

STEPS TOWARDS OPTIMAL JUDICIAL WORKWAYS: PERSPECTIVES FROM THE FEDERAL BENCH*

FRANK M. COFFIN** & ROBERT A. KATZMANN***

I. PREVIEW: CONDITIONS AFFECTING JUDICIAL PERFORMANCE

Nowhere in the Constitution is explicit reference made to judicial workways or the conditions of judging. But the architects of the charter of nationhood, concerned with the broad design and purposes of institutions, did recognize that the judiciary could not function properly without independence. Alexander Hamilton, quoting Montesquieu, observed in *Federalist* Number 78 that “there is no liberty, if the power of judging be not separated from the legislative and executive powers.”¹ John Adams wrote that judges “should not be distracted with jarring interests; they should not be dependent upon any man, or body of men.”²

Judges, then, in the view of the framers, must have decisional autonomy, perhaps the most critical element of judicial independence. Thus, so that they are insulated from public pressure, the

* The authors express their appreciation to that superb scholar/practitioner of judicial administration, Russell Wheeler, Deputy Director of the Federal Judicial Center, for his stimulating ideas. Dominique Welch, judicial assistant to Judge Katzmann, contributed ably to the work of compiling data from the questionnaire discussed in the ensuing pages. We are also grateful to the Federal Judges Association and to its then-president, U.S. Circuit Judge Ann C. Williams, for facilitating dissemination of our survey to every Article III judge. The examination that follows is part of a larger project of the Governance Institute, analyzing the workways of governance of the three branches of the national government, see *WORKWAYS OF GOVERNANCE* (Roger H. Davidson ed., forthcoming).

** Senior United States Circuit Judge, U.S. Court of Appeals for the First Circuit.

*** United States Circuit Judge, U.S. Court of Appeals for the Second Circuit.

1. *THE FEDERALIST* NO. 78, at 394 (Alexander Hamilton) (Garry Wills ed., 1982).

2. John Adams, *Thoughts on Government*, in *THE WORKS OF JOHN ADAMS* 181 (Charles F. Adams ed., 1856). Gordon Wood notes a competing strain, in which early state constitutions provided for legislative control of courts and judicial tenure. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 161 (1969).

Constitution provides for lifetime tenure and prohibits reductions in compensation.³ Such measures reflect the sensibility that judicial independence would be a hollow, albeit noble, ideal in the absence of conditions that help make decisional autonomy possible. Indeed, over the course of our nation's history, it has become apparent that institutional autonomy is fundamental to a vital judiciary. That is, if justice is to be dispensed fairly, efficiently, and wisely, then judges must have the time to devote to their responsibilities, both adjudicative and administrative, as well as the necessary resources; and the judiciary must have the authority, within reasonable limits and with appropriate accountability, to manage its own affairs, free from political retribution.

The first of these, time, is in no small measure a function of the caseload. Time, of course, is finite. As A. Leo Levin, then-Director of the Federal Judicial Center, noted: "[J]udicial dispositions are not widgets, and at some point the optimal number of decisions per judge may be exceeded. Productivity cannot be increased indefinitely without loss in the quality of justice."⁴ The second condition, resources, has to do with the institutional care and feeding of the judicial office, such as administrative and technological support and law clerk assistance. Another component relates to adequate compensation and benefits, necessary if the judiciary is to attract and retain able persons from diverse backgrounds. A third condition calls for self-governance; that is, judges should have discretion to determine the style of operations in their chambers, and the judiciary, as Gordon Bermant and Russell Wheeler have put it, must have "branch independence" so that, for example, it submits its own budgetary requests to Congress and crafts its own internal rules and regulations.⁵ Self-governance recognizes that the other branches have important responsibilities—constitutionally assigned—in such matters as confirmation, appropriations, compensation, structure and procedure, but that subject to those constraints, the judiciary's role is respected.

3. U.S. CONST. art. III, § 1.

4. FED. JUDICIAL CTR., *MANAGING APPEALS IN FEDERAL COURTS* 3 (Robert A. Katzmann & Michael Tonry eds., 1988).

5. Gordon Bermant & Russell R. Wheeler, *Federal Judges and the Judicial Branch: Their Independence and Accountability*, 46 *MERCER L. REV.* 835, 845, 849 (1995); Russell Wheeler, *The Emerging Judicial Branch*, Alfred L. Luongo Lecture to the Historical Society of the Eastern District of Pennsylvania (Dec. 11, 1996) (transcript on file with author). See also Charles Gardner Geyh, *The Origins and History of Federal Judicial Independence*, in *AN INDEPENDENT JUDICIARY: REPORT OF THE ABA COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE* 81-82 (1997).

Time, resources, and self-governance are critical elements of independent decisionmaking. They are also essential components of the optimal conditions for judging. To these may be added another ingredient: work that is challenging and satisfying. Federal courts are designed to be of limited jurisdiction, as fora for the resolution of cases with direct or indirect national implications. If the nature of that work were to broaden significantly beyond these boundaries, the character of the federal courts would also change, almost certainly adversely affecting the capacity to recruit judicial appointees and to retain the services of those already on the bench.

Any informed opinion concerning the optimal conditions for judging and whether the values of decisional and institutional autonomy are honored will necessarily involve answering such basic questions as: Is there time to perform the judicial tasks? Are there adequate resources? Does the character of the work befit the federal judiciary? Is the judiciary self-governing, with sufficient autonomy to resist political pressure? In thinking about how to approach such questions, we begin with a discussion of past and present conditions; explore the uses and limits of a variety of workway indicators such as recruitment, compensation, workload, resources, time, resignations, working relationships, security, external institutional relations, public understanding, and media coverage; report on an experiment and survey of judges combining quantitative and qualitative analyses; and, drawing upon that survey, call for a system of judicial self-help as one means of furthering the end of optimal judicial workways.

