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THE POLITICAL AND ADMINISTRATIVE HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

HONORABLE ARTHUR J. STANLEY, JR.* AND IRMA S. RUSSELL**

The Tenth Circuit Court of Appeals was created by dividing the Eighth Circuit. Until the recent formation of the Eleventh Circuit,¹ this was the only time geographical boundaries had been altered since the present federal circuit court system was instituted in 1891.² The Tenth Circuit came into existence in April 1929, the eve of a period in our nation's history that was to see vast—almost revolutionary—changes in our system of justice.

I. BACKGROUND: APPEALS IN THE EARLY DAYS OF THE FEDERAL JUDICIARY

Section 1 of Article III of the Constitution vests the judicial power of the United States "in one Supreme Court and in such inferior Courts as Congress may from time to time ordain and establish."³ The Judiciary Act of 1789⁴ created a three-tier system similar in theory, though quite different in practice and jurisdiction from the three-tier system in effect today.⁵ The Act established thirteen district courts, one per state. Although the country was divided into three circuits—Southern, Middle, and Eastern,⁶ there was no counterpart to the current United States judge of the court of appeals. The six Supreme Court Justices had the duty of riding circuit. Two justices were

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1. The new Eleventh Circuit, composed of Alabama, Florida, and Georgia, was created out of the Fifth Circuit. The reconstituted Fifth Circuit is now composed of the District of the Canal Zone, Louisiana, Mississippi, and Texas. See 28 U.S.C. § 41 (Supp. IV 1980).

2. Before the Act of 1891, boundaries were changed on several occasions. In 1802 six circuits were created, embracing all the states then in the union. Additional changes were necessary when states were added to the union. In 1842 the boundaries of the Fourth, Fifth, Sixth, and Ninth Circuits were redrawn. Act of August 16, ch. 1891, 1842, 5 Stat. 507. In 1863, the boundaries of the Seventh and Eighth Circuits were redrawn when Indiana was detached from the Seventh and included in the Eighth. Act of Jan. 28, 1863, ch. 13, 12 Stat. 637. See Surrency, *A History of Federal Courts*, 28 MO. L. REV. 214, 225 (1963). It has been proposed that the Ninth Circuit be split. See A Commission on Revision of the Federal Court Appellate System, *The Geographic Boundaries of the Several Judicial Circuits: Recommendation for Change*, 62 F.R.D. 223, 234 (1973) [hereinafter *Geographic Boundaries*].

3. U.S. CONST. art. III, § 1.

4. Judiciary Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

5. In addition to this three-tier system, other courts that derive their powers from Article III were later created by statute. See Maris, *The Federal Judicial System*, 12 MOD. FED. PRAC. DIG. 815, 821-22 (1960).

6. Judiciary Act of Sept. 24, 1789, ch. 20, § 4, 1 Stat. 73, 74.

assigned to each circuit and would sit with a district judge to constitute the circuit court.⁷ Two districts, Maine and Kentucky, were not under the jurisdiction of any circuit court.⁸

These circuit courts not only exercised appellate jurisdiction, but original jurisdiction in certain cases.⁹ They held concurrent original jurisdiction in diversity cases with an amount in controversy in excess of \$500.¹⁰ In 1793, Congress provided that only one Supreme Court Justice need sit on each circuit court, which meant that a single justice and two district judges could constitute the circuit court.¹¹ It also empowered the single Supreme Court Justice to sit as the circuit court in cases in which the district judge "shall be absent, or shall have been of counsel, or be concerned in interest in any cause then pending. . . ."¹² Congress later provided that each justice need sit as a circuit judge during only one session each year.¹³ Despite reform attempts¹⁴ and the creation of the courts of appeals in 1891,¹⁵ this system remained basically unchanged in theory until 1911.¹⁶ In practice, the Supreme Court Justices stopped riding circuit sometime in the second half of the nineteenth century.¹⁷

The office of circuit judge was created in 1869,¹⁸ with one circuit judge assigned to each circuit. The additional judge provided several alternatives for review of appellate matters: Circuit court could be held, as before, by the

7. Parker, *The Federal Judicial System*, 14 F.R.D. 361 (1954). Under 28 U.S.C. § 42 (1976 & Supp. IV 1980) the Supreme Court allots a justice to each circuit to serve as circuit justice. Although the justices are authorized to sit on the appellate court, they are no longer required to do so. 28 U.S.C. § 43(b) (1976). The circuit justices who have been assigned to the Tenth Circuit are as follows:

Willis Van Devanter, 1929-1937 (279 U.S. iv) (1929).

Pierce Butler, 1937-1940 (302 U.S. iv) (1937).

Stanley Reed, 1940 (309 U.S. iv) (1940).

Frank Murphy, 1941-1943 (314 U.S. v) (1941).

Wiley B. Rutledge, 1943-1949 (318 U.S. iv) (1943).

Tom C. Clark, 1949-1957 (338 U.S. v) (1949).

Charles Whittaker, 1957-1962 (353 U.S. iv) (1957).

William O. Douglas, April 2, 1962-April 16, 1962 (369 U.S. vi) (1962).

Byron R. White, 1962-present (370 U.S. iv) (1962).

8. See *supra* note 6.

9. Judiciary Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 78. The circuit court had original jurisdiction to hear most civil litigation, including diversity cases, and to hear important criminal cases involving violations of federal statutes.

10. Surrency, *supra* note 2, at 215. In 1842 the circuit and district courts were given concurrent original jurisdiction for trials of noncapital crimes. Act of August 23, 1842, ch. 188, § 3, 5 Stat. 516, 517.

11. Act of Mar. 2, 1793, ch. 22, 1 Stat. 333.

12. *Id.* at 334. For example, Aaron Burr was tried by a circuit court composed only of Chief Justice John Marshall and District Judge Cyrus Griffin. See *United States v. Burr*, 25 F. Cas. 25 (C.C.D. Va. 1807) (No. 14.692b).

13. Act of June 17, 1844, ch. 96, 5 Stat. 676.

14. See Surrency, *supra* note 2, at 228-31. In 1801 the Midnight Judges Bill provided for 16 additional circuit judges and increased the number of circuits to six. It also reduced the number of Supreme Court justices to five and relieved them of circuit duty. The entire statute was repealed the following year. See Maris, *supra* note 5, at 816.

15. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.

16. Act of Mar. 3, 1911, Pub. L. No. 61-475, 36 Stat. 1027. The Act created exclusive appellate jurisdiction in the circuit courts except for decisions that could be appealed directly to the Supreme Court. See *id.* at 1133-34.

17. Surrency, *supra* note 2, at 223.

18. Act of Apr. 10, 1869, ch. 22, 16 Stat. 44.

Supreme Court Justice assigned to the circuit, the local district judge, and the new circuit judge, or by any two of these three sitting together.¹⁹

The Judiciary Act of 1891 (Act)²⁰ established the basic foundation of the current federal judiciary system. To reduce the overloaded docket of the Supreme Court, the Act created a circuit court of appeals for each of the existing circuits.²¹ The Circuit Court of Appeals heard appeals from both district and circuit courts.²²

When the circuit courts were abolished in 1911,²³ their original jurisdiction vested in the district courts.²⁴ The jurisdiction of the courts of appeals was appellate only, and extended over all final judgments of the federal district courts except those directly appealable to the Supreme Court.²⁵ In 1925 Congress significantly limited the types of cases that could be directly appealed to the Supreme Court,²⁶ thus enlarging the jurisdiction of the circuit courts. Their jurisdiction was later further enlarged to include enforcement of the orders of certain agencies,²⁷ review of decisions of the Tax Court,²⁸ and of actions by federal agencies.²⁹ The Judicial Code of 1948 changed the name Circuit Court of Appeals to Court of Appeals.³⁰

When a new state was added to the Union, a single judicial district with one judge was added to the federal judicial system. The only exception to this rule was Oklahoma which was organized into two districts at the time it joined the Union.³¹ Later, some other states were also divided into additional districts. Redistricting was not always accomplished in conjunction with the appointment of an additional judge for the new district.³² In cases where an additional judge was not appointed, the only benefit gained by

19. Surrency, *supra* note 2, at 232.

20. Act of Mar. 2, 1891, ch. 517, 26 Stat. 827.

21. Surrency, *supra* note 2, at 233.

22. *Id.*

23. Act of Mar. 3, 1911, Pub. L. No. 61-475, 36 Stat. 1087. The Act is entitled, "[a]n Act to codify, revise and amend the laws relating to the judiciary."

24. Surrency, *supra* note 2, at 216.

25. See Act of Mar. 3, 1911, Pub. L. No. 61-475, § 128, 36 Stat. 1087, 1133-34.

26. See Act of Feb. 13, 1925, ch. 229, § 128, 43 Stat. 936; see 28 U.S.C.A. § 1291, Prior Law on Appellate Jurisdiction. Before this Act parties had a right of direct appeal from the district court to the Supreme Court as follows:

Any case in which the jurisdiction of the court was in issue, in which case the question of jurisdiction alone was certified to the Supreme Court; final sentences and decrees in prize causes; any case which involved the construction or application of the Constitution of the United States; any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority was drawn in question; and any case in which the constitution or law of a State was claimed to be in contravention of the Constitution of the United States.

Act Mar. 3, 1891, § 5, 26 Stat. 827 (currently found at 28 U.S.C.A. § 1252 (1966) (historical note)). The 1925 Act abolished the right of appeal to the Supreme Court except in specific cases. See 28 U.S.C. §§ 1252, 1253 (1976).

27. See 15 U.S.C. § 21 (1976).

28. See Act of Nov. 2, 1966, Pub. L. No. 89-713, § 3, 80 Stat. 1107, 1109 (codified at 26 U.S.C. § 7482 (1976)).

29. See 5 U.S.C. §§ 701-702 (1976).

30. Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 869, 870 (codified at 28 U.S.C. § 43 (1976)).

31. Act of June 16, 1906, Pub. L. No. 59-234, § 13, 34 Stat. 267, 275 (codified in scattered sections of 16 and 28 U.S.C.)

32. See Surrency, *supra* note 2, at 238-39.

redistricting was additional locus for the court. Generally, each district had its own federal district judge, though occasionally two districts would share a single judge,³³ as occurred in Oklahoma. At present Oklahoma is the only state in the Tenth Circuit comprising more than one federal judicial district; it is divided into three districts with some judges appointed to serve in all three.

