

# Toward a Judicial Administrator of Limited Powers: Bankruptcy Crisis and the Administrative Office of the United States Courts

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Administrative power in the federal judicial system is, like the system itself, decentralized. Such power has historically been lodged primarily with the judges of the several courts rather than with non-judge administrators. As it turned out, even the Administrative Office Act of 1939<sup>1</sup> exerted only a minor centripetal influence on the judiciary's diffuse system. That the Administrative Office created by that Act<sup>2</sup> afforded an instrumentality for extensive centralization of federal judicial administration loomed as a distinct possibility for only a brief moment in the formative years of the agency's history. The precipitating element was a dramatic reform of bankruptcy administration proposed in 1940 by the Department of Justice.<sup>3</sup> It would have substantially augmented the power exercised by the new Director of the Administrative Office.

Failure to enact the plan in the form advanced by the Attorney General would reflect the then contemporary pattern of judicial politics. Viewed in historical perspective, its defeat would serve to illuminate the character of the Office. Twenty years after both the agency's establishment and the bankruptcy dispute, Acting Director William L. Ellis flatly declared that "We are not a central-office executive agency like the F.B.I., but rather a staff office of the Judicial Conference [of the United States]."<sup>4</sup> Thus, the conception

of the Administrative Office held by its officials changed little in the decades after 1939; there remained in the federal judiciary "no centers of authority nor lines of authority in the usual administrative sense."<sup>5</sup> When administrators acted, they acted "in terms of guideline, not directive; of coordination, not command; of suggestion, not instruction; of assistance, not management; of counsel, not superintendence."<sup>6</sup>

This conception of the kind of power available to the Administrative Office largely accorded with that held by the framers of the 1939 Act. As is common in the American political system, they came largely from the ranks of the interest group most affected by the legislation, in this instance from that of the federal judges.

The 1938 Judicial Conference created a special committee of its members to secure reform of federal judicial administration.<sup>7</sup> Chief Justice Hughes selected as chairman a conservative Virginia Republican, Duncan Lawrence Groner, then Chief Judge of the Court of Appeals for the District of Columbia Circuit.<sup>8</sup> The committee's dominant figure, he would be aided by his colleague on the Court of Appeals and a non-member of the committee, Judge Harold M. Stephens. Other members of the committee included the Senior Circuit Judge of the Eighth Circuit, Kimbrough Stone, and Judge John J. Parker of the Fourth Circuit, both of

<sup>1</sup> Act of August 7, 1939. 53 Stat. 1223.

<sup>2</sup> *Ibid.*, Sec. 302.

<sup>3</sup> Sec: "Administration of the Bankruptcy Act," *Report of the Attorney General's Committee on Bankruptcy Administration, 1940* (Washington: Government Printing Office, 1941). Referred to hereafter as *Report of the Attorney General's Committee on Bankruptcy Administration, 1940*.

<sup>4</sup> William L. Ellis to Warren Olney, III, November 30, 1960, Files of the Administrative Office of the United States Courts (Federal Records Center, Alexandria, Virginia), 61-A-298, Box 2. Cited hereafter as Files of the Administrative Office.

<sup>5</sup> "Statement of the Administrative Office, Judicial Salary Plan," in

U. S. Congress, Senate, Subcommittee of Committee on Appropriations, *Hearings, on H.R. 11134, Department of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations, 1965*, Part I, 88th Cong., 2nd Sess., 1964, p. 73.

<sup>6</sup> William L. Ellis to Warren Olney, III, November 30, 1960.

<sup>7</sup> "Report of the Judicial Conference," in U.S., *Annual Report of the Attorney General of the United States for 1938*, pp. 23-24.

