. 1-5, 20-29, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4315-19, 4333-43.
84. 28 U.S.C. § 372(c)(1) (1982).

Every complaint must be treated with great seriousness. The record facts are obtained, the charge is considered with care, and, even if the complaint is dismissed, an order—actually a short opinion—is written. By June 30, 1984, almost fifty complaints had been filed in the Second Circuit since the effective date of the Act in October 1981.[88] Each year there has been an increase in the complaints filed. Because the Act is so new, each circuit is feeling its way in devising procedures. For example, when we had a complaint filed in the Second Circuit against all of the active circuit judges, including me, the question of who would handle it immediately arose. After obtaining views from a number of knowledgeable sources, I requested and obtained the designation of a chief judge from another circuit to act as chief judge of the circuit for the purpose of handling the complaint.

In a related vein, I mention only in passing the hundreds of letters I receive every year from frustrated pro se litigants, many of whom are incarcerated or are simply unhappy with the way they have been treated by the judicial system. I usually read each one quickly in order to send it to the appropriate person for investigation. Some of the more serious require careful attention. Of course, all judges get such correspondence but my experience has been that people suffer from the false impression that the chief judge has the power to correct all ills. Would that it were so!

Another major portion of the chief judge's time—again mandated by statute—is devoted to the convening and running of the annual Circuit Judicial Conference.[89] In the Second Circuit, the Conferences were first held in desultory fashion, starting some forty-five years ago,[90] and took their present form about fifteen years later. J. Edward Lumbard, who was chief judge for almost twelve years and happily is still carrying a substantial workload, recently recalled in a volume of his reminiscences that Chief Judge Charles E. Clark was the first "to make something" of

85. *Id.* § 372(c)(3).
86. *Id.* § 372(c)(4).
87. *Id.* § 372(c)(6)(B), (c)(7).
88. *See* 1984 Annual Report, *supra* note 2, at 70, table 30; 1983 Annual Report, *supra* note 2, at 78, table 30; 1982 Annual Report, *supra* note 2, at 66, table 30.
89. *See* 28 U.S.C. § 333 (1982).
90. *See* Administrative Office Act of 1939, ch. 501, § 306, 53 Stat. 1223, 1224.

the Circuit Conference in the Second Circuit, starting in 1955 in Hartford.[91]

The Conference is an annual affair, attended now by circuit, district and bankruptcy judges whose presence is required by statute unless excused by the chief judge,[92] and about 150 lawyers, usually with spouses, along with other interested invitees, for a grand total of some 500 people. Usually, the Conference lasts two and one-half days and is held in an area far from the madding crowd.[93]

At the Conference an executive session of the judges is held; indeed, it is the only time each year that all the active judges in the circuit meet with one another. The subjects of the Conference vary: in the last three years, they have been, respectively, the operation of the jury system, the pretrial phase of civil and criminal cases and the operation of the appellate process in the Second Circuit. Panels and workshops, led by judges, academics and practicing lawyers, address aspects of the general topic. The chief judge is directly involved in the planning for and organizing of the Conference in all its phases. He also presides at it, gives an annual report to the conferees, and in recent years, has appointed a committee each year to follow up on the serious work of the Conference.

There are many other external duties that make heavy demands on a chief judge's time. Congressional committees frequently express interest in hearing the views of chief judges on matters affecting the federal courts. Last year, I testified before Congressman Kastenmeier's Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary, in opposition to the proposal for a new inter-circuit tribunal.[94] Similarly, I have often publicly advocated the elimination of diversity jurisdiction.[95] I believe it is important for Congress and those who run the national government to hear the views of those who neither work nor reside in Washington, D.C. A friend of mine who had a recent stint in the executive branch in Washington was startled by how much of his agency's daily agenda was set by the media in the Capitol and by how different his perspective became, once he got away from Washington.

In addition, it is essential for the public to know how the courts are operating. On a circuit-wide basis, this information is conveyed primarily by means of reports issued and speeches given by the chief judge. I do not refer here to news about a particular decision, which is not the responsibility of the chief judge unless a systemic problem arises, such as

91. A Conversation with Lumbard, *supra* note 4, at 62.

92. *See* 28 U.S.C. § 333 (1982).