The creation of the Tenth Circuit in 1929 was actually the second time a "Tenth Circuit" had been created in the United States judicial system. In 1863, Congress created ten circuits and increased the number of Supreme Court Justices to ten.³⁴ The first Tenth Circuit embraced California and Oregon.³⁵ After three years, this circuit was abolished and the states redistributed among the nine circuits.³⁶ Subsequently, as new states joined the Union, they were assigned to one of the nine circuits. In 1940 the District of Columbia Circuit was added for specific purposes.³⁷ Later, the District of Columbia Circuit was given the same authority of the other circuits³⁸ and the chief judge of the District of Columbia Circuit was included as a member of the Judicial Conference.³⁹ The Eleventh Circuit was added in 1980⁴⁰ because of the growing caseload in the old Fifth Circuit.⁴¹ Division of the Ninth Circuit has been advocated.⁴² In 1982 the United States Court of Customs and Patent Appeals and the appellate functions of the United States Court of Claims were combined into a new United States Court of Appeals for the Federal Circuit.⁴³

II. CREATION OF THE TENTH CIRCUIT—SOCIAL CLIMATE

When the Tenth Circuit was created in April 1929, the social and political climate in the United States was marked by optimism and apparent stability.⁴⁴ Of the new Tenth Circuit's non-Indian inhabitants, many were only a generation away from the pioneers who had settled along the Oregon and Santa Fe Trails. Their parents and grandparents taught them self-reliance and independence. Inhabitants also included the descendants of miners and adventurers who came west seeking fortunes and then settled down

33. *Id.* at 239-40.

34. Act of Mar. 3, 1863, ch. 100, 12 Stat. 794.

35. *Id.*

36. Act of July 23, 1866, ch. 210, 14 Stat. 209.

37. Act of Dec. 29, 1942, ch. 835, § 1(d), 56 Stat. 1094.

38. *See* 28 U.S.C. § 41 (1976). This was accomplished partially in order to conform the system to the Supreme Court's expectations. *See, e.g.*, *Commissioner v. Estate of Bedford*, 325 U.S. 283, 288 (1945) (Court referred to "the eleven circuits forming the . . . federal judiciary"); *see also* *O'Donoghue v. United States*, 289 U.S. 516 (1933); *Swift & Co. v. United States*, 276 U.S. 311 (1928).

39. P. FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 40 (1973).

40. *See* Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, § 2, 94 Stat. 1994 (codified at 28 U.S.C. § 41 (Supp. IV 1980)).

41. *See* H.R. REP. NO. 1390, 96th Cong., 2d Sess. 1, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4236, 4237.

42. *See supra* note 2.

43. Federal Court Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified in scattered sections of 5, 16, 18, 19, 26, and 28 U.S.C.).

44. In at least economic terms, this apparent stability proved false. In October 1929, just seven months later, the stock market crashed and the depression began.

to establish towns, ranches, and farms. The states in the Tenth Circuit had entered the Union under varying circumstances, and their people were varied in heritage, culture, and life style as were the Indians who had farmed the valleys and roamed the mountains and plains long before the white settlers arrived.

At the time, most Americans were moderately prosperous, self-satisfied, and confident of the future. The dollar was backed by gold. In *Wealth of Nations*,⁴⁵ the bible of many respected economists and politicians, Adam Smith argued that society's good is promoted by the activities of profit-seeking entrepreneurs. John Maynard Keynes' view that government should manage the economy would not gain its followers until the Depression had taken its toll.⁴⁶

Jurisprudence, "the science which treats of the principles of positive law and legal relations,"⁴⁷ was of interest chiefly to philosophers and law professors. Courts generally did not see their function as requiring consideration of "the ultimate effect which would be produced if each rule were applied to an indefinite number of similar cases, and to choose that rule which, when so applied, will produce the greatest advantage to the community."⁴⁸

Practice and procedure in the federal courts were governed by rules that had prevailed without radical change since the enactment of the Judiciary Act of 1789.⁴⁹ The Federal Rules of Civil, Criminal, and Appellate Procedure had not been promulgated.⁵⁰ *Erie Railroad Co. v. Tompkins*⁵¹ had not yet overruled *Swift v. Tyson*.⁵² Federal practice differed radically on the law and equity sides. Cases at law were conducted in accordance with the procedural law of the state in which the court sat, while the Federal Equity Rules governed the trial of cases in equity. The published rules and regulations of the federal agencies did not, as they do now, take up fifteen feet of shelf space. The number of administrative law cases had not yet burgeoned to the point that led Justice Frankfurter to declare in 1957: "Review of administrative action, mainly reflecting enforcement of federal regulatory statutes, constitutes the largest category of the court work, comprising one-third of the total cases decided on the merits."⁵³ Ernesto Miranda had not been born. "The Trilogy" of habeas corpus cases was still thirty years from decision.⁵⁴ The class action, the child of equity, was mentioned more often in scholarly dissertations than in court opinions.

The eighteenth amendment had not yet been repealed by the twenty-

45. A. SMITH, *WEALTH OF NATIONS* (1776).

46. See, e.g., J.M. KEYNES, *THE ECONOMIC CONSEQUENCES OF PEACE* (1920); J.M. KEYNES, *THE GENERAL THEORY OF EMPLOYMENT INTEREST AND MONEY* (1936).

47. BLACK'S LAW DICTIONARY 767 (Rev. 5th ed. 1979).

48. *Id.*

49. Judiciary Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

50. The Federal Rules of Civil Procedure became effective Sept. 16, 1938; the Rules of Criminal Procedure Sept. 1, 1945; the Rules of Appellate Procedure July 1, 1968.

51. 304 U.S. 64 (1938).

52. 41 U.S. (16 Pet.) 1 (1842).

53. Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 793 (1957) quoted in K. DAVIS, *ADMINISTRATIVE LAW AND GOVERNMENT* 13 (1960).

54. *Sanders v. United States*, 373 U.S. 1 (1963); *Fay v. Noia*, 372 U.S. 391 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963).

first, and thus the "noble experiment"—the prohibition of the manufacture, sale, and transportation of intoxicating liquors—was still underway. Cases charging violations of the prohibition laws, the Volstead Act,⁵⁵ cluttered the criminal dockets of federal trial and appellate courts.

III. LEGISLATION CREATING THE TENTH CIRCUIT⁵⁶

The efforts of Congress and the bar to alleviate congestion in the circuit courts, particularly in the Eighth Circuit, began in 1925 and culminated in 1929 with the creation of the Tenth Circuit. Before the creation of the Tenth Circuit, the Eighth Circuit contained thirteen states touching both the northern and southern borders of the country (Minnesota and New Mexico) and stretching from Iowa on the east to Utah on the west. After studying the problem of congested dockets, a subcommittee of the American Bar Association (ABA) drafted a bill, H.R. 5690, that would have redrawn the areas of all the existing circuits as well as adding a tenth circuit. The Tenth Circuit would have included the following states: Arizona, California, Idaho, Montana, Nevada, Oregon, Utah, and Washington.⁵⁷ The bill was presented to Congress in 1927 without the ABA's endorsement or, indeed, a consensus of the committee that had created it.⁵⁸ It received an overwhelmingly negative response from attorneys and the Congress.⁵⁹

Opposition to the bill centered on its failure to create any new judge-ships⁶⁰ and also the switching of states from one circuit to another. Congressman Newton objected to the plan because of the differences in the procedural and substantive law of the existing circuits.⁶¹ Some traditionalists were opposed to creating an additional circuit on the ground that the number of circuits should be equal to the number of Supreme Court Justices.⁶² Since 1837 the number of Supreme Court Justices had remained

55. Pub. L. No. 66-6810, 41 Stat. 305, *repealed by* Liquor Law Repeal & Enforcement Act 1935, ch. 740, § 1, 49 Stat. 872.

56. This section draws significantly from D. Bonn, *The Geographical Division of the Eighth Circuit Court of Appeals* (Sept. 1974) (research report written for the Federal Judicial Center).

57. *Id.* at 4.

58. *Id.* at 3. Similarly, in recent recommendations the Commission on Revision of the Federal Court Appellate System rejected the idea of realigning all the circuits to equalize the workload.

We have not recommended a general realignment of all the circuits. To be sure, the present boundaries are largely the result of historical accident and do not satisfy such criteria as parity of caseloads and geographical compactness. But these boundaries have stood since the nineteenth century, except for the creation of the Tenth Circuit in 1929, and whatever the actual extent of variation in the law from circuit to circuit, relocation would take from the bench and bar at least some of the law now familiar to them. Moreover, the Commission has heard eloquent testimony evidencing the sense of community shared by lawyers and judges within the present circuits. Except for the most compelling reasons, we are reluctant to disturb institutions which have acquired not only the respect but also the loyalty of their constituents.

62 F.R.D. 223, 228 (1973).

59. Bonn, *supra* note 56, at 4-5.

60. *Id.*

61. *Id.* at 7.

62. *Id.* at 5.

fairly constant at nine,⁶³ although it had once dropped to seven.⁶⁴

Some even disputed whether the Eighth Circuit was overloaded with cases. Judge Kimbrough Stone, Senior Judge⁶⁵ of the Eighth Circuit, declared that in his eleven years on the bench, his court had "never been even one case behind its docket and it is not now."⁶⁶ However, the Eighth Circuit frequently had to use district judges on the circuit court; indeed, district judges wrote forty percent of the circuit's decisions.⁶⁷ This practice of using district judges on the circuit court was criticized during debates on congressional bills aimed at this problem by Justices Taft and Van Devanter⁶⁸ and members of the bar of the Eighth Circuit, particularly because it created delay at the trial level.⁶⁹

After the resounding defeat of H.R. 5690, Chief Justice Taft suggested that a less sweeping change might accomplish the desired purpose: "My own impression is that the best thing to do, if you want to do something that can be done at once and not involve conflicting considerations, is merely to divide the Eighth Circuit and let all the other circuits stand as they are."⁷⁰ In January 1928, a special ABA subcommittee composed solely of Eighth Circuit lawyers met to consider dividing the Eighth Circuit. Two bills providing for such a division were presented to Congress during May 1928. Congressman Walter H. Newton of Minnesota submitted H.R. 13567, which called for a division of the circuit into northern and southern areas with

63. Act of Mar. 3, 1837, ch. 34, 5 Stat. 176 (establishing nine as the number of Supreme Court Justices).

64. See Parker, *supra* note 7, at 362.

65. At that time, "senior judge" was the title used for the position known today as "chief judge." See 28 U.S.C. § 45 (1976) (revisor's note). The title "chief judge" was given by Congress in recognition of this position's great increase of administrative duties. See H.R. REP. NO. 308, accompanying H.R. 3214, 80th Cong., 1st Sess. A6 (1947). See also P. FISH, *supra* note 39, at 244.

66. Letter from K. Stone to I.G. Hersey (Feb. 20, 1928) (on file in the National Archives, House Jud. Comm. Files) (cited in Bonn, *supra* note 56, at 8).

67. *Hearings on H.R. 5690, H.R. 13567, and H.R. 13757 Before the House Comm. on the Judiciary, 70th Cong., 1st & 2d Sess. 63, 72* (Testimony of Justice Van Devanter) [hereinafter cited as *Hearings*].

68. *Id.* at 66-72.