II. TODAYS CONTEXT

Recent years have seen expressions of concern from a variety of sources about threats to the continued health of the federal judiciary, recognizing that it is an institution that in the last century has been increasingly called upon to resolve all manner of disputes in ever-increasing volume. Chief Justice William Rehnquist provided this snapshot:

One hundred years ago, there were 108 authorized federal judgeships in the federal Judiciary, consisting of 71 district judgeships, 28 appellate judgeships, and 9 Supreme Court Justices. Today, there are 852—including 655 district judgeships, 179 appellate judgeships and 9 Supreme Court Justices. . . . This past year [1999], over 320,194 cases were filed in federal

district courts, over 54,600 in courts of appeals, and over 1,300,000 filings were made in bankruptcy courts alone.⁶

The highly respected Senior United States Circuit Judge and former Chief Judge of the Second Circuit, Wilfred Feinberg, reflecting upon his lengthy career, noted that in the statistical year 1966-67, the year he joined the Court of Appeals, 979 appeals were filed; he sat on 136 argued or submitted and fully briefed appeals; the court had nine active judges and three senior judges; and each circuit judge usually had two clerks. By contrast, in the statistical year ending September 30, 2000, Judge Feinberg observed, 4,391 appeals were filed; each active judge sat in about 260 argued or submitted and fully briefed cases; the court had thirteen authorized active judges; eight seniors sat frequently with help from many visiting judges from other circuits and from the district courts; and each active judge could have up to four law clerks.⁷

Not surprisingly, given the increasing burdens, the health of the federal judiciary has long been a concern of the Third Branch itself. For example, at Congress's direction, "[r]esponding to mounting public and professional concern with the federal courts' congestion, delay, expense and expansion," the Federal Courts Study Committee undertook a fifteen month examination.⁸ Seeking to prevent "the system from being overwhelmed by a rapidly growing and already enormous caseload," the Committee warned in 1990 of the "impending crisis of the federal courts."⁹ Five years later, the Judicial Conference of the United States approved a long range plan for the Federal Courts, in which it observed:

Today, a number of the federal courts' core values are in jeopardy, largely for reasons beyond the courts' control. The increasing atomization of society, its stubborn litigiousness, the breakdown of other institutions, and paradoxically, the very popularity and success of the federal courts, have combined to

6. The 1999 Year-End Report of the Federal Judiciary, 32 *THE THIRD BRANCH* 1 (Jan. 2000) (containing the text of Chief Justice Rehnquist's fourteenth annual year-end report).

7. Wilfred Feinberg, Remarks at Federal Judicial Center Workshop for Judges of the 2nd & D.C. Circuits (Nov. 9-11, 2000) (transcript on file with author).

8. *FED. COURTS STUDY COMM'N., JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE* 3 (1990).

9. *Id.* at 4. Fifteen years earlier, the Commission on Revision of the Federal Court Appellate System focused on caseload burdens in the appellate courts. *COMM'N ON REVISION OF THE FED. CT. APP. SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 2* (1975).

strain the courts' ability to perform their mission. Huge burdens are now being placed on the federal courts.¹⁰

Over the last decade, the year-end reports of the Chief Justice have been marked with concerns about the increasing federalization of crimes: "The trend to federalize crimes that traditionally have been handled in state courts not only is taxing the Judiciary's resources and affecting its budget needs, but it also threatens to change entirely the nature of our federal system."¹¹

Another common problem raised in the year-end reports is that of the adverse impact on the capacity to attract candidates to the bench and retain those confirmed because of inadequate compensation and the failure of judicial salaries to keep pace with inflation. In the words of the Chief Justice: "I fear that . . . the question will not be who is most fit to be chosen, but who is most willing to serve. We cannot afford a Judiciary made up primarily of the wealthy."¹²

Still an additional expressed concern relates to alleged congressional efforts to "micromanage the work of the federal judiciary."¹³ At the level of the individual circuit judge, one of us wrote:

[T]here are the pressures to which he or she seeks to respond: an inexorably rising caseload; the demand for expedition in disposing of appeals; the demand to publish all opinions . . . ; the rising involvement in administration and committee work . . . ; the proliferation of congressional oversight inquiries and hearings often resulting in new obligations and reporting requirements; the impact of government-wide ethical restraints, limiting judges' recompense from teaching and barring any

10. JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 9 (1995).

11. The 1998 Year-End Report of the Federal Judiciary, 31 *THE THIRD BRANCH* 1 (1999) (containing the text of Chief Justice Rehnquist's thirteenth annual year-end report). See also WILLIAM W. SCHWARZER AND RUSSELL R. WHEELER, *ON THE FEDERALIZATION OF THE ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE* 1 (1994).

12. The 2000 Year-End Report of the Federal Judiciary, 33 *THE THIRD BRANCH* 1 (2001) (containing the text of Chief Justice Rehnquist's fifteenth annual year-end report). See also Chief Judge Deanell R. Tacha, Statement before the Second National Commission on the Public Service (July 17, 2002), <http://www.brook.edu/dydocroot/gs/cps/volcker/testimony/tacha.pdf>.

13. The 1995 Year-End Report of the Federal Judiciary, 28 *THE THIRD BRANCH* 3 (1996) (containing the text of Chief Justice Rehnquist's tenth annual year-end report).

compensation for delivering a scholarly address or writing a solidly researched article for a periodical.¹⁴

An esteemed appellate jurist, James L. Oakes, then Chief Judge of the U.S. Court of Appeals for the Second Circuit, lamented:

We are merely coping however, because there is very little travel or intercourse among the judges except for those who have senior status, those who are chief judges, or those who serve on Judicial Conference Committees; there are no sabbaticals, and vacations are limited to two or three weeks a year; and there is too little communication among the judges in an age of communication and too little time for meditation in an age of stress.¹⁵

All judges, we think, understand that any job, even the most fulfilling, is not without some unavoidable frustrations—and for our part, we cannot imagine a life more challenging, more rewarding or more satisfying than that of a federal judge. But to equate the awareness of a special calling on the part of most judges with a sign that there is no cause for concern would be imprudent. Judges will judge, no matter what the conditions, frustrations, and harassments. But the quality of that judging will suffer. And to the extent that happens, the nation suffers also.

III.

A SPECTRUM OF WORKWAY INDICATORS

A. Underlying Assumptions

Before setting forth the authors' concept of ways and means to deal with the expressed concerns, two underlying assumptions should be clearly stated.

The first is that this discussion does not travel under a banner of "crisis." As the distillation of responses of judges indicates, among the plethora of specific critical comments can be detected a deep-seated dedication to their occupation. What this paper proposes is something rather out of the ordinary: the taking of steps to safeguard the optimal effectiveness of an institution before diminishing quality becomes a reality.