93. Last year was an exception: As an experiment, the conference was again held in the urban area of Hartford, Connecticut.

94. Supreme Court Workload: Hearings on H.R. 1968 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 98th Cong., 1st Sess. 150-55 (1984) (statement of Wilfred Feinberg, Chief Judge, United States Court of Appeals for the Second Circuit).

95. *See, e.g.*, Feinberg, *supra* note 1, at 374-75.

inability to get copies of filed opinions. I refer instead to statistical reports, to speeches (such as the talk that is the basis of this Article) and to the myriad ways of letting the profession and the public know what is taking place in the various courts in the circuit, particularly in the court of appeals. Over the last few years, in addition to two "State of the Second Circuit" addresses before the Association of the Bar of the City of New York and talks at other annual bar association dinners, I have gone to meetings of local bar associations or their committees to discuss our procedures and problems, and in the case of our summary orders to explain and defend our practices. With regard to the latter, at times I have felt like Daniel in the den of lions![96]

Other ways of informing the public about the courts as an institution may not be immediately obvious, such as induction ceremonies usually held in the courthouse. In all of these settings the chief judge must maintain the delicate balance in the judiciary's relationship with the media by attempting to meet their legitimate requests for information and to obtain adequate publicity about the functioning of the courts while at the same time protecting confidentiality where it is essential. There are a number of other ways by which the federal courts reach out to inform and to be informed by the profession or by other courts. The state/federal councils are composed of representatives from each judicial system in the states involved.[97] A committee on Local Rules and Internal Operating Procedures of the Court of Appeals, which is mandated by statute,[98] is composed of judges, lawyers and academics. The chief judge is directly involved in selecting the membership of these bodies and in following up on their recommendations.

I could go on with further illustrations of external duties, such as meeting with distinguished visitors, many from foreign countries, but I think that no more examples are needed.

III. Ruminations and Suggestions for Change

My own ruminations about the job of chief judge are based on my experience of more than four years as chief judge and, before that, some fourteen years as a circuit judge and four and one-half years as a district judge. I focus here only on the chief judge's role as an administrator and leader with regard to policies and problems that affect the court as a whole rather than on his role as a leader with regard to substantive legal doctrine.

The demands of the office of chief judge are great, and quite simply cannot be appreciated until you are in it. As this Article suggests, I spend a great deal of time on what, for want of a better term, we call

96. See *supra* note 38 and accompanying text.

97. *See* Report of the Circuit Executive, Court of Appeals for the Second Circuit 1983, at 59-60 (1984).

98. *See* 28 U.S.C. § 2077(b) (1982).

judicial administration. My rough but realistic guess is that this absorbs about fifty percent of my time. I also carry eighty percent of an active judge's usual caseload. That is, in the last few years of heavy volume, eight weeks of sitting instead of ten during the year, with approximately twenty-four appeals heard in each of those weeks. My wife has pointed out to me with some asperity that 50% plus 80% equals 130%, an observation whose accuracy I cannot contest.[99] What this means is that briefs and various memoranda concerning administrative matters are read at night or over the weekend and in the interstices of existence: on the train, in the subway, in an automobile (while someone else is driving, I hasten to add), literally, it sometimes seems during sitting weeks, in every spare moment.

The obvious question, of course, is whether this load is necessary. Whether, for example, a chief judge should sit in almost as many cases as his colleagues and whether his administrative burdens can, or should, be lightened, and if so, how. The first part of this question is comparatively easy to answer. I put to one side the obvious: For most federal judges, including this one, deciding cases is much more interesting than presiding at, or preparing for, meetings. Even after twenty-three years on the bench, despite the relentless flow of cases, many frivolous or inadequately argued, I still find it exciting to be a judge and to decide cases. Each year, there are still more appeals that sorely perplex me, and then engage me to the fullest in the attempt, never perfectly achieved, to reach the right result for the right reasons, explained clearly and concisely.