69. Letter from G.B. Rose to L.C. Dyer (Feb. 17, 1928) (on file in the National Archives, House Jud. Comm. Files) (cited in Bonn, *supra* note 56, at 18). Senior Judge Stone noted the problem in a letter to A.C. Paul:

As this bill [The Thatcher Bill—H.R. 13757] provides for but three circuit judges in each of these two circuits (or groups), the inevitable result in the second group would be that two district judges would have to sit in every case, in order to keep up with the docket. This is so because the experience of this court has shown that 30 opinions is a good annual average for a judge working diligently, which means that each judge can sit in only 90 cases a year. As this group averages 270 or more cases annually, the above result is inevitable. This extensive use of district judges would seriously interfere with and delay trials in the district courts. Two-thirds of the opinions would be written by district judges and such opinions would often be delayed because of pressure of district court work on those judges.

Letter from K. Stone to A.C. Paul (June 30, 1928) (on file in the Library of Congress) (*quoted in* Bonn, *supra* note 56, at 18).

70. Testimony of W.H. Taft, in *Hearings, supra* note 67, at 66. Chief Justice Taft also suggested that Nebraska be included in the Tenth Circuit because of its proximity to Kansas and Wyoming and because the railroad from Chicago to Colorado passed through Wyoming and Nebraska. *Id.* at 67. Because there was no circuit judge residing in Nebraska, its inclusion would not have affected the number of judges in either circuit.

Minnesota, North Dakota, South Dakota, Iowa, Nebraska, Missouri, and Arkansas remaining in the Eighth Circuit, and Colorado, Wyoming, Utah, Kansas, Oklahoma, and New Mexico forming the new Tenth Circuit. The bill provided for five judges in the reconstituted Eighth Circuit and four in the Tenth, an increase of three judges for the area covered by the old Eighth Circuit.⁷¹

Congressman Maurice Thatcher of Kentucky, submitted H.R. 13757, proposing what was regarded as an east-west division of the circuit. Under his proposal, Iowa, Minnesota, Nebraska, North Dakota, South Dakota, and Wyoming would remain part of the Eighth. The Tenth Circuit would consist of Arkansas, Missouri, Oklahoma, Kansas, Colorado, New Mexico, and Utah. This division was patterned after a proposal made by Justice Willis Van Devanter of Wyoming who felt it followed "recognized routes of travel and commerce."⁷² The Thatcher Bill also provided for nine judgeships, assigning six to the Eighth Circuit and three to the Tenth Circuit.⁷³

The Newton Bill was endorsed almost unanimously by the bar and judges,⁷⁴ and by two major railroads.⁷⁵ Several judges noted favorably that the Newton Bill kept the mountain states intact and grouped the agricultural states together, thus providing a basic division by type of litigation—primarily mining and irrigation in the mountain states and agricultural in the other states.⁷⁶ The Newton Bill also appeared to divide the case load of

71. The bill also provided that judges would remain where they were residing and would preside in the circuit comprising that district. The Eighth Circuit would continue to hold court at St. Louis and St. Paul. Denver was to be the seat of the new Tenth Circuit. See *supra* note 67.

72. Testimony of Justice Van Devanter, in *Hearings, supra* note 67, at 72.

73. The seats of the Eighth Circuit were to be St. Paul and Cheyenne; those set for the Tenth Circuit were St. Louis, Denver, and Oklahoma City. Cheyenne had been listed as an alternative seat of court to Denver for the Eighth Circuit under § 126 of the Judicial Code, but was rarely used. See *supra* note 67.

74. It is unclear, however, whether the judges and lawyers received copies of the Thatcher Bill. When the House Judiciary Committee was studying the two bills and wanted the views of the district judges in the Eighth Circuit, Congressman Newton said he would ask A.C. Paul to write to those judges whose opinions he did not have. At the Jan. 11, 1929 hearings, Newton said that he had spoken with Mr. Paul: "I did not say anything to Mr. Paul about presenting the Thatcher bill, because I did not understand that I was to do so." Testimony of W.H. Newton, in *Hearings, supra* note 67, at 90. Because of illness, Mr. Paul was not at the committee hearing and, thus, it is unclear what he did. In their responses, some of the judges mentioned only the Newton Bill, stating that they received "the bill" or the "Newton bill," while others specifically stated they favored the Newton Bill over the Thatcher Bill.

75. Both the Northern Pacific Railroad Co. and the Missouri-Kansas Texas Railroad Co. wrote letters to the Committee favoring the Newton Bill. Bonn, *supra* note 56, at 25. The interest of a Nebraska attorney who worked for the Union Pacific gave rise to speculation by another attorney from that state:

It is my understanding that Mr. N.H. Loomis of the Union Pacific Law Department is devoting an unusual amount of time and attention to the consideration of the Newton Bill and its progress in Congress, and I am at a loss to know just what his deep and particular interest in the Bill can be. We know, of course, that railroads are always deeply interested in the appointment of Federal Judges and I am wondering whether Mr. Loomis would be opposed either to you or me. It may be that he is only interested in having the court sit at Omaha on account of the probable increase in passenger traffic which might result.

Letter from J.C. Kinsler to Sen. G.W. Norris, Neb. (Feb. 23, 1929) (on file in the Library of Congress, Norris papers) (*cited in* Bonn, *supra* note 56, at 25).

76. Testimony of District Judges Kennedy and Farris, in *Hearings, supra* note 67, at 113-15; Letter from Finley, Allen, & Dunham to I.G. Hersey (Jan. 2, 1929) (*Hearings, supra* note 67, at

the old circuit fairly evenly.⁷⁷

By the close of the January 11, 1929 hearings, the Newton Bill had been approved by all six circuit judges of the Eighth Circuit, the bar associations of eight states of the circuit, fifty-two attorneys from the Eighth Circuit, and by the ABA.⁷⁸ On January 28, 1929, after a few revisions, Congressman Newton introduced the revised bill, H.R. 16658, to the House Judiciary Committee.⁷⁹ On February 18, 1929, the House unanimously passed the Newton Bill. After one amendment adding Kansas City, Missouri, as a seat of the Eighth Circuit, the bill passed the Senate on February 23, 1929. The House agreed to this amendment on February 25, and President Hoover signed the bill into law on February 28, 1929.⁸⁰

The Act required the Tenth Circuit to hold an annual term of court in Denver and Wichita, and in Oklahoma City "provided that suitable rooms and accommodations for holding court at Oklahoma City are furnished free of expense to the United States."⁸¹ The legislative history of the Act, however, reveals no reason for this proviso. Five circuit judgeships were allocated to the diminished Eighth Circuit and four to the new Tenth Circuit. Section 4 of the Act, in effect, transferred Judges Robert E. Lewis of Colorado and John H. Cotteral of Oklahoma from the Eighth Circuit to the Tenth.⁸² President Hoover appointed United States District Judges Ori L. Phillips of New Mexico and George T. McDermott of Kansas to fill out the new court.

The Tenth Circuit's jurisdiction is unique in that one of the districts in the circuit contains areas outside the state.⁸³ The District of Wyoming in-

134); Letter from Utah Bar Ass'n to I.G. Hersey (Jan. 8, 1929) (*Hearings, supra* note 67, at 130) (*cited in* Bonn, *supra* note 56, at 49).

77. Judge Stone stated in a letter to A.C. Paul:

On the basis of cases filed in 1927 there are 222 cases in the first group [Eighth Circuit] and 179 in the second [Tenth Circuit]; on the three year average there are 232 in the first and 174 in the second group. To take care of this difference, the Newton Bill provides for five judges in the first group and four judges in the second. By this increase from the present six judges to nine in both of the two new circuits, the bad effect of dividing the circuit is lessened.

Letter from K. Stone to A.C. Paul (June 30, 1928) (on file in Library of Congress) (*quoted in* Bonn, *supra* note 56, at 23).

78. Bonn, *supra* note 56, at 27.

79. Notably, Wichita was added as a seat in the Tenth Circuit in response to suggestions from W.A. Ayres, a representative from Kansas, and an ABA resolution calling for a seat of the court in Wichita. Bonn, *supra* note 56, at 27. Omaha was also added as a seat for the Eighth Circuit. *Id.* See also *id.* at 27 for a list of other changes made in H.R. 13567 by H.R. 16658.

80. Act of Feb. 28, 1929, Pub. L. No. 840, § 126, 45 Stat. 1346 (presently codified at 28 U.S.C. §§ 41-48).

81. Act of Feb. 28, 1929, Pub. L. No. 840, § 126, 45 Stat. 1347.

82. Section 4 reads:

Any circuit judge of the eighth circuit as constituted before the effective date of this Act, who resides within the eighth circuit as constituted by this Act, is assigned as a circuit judge to such part of the former eighth circuit as is constituted by this Act the eighth circuit, and shall be a circuit judge thereof; and any circuit judge of the eighth circuit as constituted before the effective date of this Act, who resides within the tenth circuit as constituted by this Act, is assigned as a circuit judge of such part of the former eighth circuit as is constituted by this Act the tenth circuit, and shall be a circuit judge thereof.

Id. at 1348.

83. 28 U.S.C. §§ 82-131 (1976). Some districts include entities that are, for many purposes, treated as states. See, e.g., 28 U.S.C. § 88 (1976) (District of Columbia); 28 U.S.C. § 119 (1976)

cludes "those portions of Yellowstone National Park situated in Montana and Idaho,"⁸⁴ and the statements of jurisdiction of Idaho and Montana expressly exclude the portions of the respective states within Yellowstone.⁸⁵ Furthermore, 28 U.S.C. § 1294 indicates an appeal from a reviewable decision of a district court is to be taken to the "court of appeals for the circuit embracing the district."⁸⁶ United States Attorneys are appointed to serve in a particular judicial district,⁸⁷ and the duty to prosecute for offenses against the United States applies "within his district."⁸⁸ Thus, the District of Wyoming's jurisdiction over the entirety of Yellowstone seems clear. However, courts have occasionally overlooked the boundaries of the district, drawing the jurisdiction along state lines, even though the cases arise in Yellowstone National Park.⁸⁹

IV. THE FIRST SESSION OF THE CIRCUIT

The court convened for its first session on April 1, 1929, for the "purpose of organizing said court."⁹⁰ Senior Circuit Judge Robert E. Lewis presided. Circuit Judge John H. Cotteral and Marshal Richard C. Callen were present. The first order of business was the appointment of Albert Trego of Denver as Clerk of Court. Next the Court adopted its seal. Judges Ori L. Phillips and George T. McDermott, then judges of the districts of New Mexico and Kansas respectively, were assigned to the circuit and designated to sit for its first session.⁹¹

On the second day of the session, the rules of practice were adopted, providing for three regular terms to be held annually, one each at Denver, Oklahoma City, and Wichita. Denver was designated as the location for the clerk's office. It was ordered that practice, as far as feasible, was to be the same as in the Supreme Court of the United States. Provisions were made

(Puerto Rico); 48 U.S.C. §§ 1405x-1405z (1976) (Virgin Islands); 48 U.S.C. § 1424 (1976) (Guam).