The second assumption is that the federal judiciary will be able to devise ways to assess and deal with the conditions that threaten quality, which ways are consistent with judicial independence. Fed-

14. Frank M. Coffin, *Research for Efficiency and Quality: Review of Managing Appeals in Federal Courts*, 138 U. PA. L. REV. 1857, 1865–66 (1990).

15. James L. Oakes, *Judges on Judging: Grace Notes on "Grace Under Pressure,"* 50 OHIO ST. L.J. 701, 702 (1989).

eral judges, appropriately, are always alert to any requirement or other action that might encroach on their decisional or institutional autonomy. It would, however, be a poignant paradox if judges were to resist judge-led efforts to identify and monitor conditions that threatened their continued ability to render top-quality judicial service.

This paper, therefore, assumes that the federal judiciary will be able, in its own interest and in the nation's, to devise the precise means of accomplishing the tasks herein described.

We believe that a multi-faceted inquiry can aid in gauging the health of the federal judiciary and the conditions for effective judging. Among the elements to be considered are: recruitment, compensation, workload volume/character, resources, time, resignations, working relationships, security, external institutional relations (i.e., Congress and the Executive), public understanding, and media coverage. As will be obvious, some of these factors are more open to meaningful attempts to measure than others. Quantitative analysis is of limited value for our purposes, however. Rather, we think that periodic qualitative and carefully crafted inquiries, which make use of quantitative data where appropriate, are more likely to bear fruit. The analogy, as one of us once remarked, is to the periodical physical examination, where tests of various types, together with the physician's observations, combine to mark the patient's status and prospects.¹⁶ While the ability to develop baseline data for the derivation of norms and deviations is far more pronounced in the field of medicine, the discipline of repeated inquiry following consistent procedures is bound to reveal problem areas.

B. Recruitment

One measure of the judiciary's perceived health is recruitment—whether the judiciary attracts able candidates. Why potential candidates choose not to apply or be considered is very hard to analyze. Identifying such persons presents considerable methodological challenges. The link between recruitment and the conditions of judging is difficult to gauge. Would-be candidates might be dissuaded from applying for reasons completely apart from the judicial environment—because, for example, of the nature of the

16. Frank M. Coffin, A Mid-Project Commentary to The Pew-Governance Institute, Conditions for Effective Governance 1–2 (Oct. 17, 1997) [hereinafter Conditions for Effective Governance] (transcript on file with the author).

nomination and confirmation processes (a subject itself worthy of continuing scrutiny).¹⁷

Anecdotal information has occasionally been sought from officials in various administrations who have been involved in screening judicial candidates. A sustained and systematic "exit interview" of such officials over time would yield useful information. Similarly, members of the American Bar Association Standing Committee on the Federal Judiciary might also be queried. Committees organized by various Senators are still another source.

C. Compensation

Salary and benefits are easy to track. When they join the bench, judges accept the reality that compensation levels are not likely to rise significantly; public service, after all, is not about financial wealth. But when salary and benefits do not keep pace with inflation, they can deprive judges of stability, a particular problem for those who have young families, with the prospect of children of college age. Since 1969, federal judicial salaries have lost twenty-four percent of their purchasing power.¹⁸ In fact, because living costs diverge widely across the nation, while judicial salaries are uniform (unlike those of other federal employees, who receive locality-based comparability pay increases in high-cost areas), the erosion of purchasing power is even greater in expensive metropolitan areas. Especially for judges living in such areas, the failure of salaries to keep up with inflation affects not just morale, but also their continuing prospects of remaining on the bench, as well as the willingness of potential candidates to be considered for judgeships.¹⁹ The Volcker Commission has endorsed a fresh approach to determining salary comparability by urging that compensation be on a par with leading academic and non-profit centers.²⁰

17. See, e.g., MILLER CTR. OF PUB. AFFAIRS, UNIVERSITY OF VIRGINIA, REPORT OF THE COMMISSION ON THE SELECTION OF FEDERAL JUDGES 5 (1996), available at http://millercenter.virginia.edu/programs/natl_commissions/past_commissions/comm_1996.pdf.

18. NAT'L COMM'N ON THE PUB. SERV., *Urgent Business for America: Revitalizing the Federal Government for the 21st Century*, 22 (2003) [hereinafter the Volcker Commission], available at <http://www.brookings.edu/gs/cps/volcker/reportfinal.pdf>.

19. For a different view, see RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 30 (1996).

20. The Volcker Commission, *supra* note 18, at 23. The commission observed that whereas the salary of federal district judges is in the range of \$150,000, a recent survey found that the average salary for deans of the U.S. News & World Report's top-ranked twenty-five law schools was \$301,639, *id.*; see also Justice Stephen G. Breyer, Statement Before the National Commission on the Public Service (July

Creation of a permanent, broad-based, and authoritative commission on compensation for the highest levels of the three branches, as proposed by the Judicial Conference Committee on the Judicial Branch, is a sine qua non of any systematic address of this problem. Understanding the uses and limits of such other devices as the Quadrennial Commission on Executive, Legislative, and Judicial Salaries is helpful in considering new approaches.

D. Workload Volume/Character

Whether and how the volume of the caseload affects judicial performance is worthy of attention. As noted above, volume has increased substantially over time. For many years, the Federal Judicial Center has conducted case-weighting analyses, and the Judicial Statistics Subcommittee of the Judicial Conference, aided by the Administrative Office of the U.S. Courts, offers a sense of the burdens on the courts of appeals and the district courts. Russell Wheeler reports that in a 1989 Federal Courts Study Committee survey, fifty-eight percent of the circuit judges responded that the extent to which the workload necessitated that they use law clerks for work they should do themselves was "worse" or "much worse" than when they joined the bench. About half of the district judges said the circumstance was about the same, and thirty-nine percent said it was worse or much worse.²¹ A 1992 Federal Judicial Center survey, conducted for the Long Range Planning Committee, indicated that nearly fifty percent of circuit judges but only about thirty-three percent of the district judges viewed the volume of civil cases as a large or grave concern, but nearly seven-fifty percent of the circuit judges and over fifty percent of the district judges viewed similarly the volume of criminal cases.²² It would be useful to replicate such surveys to have a sense of judicial perceptions of caseload volume.