But it is for entirely different, institutional reasons that I believe that the caseload assumed by a chief judge should not be significantly lighter than that of the other active judges. As statutory responsibilities expand, chief judges will be hard-pressed to become more and more like full-time administrators. I suggest that this would be most unfortunate, and that the challenge will be to prevent it from happening. If administrative duties come to consume the bulk of the chief judges' time, the courts of appeals would lose the service of their most experienced members. More importantly, the model of collegial government would tend to break down; the chief judge's problems and duties would be very different from those of his colleagues on the court, and, in time, he would cease to be perceived as one of them. He would be regarded as an administrator rather than as a colleague who also happens to have additional responsibilities.

The difference in perception is subtle but significant. The essence of a smoothly functioning court is collegiality. That spirit extends to every aspect of the court's operation: the number of cases it disposes of, the speed of disposition and the quality of the judicial work product. The effect of collegiality on the first two aspects is obvious. Court of appeals

99. A former clerk with a mathematical bent pointed out that if 50% of my time is spent on an 80% caseload, then in fact I spend 160% of the time I would were I not chief judge. Whatever the figure, it represents a substantial amount of time.

judges work very hard—over the past several years, in the face of increased filings, probably too hard. Last year, an active court of appeals judge in the Second Circuit sat, on the average, in 240 appeals. That means the judge read the briefs, heard argument except for comparatively rare submissions, and participated in the decision in 240 cases and also wrote his fair share of opinions. Increased filings have also brought an increase in the number of sitting weeks and in the number of cases heard each week. No one welcomes these additional burdens, but no one is shirking the work either, and in a collegial court, each is willing to carry the load and does so.

Similarly, the Second Circuit has continued to dispose of its appeals with remarkable expedition. The median time in the Second Circuit from notice of appeal to termination has consistently been the lowest in the nation.[100] Part of this stems from our practice of summary orders, which account for about sixty percent of our dispositions of cases heard or submitted.[101]

Our low median time is also due to our CAMP program[102] and to our use of what we call "the 60-day list" to move opinions along. This is a list of cases undecided sixty days after argument or submission. It is examined case by case at each meeting of the court of appeals. There is no criticism of anyone on the list; almost all of us, including the chief judge, are on it from time to time. But the willingness to accept it as a useful device, like the willingness to accept the burdens of preparing detailed written orders in a short period of time, stems from a spirit of collegiality in a cooperative enterprise.

Not so obvious, perhaps, is that collegiality also improves the quality of opinions and keeps down the number of separate opinions, which often create needless confusion. When members of a panel are willing to listen to the suggestions of their colleagues regarding a proposed disposition and ultimately regarding a proposed opinion, the work product usually benefits. Three heads are almost always better than one. Do not misunderstand me; appeals court judges are usually strong-minded, independent souls. They relish criticism no more than anyone else does—perhaps less—and they are willing to accept it in a cooperative spirit only up to a point. But the location of that point is affected by the collegiality of the court. Indeed, given the Article III [103] independence and the strong personalities of the judges, it is remarkable that there is so much harmony and cooperation in the Second Circuit.

I must back up a bit to clarify my thesis. I do not suggest that a chief judge alone can create such a spirit, although he could undoubtedly substantially impair it. Much more depends upon tradition, the character

100. See *supra* notes 43-44 and accompanying text.
101. *See* Report of the Circuit Executive, Court of Appeals for the Second Circuit 1983, at 7 (1984). See *supra* note 38 and accompanying text.
102. See *supra* note 42 and accompanying text.
103. U.S. Const. art. III, § 1.

and personality of the judges, the indefinite chemistry when personalities meet and clash, and the panel system, which allows us to go about our business without all of us sitting with each other in each case, with the constant need to agree or disagree. But tradition may wither, and the chief judge can, by example and emphasis, help to preserve and continue valuable customs of the court, such as our voting memoranda,[104] a practice that goes back to Learned Hand and is unique, I believe, to the Second Circuit. This chief judge function is particularly important when there is a large influx of new judges to the court in a short period of time.