84. 28 U.S.C. § 131 (1976).

85. *Id.* §§ 92, 106.

86. *Id.* § 1294(1).

87. *Id.* § 541.

88. *Id.* § 547.

89. In the case of *United States v. Sanford*, 503 F.2d 291 (9th Cir. 1974), *vacated*, 421 U.S. 996 (1975), for example, the Ninth Circuit upheld the Montana district court's dismissal of an indictment for game violations in a portion of Yellowstone Park falling within Montana. The Ninth Circuit again dismissed on other grounds, *United States v. Sanford*, 536 F.2d 871 (9th Cir.), and again was reversed by the Supreme Court, 429 U.S. 14 (1976) (*per curiam*), all without mention of the original failure of jurisdiction in the District of Montana. See *Martin v. United States*, 546 F.2d 1355 (9th Cir. 1976), *cert. denied*, 432 U.S. 906 (1977); *Rubenstein v. United States*, 488 F.2d 1071 (9th Cir. 1973).

This division of jurisdiction raises an interesting question regarding what law should be applied in diversity cases arising in the Idaho and Montana portions of Yellowstone Park. Under the rule of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny, federal courts that exercise jurisdiction over a case solely by virtue of diversity of citizenship are to apply the law of the state where the cause of action occurred. *Id.* at 71-73. Apparently, then, a court must apply Idaho or Montana law in diversity actions that arise within the boundaries of those states, even though jurisdiction lies within the judicial district of Wyoming. The question has yet to require judicial resolution.

90. 1 Tenth Circuit Record 1 (Apr. 1, 1929) [hereinafter cited as Record].

91. *Id.* at 4-5.

for the admission of attorneys and for the preparation of bills of exception on appeals from the district courts.⁹²

On the third day of its first session, the court admitted Julius C. Gunter to practice as an attorney.⁹³ Gunter was a former justice of the Supreme Court of Colorado and former governor of the state. On Mr. Gunter's motion, the court admitted to practice before it seventy-four lawyers from Colorado and three from Wyoming.⁹⁴ Rules were adopted governing review of the decisions of the United States Board of Tax Appeals. Cases transferred from the Eighth Circuit were ordered entered on the court's dockets for disposition in due course.⁹⁵

V. THE FIRST YEARS OF THE CIRCUIT

The Act of February 28, 1929, creating the Tenth Circuit, provided for the transfer from the Eighth Circuit of all cases arising in the states assigned to the Tenth Circuit in which no hearing had yet been held. By order of the Eighth Circuit entered March 20, 1929, ninety such cases were transferred to the new court. Of the first 238 cases transferred from the Eighth Circuit or filed in the Tenth Circuit during the period April 1, 1929, to June 24, 1931, the clerk classified eighty-nine as sounding in equity, 106 as law cases, and forty-three as criminal. Thirty-two of the cases originated in the District of Colorado, thirty-two in Kansas, twenty-two in New Mexico, thirty-seven in the Eastern District of Oklahoma, thirty-four in the Northern District of Oklahoma, fifty-four in the Western District of Oklahoma, seventeen in Utah, and ten in Wyoming.⁹⁶

In addition to the official records, Mr. Trego, the first clerk, prepared a set of hand-printed cards giving a brief summary of each of the first fifty-six cases disposed of by the court. These cards and the docket summary sheets show that the nature of the cases reaching the court in its first year differed markedly from the type of litigation with which the court now deals. As Howard K. Phillips, the present clerk, expresses it:

The sample [of the cases summarized on the cards] reflects the period through which the nation was living at the time. For example:

The crimes included violations of the Volstead Act. Bootleggers and illegal distillers were being caught and prosecuted.

The cases reveal, in disputes over property of failing banks, bankrupt estates, and attempts to defraud people who have money or property, that hard times are just over the threshold.

We are still a young enough area to have numerous disputes concerning the validity of patents issued to homesteaders. Several of the earliest cases sought cancellation for lack of required residence, improvements or cultivation.

92. *Id.*

93. Breitenstein, *The United States Court of Appeals for the Tenth Judicial Circuit*, 52 DEN. L.J. 9, 10 (1975).

94. *Id.*

95. Record, *supra* note 90, at 33.

96. Summary Sheet, Vol. 1, General Docket, U.S. Court of Appeals, 10th Cir.

The "energy" importance of the area is reflected by suits involving coal lands, oil and gas lands, and mineral rights.

Taxes were a problem then, as now.⁹⁷

When the new court convened for its first session in Denver, its judges could not have foreseen the changes in the American judicial system that events would force on the courts. At that time, despite the warnings of a few financial prophets, it was generally believed that the national economy rested on a solid base. The Great Depression, ushered in by the stock market crash of October 1929, vindicated the judgment of those few. The "Dust Bowl Years," brought about by the drought of the 1930's, disrupted the economy of all of the states within the circuit. Many farmers and stockmen, as well as those whose livelihood depended on agricultural stability, lost their farms and their businesses. Many banks and once-promising enterprises failed.

In due course nature restored the land to its pre-drought condition, but the effects of the Depression and especially of the governmental measures adopted to alleviate depression-related distress remain with us to the present time. In their attempts to deal with the nation's economic problems, the executive and legislative branches created new agencies and granted them unprecedented emergency powers. Changing conditions compelled the courts to re-examine many time-honored legal concepts, with the result that judges became more inclined toward sociological interpretation and application of the law.⁹⁸

The eight judges presiding over the district courts in the circuit were not the disciplined and less colorful jurists we know today. The constitutional guarantees of tenure during good behavior and undiminished salary fostered judicial individualism.⁹⁹ The district court judges were akin to monarchs ruling over their domains. Peter Graham Fish's comment on single-judge district courts before the Court of Appeals Act of 1891 is relevant to the early days of the Tenth Circuit as well:

They became lions on their relatively remote thrones. However they might find or make the law, delay or accelerate the flow of cases, reward or punish friends and foes with patronage and favorable bench rulings, concerned none but themselves. Only appellate court reversals on points of law and impeachment for crimes and misdemeanors limited their conduct.¹⁰⁰

It may safely be assumed—as older lawyers who practiced before some of them still testify—that the judges of the federal trial courts of the first quarter of this century were rugged individualists. They ran their own dock-

97. Letter from Howard K. Phillips to Judge Arthur J. Stanley (Sept. 5, 1979).

98. See R. POUND, 1 JURISPRUDENCE 158-78 (1959).

99. See Breitenstein, *supra* note 93.

John C. Pollock of Kansas had been a district judge since December 1, 1903; Tillman D. Johnson of Utah since 1915; Colin Neblett of New Mexico since 1917; Robert L. Williams of the Eastern District of Oklahoma since 1919; Thomas Blake Kennedy of Wyoming since 1921; J. Foster Symes of Colorado since 1922; Franklin E. Kennamer of the Northern District of Oklahoma since 1924; and Edgar S. Vaught of the Western District of Oklahoma only since 1928.

100. P. FISH, *supra* note 39, at 13.

ets and were not disposed to yield to any person or any other court in the exercise of their judicial powers.

VI. COURT ADMINISTRATION AT THE NATIONAL LEVEL

A. *The Judicial Conference of the United States*

Growing popular dissatisfaction with cumbersome procedures and defective judicial administration did not go unnoticed by many jurists and academicians, including Dean Roscoe Pound and William Howard Taft. Taft, as Chief Justice of the Supreme Court of the United States, was the prime mover in legislation in 1922 creating the Judicial Conference of the United States.¹⁰¹

The bill proposing the original conference of senior judges was hotly debated. Some senators feared that the Judicial Conference would be able to give orders to every district judge in the Union. One senator protested that the bill was "an assault upon the independence of the judiciary which may grow and grow to sap and undermine that independence."¹⁰² Another opponent predicted that the Conference would "become the propaganda organization for legislation for the benefit of the Federal judiciary."¹⁰³ In the House, the floor manager for the bill saw the Conference as not only providing a stage for the exchange of ideas but also leading to a greater uniformity throughout the federal judicial system. The Chief Justice explained that the Conference could not even criticize a judge, although he expressed the belief that peer pressure would induce a fellow judge "to cooperate much more readily in an organized effort to get rid of business and do justice."¹⁰⁴ With the help of Attorney General Cummings, the original Conference was instrumental in bringing about the enactment of the Administrative Office Act of 1939.¹⁰⁵

Until recent amendments,¹⁰⁶ the powers of the Conference to act directly on individual judges were ill-defined.¹⁰⁷ Today the Judicial Conference may hold hearings, take testimony, issue subpoenas, give orders necessary to the exercise of its authority, discipline a judge, and certify a judge's disability.¹⁰⁸ In addition, the Conference circulates information on docket conditions and "submits suggestions and recommendations to the various courts to promote uniformity of management procedures and expe-

101. Act of Sept. 14, 1922, Pub. L. No. 67-298, 42 Stat. 837-40 (codified as amended at 28 U.S.C. §§ 331, 456 (1976 & Supp. IV 1980)). The Act authorized the Chief Justice to summon the chief judge—then called the senior judge—of each circuit to a meeting to "make a comprehensive survey of the condition of the business in the courts of the United States and prepare plans for transfer of the judges to districts in which they are needed, and to make suggestions to the various courts as may seem in the interest of uniformity and expedition of business."

102. 62 CONG. REC. 4863, 5280 (1922).

103. 62 CONG. REC. 203 (1921) (remarks of Clarence Lea) (*quoted in* P. FISH, *supra* note 39, at 36).

104. P. FISH, *supra* note 39, at 39 (citing Informal Address by William Taft, Report of the 44th Annual Meeting of the American Bar Association 564 (1921)).

105. *See* Maris, *supra* note 5, at 823.

106. Pub. L. No. 96-458, § 4, 94 Stat. 2040 (codified at 28 U.S.C. § 331 (Supp. V 1981)).

107. *See* 28 U.S.C. § 331 (1976).