The nature of the caseload has changed, too, as has the judicial role, in part because of such factors as federalization and sentenc-

17, 2002), <http://www.brookings.edu/gs/cps/volcker/testimony/breyer.pdf>. The commission recommended that as its first priority, Congress should grant "an immediate and substantial increase in judicial salaries." The Volcker Commission, *supra* note 18, at 32.

21. Fed. Courts Study Comm., Survey of the United States Circuit Judges, in *WORKING PAPERS AND SUBCOMMITTEE REPORTS 3* (1990); Fed. Courts Study Comm., Summary of Responses to the Survey of District Court Judges, in *WORKING PAPERS AND SUBCOMM. REPORTS 2* (1990).

22. FED. JUDICIAL CTR., *PLANNING FOR THE FUTURE: RESULTS OF A 1992 FEDERAL JUDICIAL CENTER SURVEY OF UNITED STATES JUDGES 3*, 25 (1994).

ing guidelines.²³ The 1992 Federal Judicial Center survey indicates concern among both district and appellate judges about federalization of crimes and their impact on the docket.²⁴ A recent study under the aegis of former Chief Judge of the Southern District of New York, Thomas Griesa, documents the relative decline in the percentage of that court's cases in the commercial/ financial area and the sharp increase in the percentage of civil rights cases.²⁵ With regard to the judicial role, the Administrative Office of the U.S. Courts reported that federal district courts in 1999 completed the fewest number of trials in thirty years, while filings were three times the number in 1969. Civil trials have been decreasing since 1982 and criminal trials have been decreasing since 1992. In 1980, the proportion of cases terminated by trial in civil cases was nine percent, but had declined to about three percent by 1999; the proportion of criminal cases terminated by trial was twenty-two percent in 1992, but had dropped to eleven percent by 1999. Systematic examinations of the reasons for these changes and effects of these changes on the judiciary are in order.²⁶ Periodic inquiries can also be valuable in providing some indication as to judicial perceptions about how the changing nature of the docket affects their views of their work.

Apart from issues associated with adjudicative activities, the nonadjudicative component of the judge's work also merits attention. Increasingly, administrative responsibilities occupy the judge at district and circuit court levels, at circuit council level, and at the level of committees of the Judicial Conference. Inexorably, as the size, components, and activities of the federal judiciary have expanded, judges have been compelled to invest time and judgment in giving professional attention to institutional problems facing the judiciary, court administration and case management, uses of tech-

23. On the sentencing guidelines, see, for example, KATE STITH AND JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998).

24. FED. JUDICIAL CTR., *supra* note 22, at 7, 29.

25. Memorandum from Dwayne Shivnarain on Highlights of Study of Trends in Southern District Civil Caseload, for Judge Thomas Griesa (Nov. 20, 2000) (on file with author).

26. As to the decline in civil trials, a variety of factors may have contributed, including: civil rules of practice and procedure; views on settlement as a preferred outcome; judicial education programs; case management practices; ADR programs; growing workloads, delays, financial incentives for litigants, financial incentives for attorneys; and attitudes toward and misconceptions about juries. Reasons for the decline in criminal trials include: sentencing guidelines; rise in guilty pleas; growing workloads; and prosecutorial strategies.

nology, updating rules of practice and procedure, interpreting the code of judicial conduct, monitoring budgetary planning and supervising the administration of bankruptcy and magistrate judges' courts, probation, defender services, court security, etc. How these duties affect the workways of the judge deserve some inquiry.

E. Resources

The judiciary's budget is roughly one-fifth of one percent of the total appropriated by Congress. Resources are allocated for both the maintenance of the judicial system (for example, providing funds so that jury trials can be conducted) and for support for the judicial office—for instance, secretarial, administrative, library, technological, continuing education, and law clerk assistance. We would be surprised if judges were unsatisfied with resources provided for the judicial office, although the Budget Committee of the Judicial Conference and the Administrative Office of the U.S. Courts must devote considerable effort to ensure that Congress appropriates adequate funds for the maintenance of the judicial system itself.²⁷

F. Time

How time is spent and whether that time is sufficient to perform the judicial task are vital questions, but ones not easily measured. Determining how time is allocated is a labor intensive task, requiring that judges maintain detailed time budgets each day. Perhaps for that reason, only one such inquiry has been undertaken, the landmark Third Circuit Time Study.²⁸ For a full year the active Third Circuit judges and their law clerks kept detailed daily time records. The average judge's working year exceeded 2400 productive hours, certainly comparable to the billing hours of most hard-driving law firms. Sixty percent of judge time was devoted to cases; of that thirty-two percent was spent on preparation and forty-eight percent on opinions. Of the almost forty percent spent on non-case activities, court administration activity accounted for seventeen percent of the total recorded judge time, about five percent on national Judicial Conference committee work and continuing education, some eight percent on pro bono community activities, and less

27. See generally Richard S. Arnold, *Money, or the Relations of the Judicial Branch with the Other Two Branches, Legislative and Executive*, 40 *St. Louis U. L.J.* 19 (1996).

28. A Summary of the Third Circuit Time Study, in *Conditions for Effective, MANAGING APPEALS IN FEDERAL COURTS* 299 (1988).

than four percent on general preparation (embracing all those activities to maintain professional competence).

The fact that the Third Circuit study is the only one of its kind ought to be a wake-up call that contemporary studies in various courts—at all levels—should be conducted. There is no better source of information about how judges spend their time and the implications of such. This is an area where some judges resist any external effort to document and analyze their use of time. Their sensitivity is understandable. They do not wish to be assayed against standards which they have had no responsibility in developing and which may have little relevance to their work. But wholly voluntary efforts designed and implemented by the courts themselves would seem to be a vital tool in coping successfully with present and impending pressures.