Moreover, the chief judge can to some extent encourage collegiality in many ways through his relationships with members of the court: by building consensus, by striving to get strong-minded individuals to work together and to avoid pointless feuding, by smoothing ruffled feathers, by heading off potential crises or problems, if possible, before they arise, by emphasis on appropriate ceremonial occasions, such as inductions and memorial services in court,[105] and generally by tact and concern for the welfare and feelings of his colleagues in the performance of the various duties described earlier. Obviously, this is a tall order and no chief judge can achieve it completely. But to the extent that a chief judge is able to improve collegiality at all, the perception of him primarily as colleague rather than as administrator helps.

I therefore do not find attractive the notion that a chief judge's caseload should be very much less than that of his colleagues. Where else to turn, then, to prevent the job from becoming an impossible one? An obvious answer is to lighten the administrative burdens by delegation. For example, I have in large part delegated responsibility for running the annual Second Circuit Judicial Conference.[106] I do not know how many hours I spent in connection with the first such Judicial Conference for which I had ultimate responsibility, but they were many. Since then, because the governing statute allows leeway,[107] I have delegated the primary responsibilities for the program of the Conference to one of my colleagues, as Conference Chairman, and to the head of our Planning and Program Committee. This procedure has worked splendidly in the three subsequent Conferences. Although the chief judge still has much to do in connection with each Conference, his load has been reduced considerably.

104. For those cases that the panel, after argument, agrees should be decided by opinion rather than by summary order, it is customary to exchange voting memoranda. These "voting memos" set out the particular judge's vote as well as the reasons for that vote. Voting memos are extremely useful for the purpose of discussion at the voting conferences held after the cases are heard; the memos also benefit the eventual opinion writer, who weeks later has in written form valuable suggestions about the reasoning of an opinion, as well as cogent statements of a colleague's concerns.

105. We have had four of the former, and sadly five of the latter since I have been chief judge.

106. See *supra* notes 89-91 and accompanying text.

107. *See* 28 U.S.C. § 333 (1982).

Much can also be delegated to the Circuit Executive, a position created only because of the wisdom and perserverance of Chief Justice Burger, whose efforts on behalf of improved administration of the courts have been herculean. The Circuit Executive is a useful and indispensable aid in administering the circuit. Indeed, I shudder to think of what the job of chief judge would be without him. But the Circuit Executive's duties are predominantly circuit-wide and systemic. Even in this sphere, the chief judge has ultimate responsibility and therefore must supervise. In addition, there are duties that only the chief judge can perform even in the first instance, such as attending and participating in the Judicial Conference of the United States.

Frequently there are reasons for not delegating even when it is in theory possible. In at least one circuit, I believe, invitations to visiting judges,[108]—whether district judges from inside the circuit or judges from outside the circuit—are made by staff personnel, not by a judge. I have found that a telephone call from the chief judge is more effective and obtains a quicker response. In theory, panels can be composed by computer, but in practice, we have not yet achieved this result. I attain almost the same efficient results by working closely with an experienced staff member in meeting the various conditions, such as the number of desired panels, the need to mix up the composition of panels as much as possible and to have all judges preside at least once and in fair proportions, the equitable spacing of sitting weeks, and so on.

No doubt there are duties now carried out by the chief judge that could be efficiently delegated to other members of the court, but there are limits there, as well. Not every judge is interested in taking on administrative, as distinguished from judicial, burdens; some, of course, are better at it than others, and all are quite busy. But even where other judges are willing and able to assume administrative responsibilities, Congress frequently has made delegation all but impossible. Under the Criminal Justice Act, for example, the chief judge is the only official authorized to approve payments in excess of the maximum amounts permitted.[109] There is simply no persuasive reason why the statute should not be amended to allow the chief judge, or another member of the court selected by him, to perform that function.[110] At the very least, the maximum amounts that trigger chief judge involvement should be raised to higher levels. Congress recently increased them somewhat, but not sufficiently.[111]

Similarly, I suggest that there is no persuasive reason to confine only to the chief judge the authority to act at the initial stage upon complaints of

108. See *supra* note 40 and accompanying text.

109. *See* 18 U.S.C. § 3006A(d)(3) (1982).