108. 28 U.S.C. § 331 (Supp. V 1981).

ditious conduct of court business."¹⁰⁹ The "suggestions" of the Conference carry great weight, as a recent Associated Press article indicates:

The Judicial Conference is a powerful body that conducts all its work behind closed doors and is little-known to the public at large. Among its functions are the drafting and revising of the federal rules of procedure and evidence, rules that determine how civil and criminal trials are conducted in the federal courts.¹¹⁰

Few, if any, federal judges today ignore the "suggestions" of the Conference. The Conference also continuously studies the operation and effect of the federal rules of practice and procedure¹¹¹ and recommends to the Supreme Court rule changes that are intended to promote simplicity and fairness and to eliminate unjustifiable expense and delay.¹¹²

Initially the Judicial Conference consisted of the Chief Justice of the Supreme Court and the chief judges of the several circuits.¹¹³ A 1956 amendment added to the group the chief judge of the Court of Claims.¹¹⁴ Although Chief Judge Orié L. Phillips of the Tenth Circuit had advocated district court judge participation as early as 1943, it was not until the 1957 session of the Conference that district judges were included. One judge is elected to the Conference by the circuit and district judges of each circuit. Later still, the Chief Judge of the Court of Customs and Patent Appeals was added to the Conference's membership.¹¹⁵ The 1982 creation of the Court of Appeals for the Federal Circuit combined the Court of Customs and Patent Appeals and the appellate functions of the Court of Claims.¹¹⁶ The Chief Judge of the new Court of Appeals replaced the prior separate representatives of those courts. The United States Claims Court, reorganized as an Article I trial court, no longer is represented on the Judicial Conference of the United States.¹¹⁷ In 1984, two bankruptcy judges will be admitted to the Conference.¹¹⁸

Although Chief Justice Taft, the most active proponent of the legislation creating the Judicial Conference, favored including the Attorney General as a member, the Senate Judiciary Committee disagreed and eliminated that portion of the bill.¹¹⁹ But the statute does provide that, upon the request of the Chief Justice, the Attorney General is to submit reports to the conference "on matters relating to the business of the several courts."¹²⁰

109. *Id.*

110. *Kansas City Times*, Feb. 4, 1980.

111. 28 U.S.C. § 331 (1976).

112. *Id.*

113. Act of June 25, 1948, Pub. L. No. 80-773, ch. 15, 62 Stat. 902 (codified as amended at 28 U.S.C. § 331 (1976 & Supp. V 1981)).

114. Act of July 9, 1956, Pub. L. No. 84-659, § (d), 70 Stat. 497. *See also* P. FISH, *supra* note 39, at 254-57.

115. Act of Sept. 19, 1961, Pub. L. No. 87-253, § 1, 75 Stat. 521 (codified at 28 U.S.C. § 331 (1976)).

116. Federal Court Improvement Act of 1982, Pub. L. No. 97-164, §§ 105, 111, 96 Stat. 25, 27-29.

117. *Id.* at 29.

118. They will be added Apr. 1, 1984. Act of Nov. 6, 1978, Pub. L. No. 95-598, § 208, 92 Stat. 2549, 2660.

119. P. FISH, *supra* note 39, at 32-33.

120. 28 U.S.C. § 331 (1976).

Conference committees, which may include nonmembers, play a vital role in the ongoing work of the Conference. The committees meet on the call of the chairman who is appointed, like the committee members, by the Chief Justice. The chairmen attend the conference sessions and submit reports of their respective committees for Conference consideration. The committees study not only matters referred to them by the Conference, but also subjects brought to their attention by committee members or by other judges. Then they submit recommendations to the Conference. In this manner, as well as through their Conference representatives, judges contribute to Conference deliberations. In 1968, the Conference established formal selection criteria, ordering that "general committees normally have a member from each circuit and that standing committees and special committees should have seven members, at least four of whom should be district judges."¹²¹ Unless the Chief Justice decides otherwise, members serve non-renewable terms of six years.

B. *The Administrative Office of the United States Courts*

During the Tenth Circuit's first ten years the administration of the federal courts was vested in the Department of Justice, as it had been since 1870.¹²² The courts depended on the Attorney General to prepare the judicial budget, pay the salaries of court personnel, and provide needed supplies. The Attorney General fixed the compensation of the clerks of the district courts and the courts of appeal. Many federal judges, believing the Justice Department was inattentive to the courts' needs, criticized this system.¹²³ Some members of Congress questioned whether the Justice Department's supervisory power might influence judges in certain cases and thus inhibit the impartial administration of justice.¹²⁴

The American Bar Association, led by its president, Arthur T. Vanderbilt, proposed legislation to transfer the administrative functions of the judiciary to an Administrative Office of the United States Courts. Chief Justice Hughes and Attorney General Cummings approved the plan, although some members of the Supreme Court, led by Justice Brandeis, opposed it on the ground that it was the function of the courts to adjudicate, not to administer.¹²⁵

After much discussion and many compromises, a bill was enacted creating the Administrative Office of the United States Courts. The administrative and fiscal responsibilities that the Attorney General had exercised were

121. See P. FISH, *supra* note 39, at 278 (quoting Judicial Conference Report at 45 (1968)).

122. P. FISH, *supra* note 39, at 91.

123. *Id.* at 102.

124. Sen. William E. Borah of Idaho stated: "In different ways and by different methods other than by the usual practice judges are given to understand the views of the Government as to what the law is and what the decision should be." 50 CONG. REC. 3166-67 (1913) (quoted in P. FISH, *supra* note 39, at 103). Another Senator wondered how a federal jurist, under the constant scrutiny of the Department of Justice, could be a fair and upright judge in litigation in which the Department represented the Government. 72 CONG. REC. 10883 (1930) (remarks of Kenneth McKellar) (cited in P. FISH, *supra* note 39, at 103).

125. See P. FISH, *supra* note 39, at 134-44.

transferred to the Director of the Administrative Office.¹²⁶ The Administrative Office Act of 1939¹²⁷ has been heralded as "probably the greatest piece of legislation affecting the judiciary since the Judiciary Act of 1789."¹²⁸ The Act accomplished four important purposes: 1) it set up the Administrative Office under the supervision of the Judicial Conference; 2) it made the judiciary financially independent; 3) it created the Circuit Judicial Councils; and 4) it required annual circuit conferences that include district and circuit judges and members of the bar.¹²⁹ The Administrative Office prepares the budget for the judiciary, gathers statistics descriptive of the courts' operation, disburses funds, and performs other administrative functions.

To preserve the traditional autonomy of federal courts and judges, Congress placed the Administrative Office under the supervision and direction of the Judicial Conference.¹³⁰ The office's Director and Deputy Director are appointed and subject to removal by the Supreme Court.¹³¹

The Judicial Conference wanted the Administrative Office to be "on tap," but not "on top."¹³² The judiciary, not the Administrative Office, was to constitute the fundamental source of administrative power and ultimate responsibility for administrative decisions. The judiciary continued a watchful attitude toward the Administrative Office and determined that the office was to remain simply a tool for effective administration rather than a power in itself.¹³³ Orié L. Phillips, Chief Judge of the Tenth Circuit from 1940 to 1956, noted the judges' continuing concern that the "Administrative Office may get away from us."¹³⁴

VII. JUDICIAL CIRCUIT COUNCILS

The most controversial provision of the 1939 Act created a judicial council in each circuit.¹³⁵ Originally each council consisted only of the circuit judges in active service and, unlike the judicial circuit conferences, the councils included no district court judges or bar representatives.¹³⁶ District judges lobbied for representation on the circuit council, but while the councils welcomed their presence at sessions affecting the operation of district courts, district judges were not permitted to participate as members until 1981. Presently, if the council contains six or more circuit judges, at least three district judges must be included in each circuit's judicial council; if the council contains fewer than six circuit judges, at least two district judges

126. See 28 U.S.C. §§ 601-611 (1976).

127. Pub. L. No. 76-299, ch. 15, 53 Stat. 1223.

128. See Parker, *supra* note 7, at 369; Maris, *supra* note 5, at 823.

129. See *supra* note 126.

130. 28 U.S.C. § 604(a) (1976).

131. *Id.* § 601.

132. P. FISH, *supra* note 39, at 135.

133. *Id.* at 145.

134. *Id.* at 225 (Interview with Orié L. Phillips, Chief Judge, in Washington, D.C. (Feb. 22, 1965)).

135. Pub. L. No. 76-299, § 306, 53 Stat. 1223, 1224.

136. *Id.* The idea of additional peer representation from these groups was considered and rejected. See P. FISH, *supra* note 39, at 159-61.

must be appointed to the council.¹³⁷ The Judicial Council of the Tenth Circuit now consists of the chief judge of the circuit, four other circuit judges, and two district judges. The Council is empowered to make "all necessary orders for the effective and expeditious administration of the business of the courts within its circuit."¹³⁸

Both Peter Graham Fish and Chief Justice Burger have criticized the judicial councils.¹³⁹ Calling them "pillars of passivity," Fish has speculated that the councils are inactive because of deference to trial judges and the pervasive concept of an independent judiciary.¹⁴⁰ In its early years, the Tenth Circuit Judicial Council did little to affect the administration of justice in the circuit.¹⁴¹ Since minutes of the council meetings were not kept until February 1957, a meaningful assessment of the Council's accomplishments during the early sessions is difficult. When new statutes were enacted, such as the first Magistrates Act, the Jury Selection and Service Act, and the Criminal Justice Act, councils had more duties assigned to them and consequently began meeting more often. Also, in more recent times, the Judicial Conference of the United States has sought and relied on the advice and recommendations of the circuit councils in various matters.¹⁴² By recent amendments effective October 1, 1981, the circuit judicial councils are now empowered to hold hearings, to take testimony, and to issue subpoenas which are necessary to carrying out their duties.¹⁴³ By setting the maximum age of seventy years for the office of presiding chief judge, Congress alleviated one of the most difficult administrative tasks—convincing senile judges to retire from the office.¹⁴⁴

An order of the Judicial Council of the Tenth Circuit led to what Justice Douglas called "the liveliest, most controversial contest, involving a federal judge in modern United States history."¹⁴⁵ It brought the question of

137. 28 U.S.C. § 332 (Supp. IV 1980) (effective Oct. 1, 1981) provides in pertinent part:

(a)(1) The chief judge of each judicial circuit shall call, at least twice in each year and at such places as he may designate, a meeting of the judicial council of the circuit, consisting of—

(A) the chief judge of the circuit, who shall preside;

(B) that number of circuit judges fixed by majority vote of all such judges in regular active service; and

(C) that number of district judges of the circuit fixed by majority vote of all circuit judges in regular active service, except that—

(i) if the number of circuit judges fixed in accordance with subparagraph (B) of this paragraph is less than six, the number of district judges fixed in accordance with this subparagraph shall be no less than two; and

(ii) if the number of circuit judges fixed in accordance with subparagraph (B) of this paragraph is six or more, the number of district judges fixed in accordance with this subparagraph shall be no less than three.

138. 28 U.S.C. § 332(d) (1976 & Supp. V 1981).

139. See P. FISH, *supra* note 39, at 405; Burger, *The Courts on Trial*, 22 F.R.D. 71, 77 (1958).

140. P. FISH, *supra* note 39, at 405-09.

141. Letter from Emory G. Hatcher, Circuit Executive to Judge James K. Logan (Sept. 19, 1980).

142. *Id.*

143. 28 U.S.C. § 332(d) (1976 & Supp. V 1981).