G. Resignations

By themselves, resignation/ turnover figures are not necessarily linked to problems of the judicial office. Judges may be committed to serving, regardless of their frustrations. Indeed, the satisfactions of the work may exceed any such concerns. Reasons of health and age could explain departure. Emily Van Tassel and the Federal Judicial Center have documented that resignation rates are historically low.²⁹ But troubling signs are emerging. A recent survey indicates that between 1991 and 2000, fifty Article III judges resigned or retired from the Federal bench, more than forty percent of the 126 Article III judges who have stepped down from the bench since 1965; thirty-one of the fifty-two judges who resigned or retired since 1991 joined law firms, and eight of the thirty-one judges left before retirement age.³⁰ Chief Justice Rehnquist reports that more than seventy Article III judges left the bench between 1990 and May 2002, either under the retirement statute or by voluntary resignation.³¹

29. EMILY FIELD VAN TASSEL, *WHY JUDGES RESIGN: INFLUENCES ON FEDERAL JUDICIAL SERVICE, 1789 TO 1992*, at 7 (1993).

30. AM. BAR ASSOC. & THE FED. BAR ASSOC., *FEDERAL JUDICIAL PAY EROSION: A REPORT ON THE NEED FOR REFORM 15* (2001), available at <http://www.uscourts.gov/judicialpay.pdf>.

31. William H. Rehnquist, Chief Justice of the United States, Address before the National Commission on the Public Service, July 15, 2002, available at http://www.supremecourtus.gov/publicinfo/speeches/sp_07-15-02.html (last visited Feb. 2, 2002).

Resignations are easy to monitor, and exit interviews with departing judges could yield useful data as to the reasons for leaving the judiciary.

H. Working Relationships

Especially at the appellate level, where decisions are generally made by three-member courts, collegiality is important. The lack of good working relationships would almost certainly impede the functioning of the court. For each circuit, a subjective inquiry into the state of those relationships merits consideration. This is, however, one area where periodic reports attempting to measure collegiality are inappropriate. This is a factor much better addressed under our suggested judicial self-help scenario.³²

I. Security

Even before the events of September 11, 2001, the judiciary had been concerned with security—witness the existence of a Judicial Conference Committee on Security, Space and Facilities. Three judges since 1979 have been murdered while in office, and some judges, such as those who have presided over high profile terrorism cases, have received round-the-clock protection. It may very well be that the nature of the security issue varies across the country, depending upon the level and nature of the perceived threat. The subject is complex, and in the recent wake of September 11, 2001, we shy away from instant analysis or even the suggestion of appropriate indicators of security. In so noting, we recognize that within the judiciary security is a matter of increasing attention.

J. External Institutional Relations: Congress and the Executive

In varying ways, Congress and the executive branch affect the institutional health of the judiciary. The executive branch is charged with making judicial nominations, and plays a role in supporting legislation affecting judicial life, ranging from compensation to housekeeping to the substance and procedure of judicial operations.³³ Congress, too, very much affects the courts. The Senate is involved in providing advice and consent to judicial nominees. Congress appropriates funds for the judiciary; enacts

32. See *infra* Part V.

33. See Robert A. Katzmann, *The President and the Federal Courts*, in BARRY P. BOSWORTH ET AL., *CRITICAL CHOICES* 131-33 (The Brookings Institution 1989); *Conditions for Effective Governance*, *supra* note 16, at 9-10 (calling for the creation of an Academy of Governance bringing together all three branches).

legislation affecting the administration of justice by regulating the structure, function and well-being of the courts; creates judgeships; determines court jurisdiction; sets judicial compensation; passes criminal and civil laws; provides for attorneys' fees; fashions laws that require judicial interpretation; and, monitors judicial performance through hearings and surveys.³⁴ A component of a judicial check-up would involve evaluation of the state of relations among the branches: for example, resources appropriated, judicial vacancies filled, new responsibilities added, criticisms leveled.

K. Public Understanding

Of all public servants, judges enjoy lifetime tenure so that they are protected from public pressures. But general public understanding of the judiciary is necessary if judges are to make difficult, indeed, unpopular decisions and have them obeyed. Moreover, legislative and executive support for the maintenance of a vital court system is no doubt affected by public opinion. Thus, measures of general public support could be useful in evaluating optimal conditions for judging. On a more specific basis, individual public complaints against the judiciary might be examined, although such complaints are not especially meaningful in making assessments about the judiciary as a whole.

Public support, however, is not what the judiciary itself can secure. What it can do is enhance public understanding of the job entrusted to the judiciary. Talks by judges, workshops at courts, and open houses, are all means that can be taken. Whether a record of such events could be used as a "measure" of understanding, it at least could be used as a measure of effort.

L. Media Coverage

The public's assessment of the federal judiciary is filtered through media reporting and editorials. An index of media coverage could provide a sense of the state of understanding of the judi-

34. The Governance Institute has for many years undertaken work exploring the full range of relationships between Congress and the federal courts. See, e.g., *JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY I* (ROBERT A. KATZMANN ED., 1988) [hereinafter KATZMANN, *JUDGES AND LEGISLATORS*]; ROBERT A. KATZMANN, *COURTS AND CONGRESS* 2-3 (Brookings/ Governance 1997) [hereinafter KATZMANN, *COURTS AND CONGRESS*]. Perhaps the most prominent report of judicial responses to a legislative questionnaire of the judiciary is to be found in U.S. SENATE JUDICIARY SUBCOMM. ON ADMIN. OVERSIGHT AND THE COURTS, *REPORT ON THE JAN. 1996 JUDICIAL SURVEY* (Part I, U.S. Courts of Appeals & Part II, U.S. District Courts) (1996).

ciary and hurdles to be overcome in fostering appreciation of the work of the judiciary. Background stories and articles about judicial process are more productive to this understanding.

IV. BEYOND FORMAL INDICATORS

A. A Process: Four Steps

Data secured from these various categories should begin to provide a picture of the judiciary and the conditions of judging. As discussed, quantifiable measures, although useful, cannot by themselves provide a complete picture; indeed, some measures will perforce be of limited value. Rather, what is needed is the richness that qualitative inquiry can provide. Thus, we envision that the periodic check-up would involve several steps.

Step One would be deliberately unfocused, with judges being queried as to matters such as what parts of their work experience they find most rewarding and least satisfying, how they spend their time, and what changes would be desirable to improve the functioning of the judiciary.

Step Two would involve a sifting of these responses and the creation of a more pointed questionnaire in which, for example, judges might be asked to rate the sources of frustrations (very frustrating; frustrating; not frustrating) both outside and within the judiciary; rank, beginning with most frustrating, what can be done to improve effectiveness both inside and outside the judiciary; and offer their views about how the compensation issue affects the challenge of attracting able persons to the bench and retaining such individuals in office.