110. *Cf.*, Pretrial Services Act of 1982, 18 U.S.C. § 3152(a) (1982) (chief pre-trial services officer selected by panel including chief judge or designee).

111. *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 2185 (amending 18 U.S.C. § 3006A).

judicial misconduct. Regardless of whether experience will fortify the views of those who supported or those who opposed the statute, it may come to be perceived as an alternate appeal route for the disappointed or troubled litigant who, as I have pointed out elsewhere,[112] may have a grudge against the system or the world that is not amenable to any sort of legal remedy. A few months ago, I read with mounting concern a lengthy account of the hearing in open court by a statutory committee of five judges—three circuit judges, including the chief judge, and two district judges—concerning a complaint against a judge in that circuit.[113] My reaction was not based on the merits of the complaint—I have no view as to that—but on the number of judge-hours being consumed by consideration of it. In that case, a determination had already been made that the complaint was neither frivolous, nor outside the scope of the Act, nor directly related to the merits of a ruling. I therefore do not quarrel at all with the view that the chief judge should preside over and directly participate in any further proceeding. But what about complaints that *are* frivolous, or outside the scope of the Act, or directly related to the merits of a ruling, as experience has shown most so far to be? Must each of those require the personal attention of the chief judge? If Congress now trusts the chief judge's judgment sufficiently to make this initial determination, should it not also trust his ability to delegate fairly and wisely this function to a colleague? I submit that it should, and that the statute should be amended to allow it.[114]

Similarly, as I have already noted, in 1978 Congress created an entirely new set of responsibilities in connection with selection of bankruptcy judges.[115] In the period from 1978 to 1984, the chief judge alone was required by statute to decide whether to veto reappointment of incumbents.[116] This was clearly not necessary. In the new Bankruptcy Act,[117] the court of appeals has the responsibility for appointment of bankruptcy judges to new fourteen-year terms.[118] Putting to one side whether this power might not better rest with the district courts, who are more knowledgeable about the bankruptcy judges, it is still a step in the right direction. Of course, the chief judge will be intimately involved. But vesting the appointment power not in the chief judge alone, but in the court of appeals as a whole, was an improvement because it allows some room for delegation. Generally, the ability to delegate should be encouraged. It enhances the spirit of collegiality and it exposes future chief judges to the issues they will have to face. Someone remarked to me recently that I should be pleased because the chief judges are being given so much administrative power. My response is that a chief judge is getting so powerful, he soon won't have time to do anything!

112. *See* Feinberg, *Foreward* to Foundation of the Fed. B. Council, The Remarkable Hands: An Affectionate Portrait vi (1983).
113. *See* Ranii, *A Judge's Public Battles*, Nat'l L.J., July 23, 1984, at 1, col. 2.
114. See *supra* note 110.
115. See *supra* notes 73-74 and accompanying text.
116. See *supra* note 74 and accompanying text.
117. 28 U.S.C.A. § 152 (West. Supp. Sept. 1984).
118. See supra note 77 and accompanying text.

Conclusion

I hope that this sketchy summary of the history of the job of chief judge of a court of appeals and his responsibilities and some reflections of my own have added to an understanding of this rarely examined office. It is in many ways an odd sort of job. The chief judge of a circuit has ultimate responsibility for administering a large enterprise in which there may be, as in the Second Circuit, some 130 judicial officers and over a thousand employees. Yet the chief judge has little or no control over the budget for the enterprise, the judgepower and staff available to it, the space allocated to it and rates of compensation for those affiliated with it. I suppose a modern chief executive officer might question the wisdom—if not the sanity—of anyone who voluntarily assumed such a position. In addition to being a circuit-wide administrator, the chief judge is also responsible for the administration of the appellate court of which he is a member. And while serving as an administrator, he also sits as a busy appellate judge on that court. And yet, despite all of this, the job of chief judge is so interesting, the responsibilities so challenging, the relationship with colleagues so rewarding, and the intangible satisfaction simply of being the titular head of an historical institution so great, that the job is irresistible—at least for a while!