144. See 28 U.S.C. § 45(a) (1976).

145. *Chandler v. Judicial Council*, 398 U.S. 74, 130 (1970) (Douglas, J., dissenting). Another example of significant action by the Council in this area was certifying the disability of Judge Ross Rizley of the Western District of Oklahoma pursuant to 28 U.S.C. § 372(b) (1976) on Mar. 26, 1965.

the powers of the judicial councils into sharp focus, and may have provided the impetus for amendments to section 332.¹⁴⁶ In December 1965, acting under 28 U.S.C. § 332, the Judicial Council of the Tenth Circuit issued an order directing that no cases were to be assigned to Judge Stephen Chandler, United States District Judge for the Western District of Oklahoma.¹⁴⁷ Judge Chandler sought a stay of the Council's order from the Supreme Court. His request was denied on the ground that the order was "entirely interlocutory pending prompt further proceedings."¹⁴⁸ The Council scheduled a hearing, but cancelled it after learning that neither Judge Chandler nor any other judge desired to attend.¹⁴⁹ Thereafter, the Council issued an order pursuant to 28 U.S.C. §§ 137 and 332, authorizing the judge to sit only on the cases assigned to him prior to December 28, 1965.¹⁵⁰ Judge Chandler acquiesced in the assignment of cases, but later challenged the order in a petition to the Supreme Court, alleging that his acquiescence was a result of both undue duress and a strategy to deprive the Judicial Council of jurisdiction to assign cases under 28 U.S.C. § 137.¹⁵¹

The Supreme Court noted both the "imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function,"¹⁵² and the legislative grant of power to the Judicial Council which is necessary to enforce reasonable administrative standards.¹⁵³ Ultimately, the Court found it unnecessary to decide whether the Council's order was proper because it concluded the case was not in a posture for the extraordinary relief sought.¹⁵⁴ Congress had provided a procedure for evaluating a judge's ability to discharge the duties of the office when the judge is eligible to retire, but had specified no procedure for disciplining a recalcitrant judge who was ineligible for retirement.¹⁵⁵ The Court indicated that clarification of the statute was necessary:

Standing alone, § 332 is not a model of clarity in terms of the scope

146. The Senate Report on the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 states in part:

The purpose of the proposed legislation is to establish a procedure for investigating and resolving allegations that a member of the Federal judiciary has been unable to discharge efficiently all the duties of his or her office by reason of mental or physical disability or has engaged in conduct which has been inconsistent with the effective and expeditious administration of the business of the courts.

An investigation of a complaint filed against a judge of the United States may result in the dismissal of the complaint, a certification of disability, a request that the judge voluntarily retire, an order that, on a temporary basis, no further cases be assigned to the judge, private or public censure or reprimand, the filing of a report to the House of Representatives suggesting the possibility of impeachment, or other action as deemed appropriate under the circumstances.

S. REP. NO. 362, 96th Cong., 2d Sess. 1, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4315.

147. *Chandler v. Judicial Council*, 398 U.S. 74, 78 (1970). The order indicated that if all the active judges in the district could not agree on the assignment of cases, the Council would make assignments pursuant to 28 U.S.C. § 137. 398 U.S. at 78.

148. *Id.* at 79.

149. *Id.* at 80.

150. *Id.*

151. *Id.* at 86-87.

152. *Id.* at 84-85.

153. *Id.*

154. *Id.* at 86-87.

155. *See* 28 U.S.C. § 372(b) (1976).

of the judicial councils' powers or the procedures to give effect to the final sentence of § 332. Legislative clarification of enforcement provisions of this statute and definition of review of council orders are called for.¹⁵⁶

Despite this criticism, the statute has since been deemed constitutional.¹⁵⁷

Justices Douglas and Black dissented from the majority's opinion, declaring that the Council's action was, in effect, a removal of Judge Chandler. Justice Black noted that every federal judge "is subject to removal from office only by the constitutionally prescribed mode of impeachment."¹⁵⁸ In the view of Justice Douglas "there is no power under our Constitution for one group of federal judges to censor or discipline any federal judge and no power to declare him inefficient and strip him of his power to act as a judge."¹⁵⁹ Since this decision, Congress has provided the councils with procedures for certifying the disability of a judge.¹⁶⁰

Under the broad language of section 332, the councils have for many years influenced the operation of the trial courts within their circuits in various ways.¹⁶¹ If the judges of a district court are unable to agree upon rules and orders for dividing the workload among them, then by statute, the circuit councils must issue the needed orders.¹⁶² A district court may end prematurely a regular session only if the council consents.¹⁶³ No district may put into operation its plan for the random selection of jurors until it has been approved by a panel consisting of the members of the circuit council and the chief judge of the district.¹⁶⁴ Similarly, a district court's plan for furnishing representation for indigent criminal defendants¹⁶⁵ and its plan for the speedy disposition of criminal cases¹⁶⁶ require approval by the circuit council or a panel that includes members of the council. Additionally, judicial councils have rulemaking power¹⁶⁷ and, thus, may promulgate rules that provide additional avenues for processing complaints of judicial misconduct.¹⁶⁸ These rules do not provide an additional method of appealing the merits of a decision, however, except in cases where no other remedies are

156. 398 U.S. at 85 n.6. The Court also noted that "nothing in the statute or its legislative history indicates that Congress intended or anyone considered the Circuit Judicial Councils to be courts of appeals *en banc*." *Id.* at 83 n.5.

157. *Imperial "400" Nat'l, Inc. v. Judicial Council*, 481 F.2d 41, 45 (3d Cir.), *cert. denied*, 414 U.S. 880 (1973).

158. 398 U.S. at 142 (Black, J., dissenting).

159. *Id.* at 137 (Douglas, J., dissenting).

160. 28 U.S.C. § 372(b), (c) (Supp. V 1981). In the Judicial Councils Reform and the Judicial Conduct and Disability Act of 1980, Congress established a procedure for receiving and reviewing complaints of judicial misconduct. *See* 28 U.S.C. §§ 332, 372 (Supp. V 1981). For a thorough analysis of the Act, see Neisser, *The New Federal Judicial Discipline Act: Some Questions Congress Didn't Answer*, 65 JUDICATURE 143 (1981).

161. 28 U.S.C. § 332(d) (1976 & Supp. V 1981).

162. *Id.* § 137.

163. *Id.* § 140.

164. *Id.* § 1863.

165. 18 U.S.C. § 3006A (1976 & Supp. V 1981).

166. *Id.* § 3165.

167. *Imperial "400" Nat'l, Inc. v. Judicial Council*, 481 F.2d 41 (3d Cir.), *cert. denied*, 414 U.S. 880 (1973).

168. *See Charge of Judicial Misconduct*, 613 F.2d 768 (9th Cir. 1980).

available to cure the effects of the misconduct.¹⁶⁹

The councils' powers to supervise the flow of cases in the trial courts and to order the courts' nontenured supporting personnel to cease improper practices have never been disputed. As Congress intended, the judicial councils remain the linchpin of judicial administration.

VIII. JUDICIAL CIRCUIT CONFERENCES

The Act established the judicial conferences of the circuits as another mechanism for improving federal court efficiency. Unless excused by the Chief Judge, all circuit and district judges must attend their respective circuit's annual conference.¹⁷⁰ Only the Circuit Justice and the circuit and district judges attend the first day's session. In these executive sessions the program ordinarily is restricted to the work of the courts within the circuit. The trial and appellate judges, meeting as a single group, discuss ideas and problems.

The Act also requires each circuit's court of appeals to provide for members of the bar to be represented and participate at the Judicial Conference.¹⁷¹ The circuits have responded in various ways. Some rotate lawyer-delegate participation.¹⁷² In others each circuit and district judge may invite a certain number of members of the bar.¹⁷³ The Tenth Circuit Rule provides that any member of this circuit's bar in good standing may become a member of the circuit conference by declaring in writing an intention to become a member.¹⁷⁴ By the terms of the circuit rule, if a lawyer-member is absent from two successive annual sessions without leave of the Chief Judge, he or she is dropped from membership.¹⁷⁵ Since all members of the circuit bar in good standing are eligible for membership, as a practical matter, failure to attend meetings only results in the lawyer being dropped from the circuit's mailing list.

In assessing the accomplishments of the circuit conferences, Chief Justice Burger has stated that "less than a majority of the Circuits have consistently held meaningful conferences and in some places the conferences which are held fall far short of what Congress intended."¹⁷⁶ Peter Graham Fish has remarked that most conferences have proved less than satisfactory.¹⁷⁷ He believes that success of the circuit conference depends upon the chief judge.¹⁷⁸ The chief judges of the Tenth Circuit have improved federal-state relations by controlling the programs of the circuit and by specially inviting judges of the state courts and the presidents of the state bar associations within the circuits. Tenth Circuit conferences have provided a meaningful

169. *Id.* at 769.

170. 28 U.S.C. § 333 (1976 & Supp. IV 1980).

171. *Id.*

172. *See, e.g.*, 6th CIR. R. 16(c).

173. *See, e.g.*, 5th CIR. R. 23.3.

174. 10th CIR. R. 19(b)(2).

175. *Id.*

176. Burger, *supra* note 139, at 78-79.

177. P. FISH, *supra* note 39, at 341.

178. *Id.*

and dynamic medium of communication between the bench and the bar. The programs presented at the general sessions have traditionally been on subjects of broad interest, timely, instructive, and well presented by knowledgeable speakers.¹⁷⁹ In conjunction with the Judicial Conference of the United States, the circuit conferences and councils have been instrumental in setting up a promotional policy for judicial employees and prescribing standards for probation officers and for referees in bankruptcy.¹⁸⁰ The sessions have provided platforms for advocates and opponents of proposed changes designed to improve the administration of justice. In this way, the use of pretrial conferences and discovery, which had been resisted by many older judges and practitioners, has been "sold" to the bench and bar. At his own and other judicial conferences, Judge Alfred P. Murrah, an enthusiastic supporter of the "new" rules, so persistently and successfully advocated their use that it was said in judicial circles that his middle initial stood for "Pretrial."

IX. OTHER ADMINISTRATIVE DEVELOPMENTS

The need to efficiently manage and administer cases docketed for appeal¹⁸¹ and to limit the jurisdiction of federal courts in order to alleviate congested dockets has long been recognized.¹⁸² This need has intensified in recent years because the number of appeals filed in the federal courts of appeals has skyrocketed. Between 1960 and 1973, the filings in all circuits increased by 301%.¹⁸³ In 1981,¹⁸⁴ 26,362 new appeals were filed in the United States Courts of Appeals, again the greatest number on record.¹⁸⁵ This is a rise of nearly fourteen percent over 1980 and is fifty-eight percent higher than filings in 1975.¹⁸⁶ The increase resulted in 599 new appeals for each three-judge panel of the courts of appeal.¹⁸⁷

Some commentators have termed the overload of the judicial system "a crisis."¹⁸⁸ The factors contributing to this stunning increase include the

179. *See, e.g.*, Proceedings, 1969 Tenth Judicial Circuit Conference, 49 F.R.D. 347 (1969) (Chief Justice Burger's first official appearance as Chief Justice at a circuit judicial conference); Proceedings, Tenth Judicial Circuit Conference, 44 F.R.D. 245 (1967).

180. *See* Maris, *supra* note 5, at 824.

181. *See* Burger, *School for Judges*, 33 F.R.D. 139, 140-41 (1964).