Step Three would entail focused discussions, based on the responses to the Step Two questionnaire, perhaps in the context of individual circuit conferences or workshops, with the objective of exploring what kinds of improvements can or should be made within and without the judiciary.

Step Four would be the implementation of these suggested improvements.

As we indicate below in "The Next Step," district courts, circuit courts, circuit conferences, and the Federal Judicial Center should be involved in this process.

B. An Experiment: Views from the Field

Our recent experience provides an example of how such an inquiry might be undertaken. In November 2000, the district and

appellate judges of the Second Circuit, with some participation from the district judges of the D.C. Circuit, held a workshop in Cooperstown, New York, under the auspices of the Federal Judicial Center. One of the sessions, which the junior author was charged with organizing, explored the "Life of the Judge." Along the lines of Step One, the judges were asked a series of general questions. A seasoned panel, consisting of Senior U.S. Circuit Judge Wilfred Feinberg, Senior U.S. Circuit Judge James L. Oakes, Senior U.S. District Judge Leonard Sand, U.S. District Judge Thomas Hogan, and U.S. District Judge Naomi Buchwald, offered their views and engaged in a discussion with the other judges present. Next, the authors of this article proceeded to Step Two, analyzing the responses and devising a more focused questionnaire. Through the good offices of the Federal Judges Association ("FJA") and its then-President, U.S. Circuit Judge Ann Williams, we were able to send a questionnaire in the FJA newsletter *In Camera*, with return postage provided, to every federal judge. We received 258 responses, nearly twenty-four percent of the whole judiciary (both actives and seniors).³⁵

The questionnaire (Chart A) and responses are suggestive of judicial perceptions of a not inconsiderable number of federal judges, although we make no claims of methodological rigor and completeness.³⁶

1. CHART A

Judges' Questionnaire: Perceived Obstacles to Optimum Performance

This brief series of questions seeks to identify obstacles and frustrations perceived by judges in their work and the most likely opportunities for improving our effectiveness. Kindly mail your responses by May 25, if possible, by folding this page in half and stapling the corners.

35. At the time of the survey, there were authorized 179 circuit judgeships and 646 district court judgeships, with some 107 vacancies; in addition, eighty-six circuit judges and 273 district court judges were on senior status.

36. We note that some questions elicited more responses than others, so that it is difficult to reach any definitive conclusion with respect to those questions. Moreover, to assuage concerns about anonymity, we did not ask respondents to identify their circuits and districts. Had we done so, we would have been able to attempt to make comparisons among circuits, geographically and demographically. Frank M. Coffin and Robert A. Katzmann, *Towards Optimal Judicial Workways*, in *WORKWAYS OF GOVERNANCE* app. (Roger H. Davidson ed., forthcoming).

1. Total years on bench ____; ____years on federal circuit court; ____yrs. on federal district ct.; ____yrs. on magistrate ct.; ____ yrs. on bankruptcy ct.

2. Rate the sources of frustration experienced in your work: V – very frustrating; F – frustrating; NF – not frustrating

Outside the Judiciary

Inside the Judiciary

___ Lawyers

___ Too much work, not enough time

___ Pro ses

___ Case management

___ Congress

___ Processes of deliberation and opinion writing

___ Public

___ Court administration, committees, etc.

___ Media

___ Support/ Personnel

___ Executive Branch

___ Technology

___ Other (specify)

___ Other (specify)

3. Concerning sources outside the judiciary:

(a) in rank order, beginning with your most frustrating, what can be done to improve our effectiveness?

1. _____

2. _____

3. _____

4. _____

4. Concerning sources inside the judiciary:

(a) again, beginning with your most frustrating, what can be done?

1. _____

2. _____

3. _____

4. _____

5. Compensation:

(a) Thinking back to your pre-judicial phase, if you were told that you could not expect regular Cost of Living Adjustments (“COLAs”) over the next ten years or a pay raise, what impact would that have had on your decision to seek judicial appointment?

___would not apply; ___less likely to apply; ___no impact on decision.

(b) Assuming a continuation of bypassing COLAs and catch-up pay for next 10 years:

(i) For judges in your 40s and 50s, what is the likelihood of your resigning?

___ Unlikely; ___ Possible; ___ Probable; ___ Certain;

(ii) All others: Likelihood of your resigning?

___ Unlikely; ___ Possible; ___ Probable; ___ Certain;

2. SUMMARY OF RESPONSES TO JUDGES' QUESTIONNAIRE

(Two hundred fifty-eight judges responded: 199 district judges; 39 circuit judges; and 20 judges who did not indicate on which court they sat. Percentages are based on the total number of responses to the survey.)

a. Frustrations Outside the Judiciary

Very frustrating and frustrating:

- 1. Congress 74% (of all reporting)
- 2. Pro Ses 68% (of all reporting)
- 3. Lawyers 34% (of all reporting)
- 4. Media 36% (of all reporting)
- 5. Exec. Br. 38% (of all reporting)

b. Frustrations Inside the Judiciary

Very frustrating or frustrating:

	Circuit Judges	District Judges
Too much work	61%	47%
Court administration	29%	27%
Technology	26%	24%
Case management	19%	26%

Other subjects with low ratings of frustration:

	Circuit Judges	District Judges
Deliberation	11%	17%
Personnel	13%	15%

Top list by far: too much work.

Second place: non-case related work

Circuit judges were bothered more about workload than district judges, while district judges were more concerned about case management.

c. Compensation

The responses to the compensation questions (5a and 5b) shed light on the link between salary and recruitment and retention.

If they knew that they could not expect regular COLAs over the next ten years or a pay raise, sixty-one percent of circuit judges and sixty-two percent of district judges would not have applied or would have been less likely to apply. Of those judges in their forties and fifties, assuming a continuation of bypassing COLAs and catch-up pay for the next ten years, sixty-four percent of district judges indicated that it was at least possible they would resign, while thirty-six percent indicated they were unlikely to do so.³⁷ The sample of circuit judges to this question was too low to draw any meaningful conclusion.

d. Insights from Judges' Comments.

What the FJA responses show is a variety of sources of frustration together with a general affirmation of, appreciation of, and commitment to the profession of a federal judge. The areas of widespread dissatisfaction are: the workload, the level of compensation and failure to keep pace with the cost of living, the varied actions of Congress (in legislating, in federalizing crimes, and in oversight, not so much in funding), and the burdens of bureaucracy and court administration.