182. *See* Burger, *Has the Time Come?*, 55 F.R.D. 119 (1973) (need for eliminating some federal jurisdiction and coordinating state and federal systems of justice).

183. *The Geographical Boundaries of the Several Judicial Circuits—Recommendations for Change*, 62 F.R.D. 223, 227 (1974).

184. Statistics are gathered for the 12-month period ending June 30, 1981. 1981 Annual Report of the Director of the Administrative Office of the United States Courts.

185. *Id.* at 186.

186. *Id.*

187. *Id.* at 13.

188. *See, e.g.*, W. Heydeband, *The Technocratic Administration of Justice*, 2 RESEARCH IN LAW AND SOCIOLOGY (1979). Heydeband asserted that:

The American judicial system is in a state of crisis. The main surface systems of this judicial crisis are that the resources and the organizational capacity of the judiciary are not keeping pace with the rising demand for its services. As a result, the nature of adjudication and judicial administration as well as the tasks and the output of the courts are being transformed. But while there is little disagreement over the surface dimensions of the crisis, opinions differ as to its deeper causes, implications, and remedies.

rapid rise in crime in this country,¹⁸⁹ statutory recognition of rights such as those of the Civil Rights Act of 1964,¹⁹⁰ the increasing tendency in this country to seek judicial resolution of disputes,¹⁹¹ and the judicial broadening of constitutional rights of criminal defendants. The rate of increase of appellate cases is far beyond the rate of increase in federal district court filings.¹⁹² If the rate continues, by the year 2010 over one million cases will reach the federal appellate courts each year, and 5,000 appellate judges will be needed to cope with the load.¹⁹³

Legal commentators and judges agree that the answer to the overload of cases is not increasing the numbers of judges. Justice Frankfurter noted that a powerful judiciary is a small judiciary.¹⁹⁴ In 1971, both the Committee of Court Administration of the Judicial Conference of the United States and the Conference itself concluded that more than fifteen judges in a circuit would prove "unworkable."¹⁹⁵ Judge Henry J. Friendly has also argued for a limited number of judges in the federal judiciary.

[T]here must come a point when an increase in the number of judges makes judging, even at the trial level, less prestigious and less attractive. Prestige is a very important factor in attracting highly qualified men to the federal bench from much more lucrative pursuits. Yet the largest district courts will be in the very metropolitan areas where the discrepancy between uniform federal salaries and the financial rewards of private practice is the greatest, and the difficulty of maintaining an accustomed standard of living on the federal salary the most acute. There is real danger that in such areas, once the prestige factor was removed, lawyers with successful practices, particularly young men, would not be willing to make the sacrifice.¹⁹⁶

Many suggestions have been made to help reduce the case load of federal circuit and district courts, including wider use of arbitration, decriminalization of some activities, more delegation of jurisdiction to administrative agencies, the nonjudicial processing of certain matters such as divorce and probate,¹⁹⁷ an increase of the amount-in-controversy requirement for diversity actions, and such judicial actions as, where permitted, awarding the prevailing party attorneys' fees or court costs to discourage frivolous claims.¹⁹⁸ Even if these ideas are adopted and successfully used to limit federal court jurisdiction, it is clear that the judiciary can meet its

Id. at 29.

189. See Burger, *Agenda for 2000 A.D.—Need for Systematic Anticipation*, 70 F.R.D. 83, 90-91 (1976).

190. 42 U.S.C. §§ 1981-1985 (1976 & Supp. V 1981).

191. Burger, *supra* note 189, at 91.

192. Federal district court filings increased 58% in the same time period. See generally, *Geographic Boundaries*, *supra* note 2.

193. Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567 (1975).

194. See Bork, *Dealing With the Overload in Article III Courts*, 70 F.R.D. 231, 234 (1976); Chief Justice Warren, Address at the Annual Meeting of the American Law Institute (May 20, 1964) (reprinted at 35 F.R.D. 181, 182 (1964)).

195. *Geographical Boundaries*, *supra* note 2, at 227-28.

196. H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 29-30 (1973).

197. Refkind, *Are We Asking Too Much Of Our Courts?*, 70 F.R.D. 105 (1974).

198. Sanders, *Varieties of Dispute Processing*, 70 F.R.D. 111, 112-19 (1974). See *Roadway Ex-*

growing responsibilities only through the most efficient administration possible.

In a speech at the American Bar Association's 1969 convention in Dallas, Chief Justice Burger said:

The Courts of this country need management which busy and overworked judges, with vastly increased caseloads, cannot give. We need a corps of trained administrators or managers, just as hospitals found they needed them many years ago, to manage and direct the machinery so that judges can concentrate on their primary professional duty of judging.¹⁹⁹

The need for improved administration has stemmed primarily from the unprecedented increases in the number of appeals. In the 1960's and 1970's the movement in the judiciary to improve the administration of justice and court management resulted in the addition of administrative positions that more than doubled the judiciary's total number of administrative personnel. The following section will discuss briefly some of the mechanisms the Tenth Circuit has adopted to meet the need for efficient administration, including the clerk of court, circuit executive, staff attorneys, and the Appellate Information Management System (AIMS).

A. Clerk of Court

The Clerk of Court has been the circuit's ministerial officer since the circuit was formed.²⁰⁰ The clerk's powers and duties are set forth in statutes, the Federal Rules of Appellate Procedure, and the Rules of the Tenth Circuit.²⁰¹ The clerk is custodian of the court's records and papers, receives and accounts for monies paid to the court, initiates a docket for each appeal, and enters all filings in appeals. He or she issues calendars of cases for the terms of court, enters orders of the court as the appeal progresses, files opinions, and enters judgments disposing of appeals. Upon disposition of petitions for rehearing, the clerk issues the court's mandate and, if certiorari is sought, the clerk upon request prepares the certiorari record.

When the Tenth Circuit was formed in 1929, the first matter of business undertaken by the court was to appoint the clerk, a Denver attorney named Albert Trego. After the clerk had given bond in the sum of \$15,000 with surety approved by the court and had taken the oath of office, the court adopted its seal and announced it was fully organized and in session.²⁰² Shortly afterward, Trego hired a deputy clerk. No personal files on Trego or council minutes relating to the period of his tenure exist, though circuit files reveal that Trego served continuously until his death late in 1939.

Robert B. Cartwright, who had been a law clerk to Judge Orrie L. Phil-

press, Inc. v. Piper, 447 U.S. 752 (1980); Note, Nemeroff v. Abelson, *Bad Faith and Award of Attorneys' Fees*, 128 U. PA. L. REV. 468 (1979).

199. Address by Chief Justice W. Burger, American Bar Association meeting in Dallas, Tex. (Aug. 12, 1969).

200. The court's authority to appoint a clerk and the clerk's authority to appoint necessary deputies, with approval of the court, is set forth in 28 U.S.C. § 711 (1976).

201. See, e.g., 28 U.S.C. §§ 711, 951-956 (1976); FED. R. APP. P. 45; 10th CIR. R. 1, 3, & 13.

202. Record, *supra* note 90, at 2.

lips since 1931, succeeded Trego on December 14, 1939. Cartwright was reputed to have known every detail of every active case on the docket.²⁰³ After serving as clerk for 27 years, Cartwright took early retirement in 1966 because of his health.²⁰⁴

Mr. Cartwright was succeeded by his chief deputy, William L. Whittaker, a Colorado lawyer. Whittaker had also served as a law clerk to Judge Phillips. After serving as chief deputy from January 3, 1966, Whittaker was appointed clerk when Cartwright stepped down at the end of that year. Whittaker served until September 1970 when he resigned to go to Washington to serve as a deputy to Judge Murrah who became Director of the Federal Judicial Center after his retirement.²⁰⁵

The current clerk is Howard K. Phillips, a Denver lawyer who succeeded Whittaker in September 1970. After serving in the Air Force during World War II, Phillips practiced law in Denver until appointed a Denver municipal judge from 1963 to 1964. He was manager of safety and excise for Denver in 1968, and then was appointed clerk of court in 1970.

The office of the clerk has grown rapidly since 1970,²⁰⁶ when the staff consisted of six deputies and only 743 appeals were filed. Even in 1975 filings were only up to 980, but by 1980 they were up to 1,402 and by 1981 they had risen another 12.5% to 1,577. Cases resolved during the year totaled 612 in 1970, 839 in 1975, 1,274 in 1980, and 1,244 in 1981, which left pending cases at 580 in 1970, 716 in 1975, 1,298 in 1980, and 1,631 in 1981.²⁰⁷ By 1980 the office had sixteen deputies.

As the caseload increases, the operation of the clerk's office becomes more complex. Acting in conjunction with the clerk's office, there are now staff attorneys, an appeals expediter, a systems analyst, a LEXIS operator, a computer system, and a word processing system. The AIMS computer program has greatly aided retrieval of needed case information. Because of the computer system, the clerk is able to report each month, with relative ease, the total number of cases argued, cases pending, motions pending, and other useful data. Similarly, the clerk prepares mailing lists of attorneys involved in cases being argued on the next calendar and prints them on mailing labels.

B. *Office of the Circuit Executive*²⁰⁸

The movement toward better court administration led, in 1969, to legislation that proposed the appointment of court administrators. Support for the proposal came from many sources, including Bernard G. Segal, then president of the American Bar Association, and Chief Judge David T. Lewis

203. Letter to Judge James K. Logan from Howard K. Phillips (Sept. 8, 1980).

204. Letter to Judge Alfred P. Murrah from Robert B. Cartwright (Sept. 22, 1966).

205. Judge Alfred P. Murrah served as Director of the Federal Judicial Center from May 1970 to October 1974.

206. The year refers to the twelve-month period ending June 30, 1981.

207. *See* Management Statistics for United States Courts, 1975, 1980, and 1981.

208. This section draws significantly from a summary written by Emory G. Hatcher, Circuit Executive for the Tenth Circuit.

of the Tenth Circuit.²⁰⁹

The Circuit Executive Act was signed into law on January 5, 1971. The Act empowered circuit councils to appoint circuit executives and to vest in them broad administrative control of all nonjudicial activities of their courts, thus relieving circuit judges of many administrative chores.²¹⁰ The standards for certification of a circuit executive are set forth by statute,²¹¹ and are applied by a board created for that purpose.²¹² On August 1, 1972, the Judicial Council of the Tenth Circuit appointed Emory G. Hatcher the first circuit executive of the Tenth Circuit; he continues to serve in this position.

Subject to general supervision by the chief judge of the Tenth Circuit, the circuit executive exercises administrative control over many of the court's nonjudicial activities, including planning, organizing, and administering a personnel system, acting as a liaison officer between the court of appeals and the General Services Administration regarding furnishings and space needs, advising the clerk of the court as to maintenance of the accounting system, conducting studies and making recommendations regarding the business and administration of the court of appeals and the district courts within the Tenth Circuit, and collecting and analyzing statistical data relating to court business.²¹³ Since the appointment of the circuit executive, many notable administrative developments have been instituted in the Tenth Circuit. Personnel policies and procedures have been streamlined. The Tenth Circuit has adopted a comprehensive personnel manual—the first in any United States court—that includes a grievance procedure and an equal employment opportunity plan.