Reading the suggestions volunteered by many of the judges opened our eyes to what a more appropriate forum for self-examination and dialogue might accomplish. These were not statistics but germs of thought that invite further probing. A few of them are:

On the key issue within our control:

- “Learn to work more efficiently.”

On relations with Congress:

- Find more ways to connect with Congress generally.

37. Specifically, thirty-seven percent indicated “possible,” twenty percent indicated “probable,” and seven percent indicated “certain.” As to all other judges—those in their sixties and above—fifteen percent of district judges responded that it was possible they would resign, ten percent that it was probable, and five percent that it was certain, while seventy percent stated that they were unlikely to do so. These data are evidence that the closer a judge is to senior status or retirement age, with the attendant financial benefits to be enjoyed upon achieving such status, the less likely that he or she will leave the bench, regardless of compensation.

- Invite Members of Congress to spend the day with a judge (and have judges spend a day with a Member). They need to know what we actually do.
- Give feedback to Congress as to how Legislation is working out.

On relations with the Executive:

- Develop relations with the White House Chief of Staff and Counsel.

On press relations:

- Get to know editorial writers
- Require a court media expert to have media experience, legal knowledge, and good people skills.
- Hold Federal Judicial Center seminars.

On lawyers:

- Assist in their training.

On relations between appellate and trial courts:

- Open a dialogue on subjects such as: eliminating disparate standards of review, uses of appellate fact finding; and increasing understanding of district judge concerns, and vice versa.
- Sensitize appellate judges to: need to reduce length of opinions; pedantic reversals; and insensitive tone.

On administration:

- "There may be too many committees. They tend to be self-aggrandizing over time."
- "A reality check is necessary."
- Pro ses: Develop more pro se law clerks and staff attorneys; legal assistance for pro ses; education programs; clearer rules and procedures; a separate administrative and judicial structure; and less permissiveness toward appeals.

On technology:

- "Concern over use of technology to expand production, not improve quality."
- "Instant communication suggests instant decision."
- Build more one-on-one relationships for technical training.
- "Fewer bells and whistles, and more reliability in simpler tasks."

On easing workload:

- Encourage lower volume courts to help higher volume courts

- Create sabbaticals
- Promote continuing education in case- and time-management.

Even this list, except for the last entry, does not touch on what judges themselves can do to make their work better and their life more pleasant. One judge responded to the FJA questionnaire with a cry of despair: “I have not taken a Sunday off in two years. I am exhausted, cranky and disgusted with the failure to adequately staff this court. My 70-hour work week will prompt my resignation.”

This judge needs help. Probably he or she needs more than additional staff if such is needed at all. What the FJA survey and responses indicate is a need for a systematic way of addressing problems confronted by judges in reaching their full potential of effectiveness.

V. THE NEXT STEP: A SYSTEM OF JUDICIAL SELF-HELP

Although the survey provided a useful compendium of concerns and suggestions, it did not offer much in the way of concrete suggestions about how to accomplish various ends. The remedies offered, for the most part, involve actions that only others can do. Indeed, the judiciary could not implement these suggestions, even if it were inclined to do so, without congressional and executive action—for example, repealing newly federalized crimes, diminishing drug cases, abolishing diversity jurisdiction, modifying or repealing the sentencing guidelines, adding more judges, or providing for discretionary appeals.³⁸ For such measures, the judiciary is dependent upon legislative and executive support; hence strategies for strengthening links among the three branches, especially the First and Third, are very much in order. Ideas for such approaches could be channeled through the chief judge of the cir-

38. Each of these subjects has already generated considerable discussion. For example, on the subject of the size of the judiciary, see Jon O. Newman, 1,000 Judges – The Limit for an Effective Judiciary, 76 *JUDICATURE* 187 (Dec.-Jan. 1993); Gerald Bard Tjoflat, Comment, The Federal Judiciary: A Scarce Resource, 27 *CONN. L. REV.* 871 (1995); J. Harvie Wilkinson III, The Drawbacks of Growth in the Federal Judiciary, 43 *EMORY L.J.* 1147, 1164–72 (1994). On diversity jurisdiction, see, e.g., *FED. JUDICIAL CTR.*, supra note 22, at 7; Dolores K. Sloviter, A Federal Judge Views Diversity Jurisdiction through the Lens of Federalism, 78 *VA. L. REV.* 1671 (1992) (arguing that diversity jurisdiction results in federal courts intruding on the function of state courts); Frank M. Coffin, Judicial Gridlock: The Case for Abolishing Diversity Jurisdiction, in 10 *BROOKINGS REVIEW* 34–39 (1992).

cuit, who, in his or her capacity as a member of the Judicial Conference, could contact the appropriate Conference committees.

As to the principal concern having to do with the task of judging—"too much work, not enough time"—the suggestion that judges "learn to work more efficiently" has the virtue of not requiring any ambitious institutional undertaking. In ascertaining how to accomplish the work with more modulated investments of time, the most promising initial step should be that of drawing upon the imponderable reservoir, judicial self-help: getting judges to pass on their wisdom and experience to other judges.

Perhaps the process of passing on such "useful knowledge," as Benjamin Franklin termed it, could begin with the newly appointed judge. A sitting schedule which places the freshly minted judge on panels with role models is perhaps the most natural way to stimulate thinking about best practices.

For judges generally, there are several levels of opportunity within the existing structure of the federal judiciary for the exchange of ideas. One opportunity is the Circuit Conference. Historically, an objective of each circuit conference is to exchange information designed to advance the administration of justice within the circuit. Traditionally, the data and reports are geared to quantitative issues: caseloads, cases and appeals decided or pending, time elapsed between filing and decision, etc. What we suggest is that periodically, perhaps once every two to four years, the Circuit Conference be devoted primarily to various kinds of sessions, workshops, seminars, focus groups and simulations designed to present practical problems confronting district and circuit judges (and their dealings with each other).

Such an event might well involve intra-circuit initiatives to stimulate informal discussions among the judges on issues of discovery, control, settlement explorations, trial time, law clerks, complex litigation, opinion writing, collegiality, en banc proceedings, even a judge's off-bench time. Small workshops within districts and the circuit, undertaken with the assistance of the Administrative Office of the U.S. Courts and the Federal Judicial Center, would prepare the way, identify the agenda, the format, and participants for the conference presentations.