The Tenth Circuit was the first to apply to the Federal Judicial Center for approval to test computer-assisted legal research. The concept was instituted in 1973. The Judicial Center leased a LEXIS terminal; when the system proved very successful, the Tenth Circuit included it in its budget on a

209. Chief Judge Lewis expressed his approval of the Act:

Although I have served as Chief Judge of the Tenth Circuit for only a few months I am already keenly aware of the administrative burden that goes with the position. Perhaps my recent experiences have not been typical for at present we have only four working judges on this Court of Appeals, there being two unfilled vacancies and one judge seriously ill. As a consequence it has been difficult to delegate any of the administrative duties and I have had to devote my time to administrative matters that could well be handled by a court executive.

I have no doubt that a court executive would do much to improve the judicial machinery and would allow the judges to better perform their intended function, the decisional process. I hope H.R. 17901 will be enacted into law.

Letter from Chief Judge Lewis to the Honorable Emanuel E. Celler (Aug. 7, 1970) (Tenth Circuit files).

210. 28 U.S.C. § 332(e) (1976).

211. *Id.* § 332(f) (1976).

212. *Id.*

213. The office of the circuit executive also acts as the court's purchasing officer; serves as secretary to the Judicial Council and the District Judges' Association; prepares all budgets; approves Criminal Justice Act vouchers; maintains records of all court property; negotiates all space needs with the Administrative Office and General Services Administration; serves on the Library and Rules Committees; acts as staff in the area of fiscal management; serves as personnel officer; recommends policies and procedures to the court regarding case management; reports to the Judicial Council matters requiring action; and performs numerous other administrative duties.

permanent basis. The Tenth Circuit now has terminals in Denver and Oklahoma City.

The Tenth Circuit has printed a comprehensive loose-leaf Practitioners' Guide to Tenth Circuit Procedures, which it sells to the circuit's practicing bar. Again, this practice is the first of its kind and was made easier because the Tenth Circuit has its own print shop, which is also unique to this circuit. All of the court's slip opinions and internal forms are printed in-house. Additionally, the print shop supplies many forms and all rules of court for the eight district courts of the Tenth Circuit.

The circuit executive chairs an annual meeting of Tenth Circuit Clerks of Court. As a result of these meetings, many areas of court management have been improved and many procedures have been standardized. One idea emanating from these meetings was the desirability of establishing a uniform circuit-wide handling of petitions and complaints filed pursuant to 28 U.S.C. §§ 2241, 2254, and 2255, and 42 U.S.C. § 1983.²¹⁴ John K. Kleinheksel, one of the staff attorneys, was assigned to the project. With the assistance of the clerks of court and an ad hoc committee comprised of district court Chief Judges Alfred A. Arraj, Frederick A. Daugherty, and Wesley E. Brown, a plan was presented and adopted at the Executive Session of Judges at the 1976 Judicial Conference of the Circuit. The plan effected a circuit-wide uniform district court rule providing for standardized forms and uniform processing of these complaints and petitions.

C. *Staff Attorneys in the Tenth Circuit*

The court's policy of encouraging district court judges to freely grant certificates of probable cause and leave to appeal in *forma pauperis* resulted in prisoner cases overburdening the court's calendar. The court appointed an attorney to brief and argue each case. The Criminal Justice Act did not provide for the payment of compensation to counsel appointed for post-conviction matters; thus, the attorneys appeared *pro bono publico*. Many newly admitted attorneys volunteered for these cases and, as compensation, the court waived the ten dollar fee for admission to the Bar of the Tenth Circuit. Prior to the fall of 1966, there was little preliminary review of docketed appeals. Consequently, appointed attorneys were sometimes compelled to brief and strenuously argue contentions that were totally untenable.

To remedy this situation the Judicial Council of the Tenth Circuit approved the concept of a central staff of attorneys in September 1966, and the court obtained funding from the Administrative Office. Originally, the staff attorney's primary responsibility was to review each prisoner case and recommend the appointment of counsel when necessary. In those cases in which counsel was not appointed, the staff attorney wrote a memorandum on the case which was made available to the panel to which the case was assigned.

On November 14, 1966, John J. McDermott, was appointed the first

214. 28 U.S.C. §§ 2241, 2254, 2255 (1976 & Supp. V 1981); 42 U.S.C. § 1983 (Supp. IV 1980).

staff attorney. Under the guidance of Chief Judge Murrah, his work substantially reduced the number of attorneys appointed in post-conviction cases.

As the project continued, its scope gradually expanded to make other staff services available to the courts. Staff attorneys prepared proposed drafts of *per curiam* opinions in those cases in which no attorney was appointed. They processed certain civil rights cases, provided procedural and technical assistance to appointed attorneys, and responded to the large volume of written inquiries from prisoners and other laypersons.

Reviewing the process after some time of operation, the court developed two concerns: the possibility that equal protection was not being afforded because the process gave different treatment to a group of cases in which the appellants typically were paupers, and the lack of advance notice to the parties that such different treatment might occur. Since the screening technique had proved successful in handling post-conviction cases, there was reason to believe that it might be beneficially applied to all cases. As a result, the court adopted Local Rule 10 (now Rule 9),²¹⁵ the summary affirmance or dismissal rule. The rule permits the appellee to file a motion to affirm on the ground that the issues presented "are so unsubstantial as not to need further argument," or to file a motion to dismiss for lack of jurisdiction. More important, the rule permits the court, on its own motion, to summarily affirm cases when proper.

Under the authority of Rule 9, the staff attorneys review a case as soon as an appellant's brief or a motion to dismiss or affirm is filed. Recommendations relating to summary affirmance or dismissal are made to the court and, if a summary action recommendation is approved, the parties are notified and given an opportunity to file a written argument supporting or opposing the summary action. If, after examination of these arguments, the court agrees that summary action is appropriate, the case is returned to the staff attorney to prepare for the court's approval a proposed draft of a *per curiam* opinion. These drafts are circulated together with the record and briefs to three-judge panels of the court, sometimes by mail and other times to "Rule 9" panels sitting in Denver at regular court terms. The judges approve, modify, or rewrite the opinions before their issuance, or they may sometimes reassign the cases for oral argument on the regular appeals docket.

McDermott established an index of cases by the issues raised, which allowed him to provide to each panel of the court information about cases involving similar issues before other panels. This index assisted the Tenth Circuit in its efforts to avoid conflicting decisions. In cases to be argued, he provided both the court and counsel with copies of relevant, unpublished Tenth Circuit opinions. Thus, even before LEXIS, attorneys and the court were able to evaluate the most recent law in the Tenth Circuit relevant to the case being argued.

The utility of the McDermott subject matter index decreased as the

215. 10th Cir. R. 9.

number of cases increased. To overcome this weakness a pilot automation project was undertaken. This computer experiment was informative and anticipated many systems now used, but financial support was unavailable and the experiment was dropped.²¹⁶ AIMS currently fills the need of comparing recent cases.

In 1967, a second staff attorney was authorized because of the increased responsibilities of the Staff Attorney's Office; Arthur J. Katsiaficas was appointed. Subsequently, McDermott was promoted to Chief Deputy Clerk, and one additional staff attorney was authorized. By 1972, staffing had increased to four staff attorney positions. With the approval of Chief Judge Lewis, it was decided to request increases in the size of the central staff until there was one such position for each active circuit judge. The fifth staff attorney position was approved in March 1975, and presently the court has eight staff attorneys.

The need for a person to supervise the central staff soon became apparent and the position of senior staff attorney was authorized October 1, 1975, for nine of the circuits, including the Tenth Circuit. Richard Banta, who had been a staff attorney since August 1972, was appointed as the Tenth Circuit's first senior staff attorney in November 1975. Permission was granted in May 1978 to reclassify one existing position to that of first assistant staff attorney. John Kleinheksel, who had been a staff attorney since July 1973, was appointed to this position in June 1978. In September 1978, senior staff Attorney Richard Banta resigned and John Kleinheksel was appointed to succeed him on the next day. Elizabeth D. Page, who had been a staff attorney since August 1974, was appointed in October 1979 to succeed Kleinheksel as first assistant staff attorney. Both are currently serving in these positions.

D. *Appellate Information Management System*

The Tenth Circuit was the field test site and the first court to use the automated Appellate Information Management System (AIMS). In December 1976, representatives from ten of the eleven federal appellate courts met to begin defining their requirements for the system. Taking its original impetus from work of the Second Circuit, an AIMS committee was formed under the guidance of the circuit executives with each court represented by a designated functional analyst. The Federal Judicial Center provided funds and technical guidance. The functional analysts and the Federal Judicial Center created the AIMS Functional Description, basing it upon the agreement between the courts on standard terminology, procedures, and requirements. After each circuit's review committee approved the functional description, the Federal Judicial Center used it to develop the computer programming required to support AIMS.

Beginning July 1, 1979, all pending cases were entered into the data base. From that date forward all new case information, new motions, and

216. Whittaker & McDermott, *Computer Technology in an Appellate Court*, 54 J. AM. JUDICATURE SOC. 73 (1970).

scheduled actions have been entered. In November 1979, the Second Circuit became the second court to use the automated system. Subsequently, the Seventh and Fifth Circuits have begun the use of AIMS, and plans are to introduce the system to the other federal appellate courts.

The clerk's office enters into the AIMS computer information relating to each case. AIMS will then provide the clerk's office with reports detailing all actions due or overdue. The statistical reports are made through AIMS as a means of identifying trends in the types and volume of appeals being processed. AIMS provides immediate display at the computer terminal of the current status of each case. The system provides judges with reports detailing their individual caseloads and with statistics on the workloads of their court. It can also be used as a research tool for finding pending or completed cases that deal with specific issues. Staff attorneys receive reports identifying and grouping cases by issues.

CONCLUSION

The Tenth Circuit was created almost simultaneously with the stock market crash of 1929. It has survived the great depression of the 1930's, World War II and several smaller wars, the prosperity and burgeoning growth of the late 1940's through the 1960's, and the cataclysmic changes in criminal law, civil rights, and federal law in general. Yet its size, measured in active judges, has only doubled from four to eight. The judges have somehow managed the dramatically greater caseload. Increased staff and imaginative innovations in procedures, of which the Tenth Circuit has been a pioneer, helped make this possible. Some prospective changes are predictable—increased population and caseload is based in part on the energy resources concentrated in Tenth Circuit states. Other changes are not so predictable, although certainly there will be a continued evolution in procedures. Since humans are mortal, different judges, and perhaps different laws, will control the future of the Tenth Circuit, but the changes are almost certain to be evolutionary rather than revolutionary, built firmly upon the sound base of the past.