For such programs to be successful, it is essential that the initiative and the direction stem from judges within the circuit. It is not enough to decide on an agenda item and then call in the Administrative Office of the U.S. Courts and the Federal Judicial Center or other sources of expertise. Each circuit should have a committee or task force of judges whose job it would be to give all necessary gui-

dance in devising and implementing “quality of life and work” assessment sessions.

Once the various circuits develop some expertise in mounting judge-to-judge self-help events, a cadre of experienced district and circuit mentor-judges might well be sponsored by the U.S. Judicial Conference on a national basis, to go where asked and share their wisdom.

In 1989, the senior author wrote the introductory essay to the Ohio State Law Journal series, “Judges on Judging,” entitled “Grace under Pressure: A Call for Judicial Self-Help.” It said in part:

A threshold question is whether self-help is possible. Do judges have anything that can be given to others? Are such qualities as initiative, a gift for innovation and ingenious improvisation, flair, and intuition communicable?

I recently spent some time with a widely respected judge who had also taught in law school for more than three decades. He was telling me about his teaching a course in negotiating. I asked, “Can this be taught?” His answer was the question, “Can it be learned? If it can be learned it can be taught.” Then he quickly added, “Of course not everything can be taught. The basic skills and attitudes and sensitivities can be passed on. There is always something more to it. But this is better than trying to do all of it on the job. Anything that is learned wholly on the job can be improved.”

...

This is what we judges should be doing—learning from our peers what they do and why they do it when their performance of a judicial function rises to such a level of elegance and excellence that it can truly be called a work of art.³⁹

VI. CONCLUSION

This study has focused on the “what” of ways to improve judicial performance. It has not sought information as to the “how” of implementation. We now briefly address that question.

We have outlined a number of areas where a systematic effort at pulse-taking can be expected to yield meaningful indications of progress or retreat in achieving optimum conditions for judicial performance. We have also sketched the fundamentals of a systematic process of judicial self-help.

39. Frank M. Coffin, *Grace Under Pressure: A Call for Judicial Self-Help*, 50 OHIO ST. L.J. 399, 400 (1989).

What is now needed is further judicial input to assess the feasibility of the various suggestions and to determine the proper agency for carrying them out. In our view, the obvious body for such tasks is the Judicial Conference Committee on the Judicial Branch. Long concerned with ways to improve the lot of the federal judiciary in such matters as travel and compensation, it has an equal interest in removing barriers to optimum judicial functioning.⁴⁰ Its membership also represents all circuits.

Accordingly, we recommend, first, that the projects identified in the section entitled "A Spectrum of Workway Indicators" be accepted by the Judicial Branch Committee for evaluation as to need and feasibility. They include: exit interviews of officials and committees involved in judicial recruitment, analysis of caseload changes and implications, voluntary time studies in district and circuit courts, exit interviews of resigned judges, evaluation of relations among the branches, maintaining records of judicial efforts to enhance a public understanding, and maintaining an index of media coverage.

The Committee should seek the aid of the Administrative Office of the U.S. Courts, the Federal Judicial Center, and other committees of the Judicial Conference, and would likely find such organizations as the Federal Judges Association, American Bar Association, American Judicature Society, and Governance Institute ready to assist in such an effort.

We recommend, second, that the Judicial Branch Committee undertake to develop a sustained system of judicial self help, involving courts at all levels and all circuits. The concept of judicial self-help should infuse the project from the start. Courts and circuits should be asked for their input. Diverse and creative pilot projects should be encouraged and monitored.

Finally, we recognize that while our focus is on what judges can do for themselves, the effectiveness of the judiciary depends on the successful operation of the entire governmental system. To that end, we reiterate a proposal made some years ago: that a simple entity be created bringing together those across the three branches of government who share in common the responsibilities of work-

40. Indeed, it was at the Committee's behest that the Governance Institute began its work on judicial-congressional relations. See *supra* note 34. The Committee also sponsored an inquiry into judicial independence. See generally Deanell Reece Tacha, *Independence of the Judiciary for the Third Century*, 46 *MERCER L. REV.* 645 (1995) (discussing the independence of the judiciary in both the institutional and individual sense).

ing toward the public good.⁴¹ Such an academy could be funded by private foundations, be quasi-governmental (for example, the Woodrow Wilson International Center for Scholars), or be wholly governmental (for instance, an organization such as the General Accounting Office, which monitors government performance). Membership would consist of retired and current representatives of the three branches, scholars and senior persons of the media. Meetings would be convened to assess periodically the current state of governing and to identify ways in which it can be improved. The society would assist in the preparation and updating of objective data and surveys of experiences; hold colloquia on the state of governance; issue reports on the health of our institutions and relations among the branches; bestow awards on outstanding performers; communicate concerns to the Congress, the executive branch, the judiciary, and the public; and provide a comfortable venue for informal discussions, lectures, and dinners.

Such an entity would be a concrete symbol of a government-wide objective of excellence in the performance of the functions of the three branches.

The far-seeing CEO of even the most successful current enterprise is constantly focusing on better ways to satisfy the public and to maintain internal efficiency and morale. The CEO has a reference library of consultants he can call upon. The federal judiciary can use consultants but only if it can fully appreciate the unique conditions and aspirations governing it. Therefore, recourse to its own immeasurable reservoir of self-help on a wider, more continuing, more systematic basis is obvious, feasible, and necessary. What we have proposed is modest and we think eminently do-able. The various processes of periodic check-ups, self-examination, self-help, and the sharing of experiences are at once preservative and renewing. They help ensure the continuing vitality of the judiciary and that its human component, the individual federal judge, is enabled to live up to the challenge of enduring excellence.

41. Conditions for Effective Governance, *supra* note 16, at 9–10 (calling for the creation of an Academy of Governance bringing together all three branches); KATZMANN, JUDGES AND LEGISLATORS, *supra* note 34, at 189 (promoting exchanges between courts and Congress); KATZMANN, COURTS AND CONGRESS, *supra* note 34, at 105 (promoting exchanges between courts and Congress).

402 NYU ANNUAL SURVEY OF AMERICAN LAW [Vol. 59:377