<sup>8</sup> The presiding judge of this Court was designated "Chief Justice" by the Act of February 9, 1893. 27 Stat. 434. By Section 2 of the Act of June 24, 1948, 62 Stat. 985, as amended by Section 51 of the Act of September 3, 1954, 68 Stat. 1245, his designation became "Chief Judge," as did that of all "Senior" Circuit and District Judges.

whom would help shape the reform legislation. Senior Circuit Judge Evan A. Evans of the Seventh Circuit and the Senior Circuit Judge of the Second, Martin T. Manton, remained in the background. The latter resigned his judicial commission four months after the committee's establishment as New York County District Attorney Thomas E. Dewey uncovered evidence of large-scale bribery.<sup>9</sup> These judges of the Conference coordinated their effort with a less prominent committee of lawyers led by Arthur T. Vanderbilt which represented the Attorney General.<sup>10</sup>

The Conference acted in the wake of a major political crisis for the federal courts. President Franklin D. Roosevelt's ill-fated "Court-Packing" Plan of 1937 had forced the judges' hands. And the manner in which they responded to this crisis indicated their perception of the nature of the judiciary as an institution as well as its relationship with the executive branch and administrators in general.

#### *FDR's "Court-Packing" Plan*

Clearly aimed at the Supreme Court and its judicial philosophy under Chief Justice Charles Evans Hughes,<sup>11</sup> the President's proposal made a broad appeal to all who were disenchanted with any or all levels of the federal judicial hierarchy. Taking cognizance of discontent with the administration of justice in the lower federal courts, the President advanced his Court Plan not merely as an attack on the Supreme Court, but as a constructive step toward reform. "A growing body of our citizens," he said, as had unnumbered judicial reformers before him,

complain of the complexities, the delays, and the expenses of litigation in United States Courts. Only by speeding up the processes of the law and thereby reducing their cost, can we eradicate the growing impression that the courts are chiefly a haven for the well-to-do.<sup>12</sup>

Efficiency and economy in the administration of justice required, Roosevelt asserted, "the same kind of reorganization of the Judiciary as has been recommended . . . for the Executive Branch of the Government."<sup>13</sup> Thus he publicly equated his Plan with that for reorganization of the executive branch submitted by his Committee on Administrative Management less than a month before presentation of the Court proposal.<sup>14</sup> This distinguished Committee, headed by Louis Brownlow,

had been created in March 1936 to analyze government administration in the light of needs generated by the depression, the nation's growth, the rising totalitarian menace abroad, and by "the vexing social problems of our times."<sup>15</sup> After intensive study it concluded that efficiency required

the establishment of a responsible and effective chief executive as the center of energy, direction, and administrative management, the systematic organization of all activities in the hands of qualified personnel under the direction of the chief executive; and to aid him in this, the establishment of appropriate managerial and staff agencies.<sup>16</sup>

The thrust of this managerial reform movement, then prominent in official thinking, was reflected in the Judicial Reorganization Bill. Section 2 augmented the power of the Chief Justice over the intercourt assignment of judges.<sup>17</sup>

Strengthening the Chief Justice's administrative power was not enough; he, like the President, needed help.<sup>18</sup> Just as the Brownlow Committee recommended adequate staff assistance for the President,<sup>19</sup> so Roosevelt urged creation of a judicial administrator "known as a Proctor . . . to be appointed by the Supreme Court and to act under its direction . . ."<sup>20</sup> Section 3 of the Court Bill empowered the Proctor to secure from the courts and publish, with the highest Court's consent, information on the business of the district and circuit courts, to

investigate the need of assigning district and circuit judges to other courts and to make recommendations thereon to the Chief Justice; (3) to recommend, with the approval of the Chief Justice, to any court of the United States, methods for expediting cases pending on its docket; and (4) to perform such other duties consistent with his office as the Court shall direct.<sup>21</sup>

Later, during hearings on the measure, it became apparent that a staff as well as a Proctor was contemplated to examine caseloads in eighty-five districts,<sup>22</sup> and to expose, if not to the general public, then to their peers "laggard judges . . . and those who lack the capacity to organize the business of their individual courts."<sup>23</sup>

#### *Counterattack and reappraisal*

Ultimately, the Administration's Court Bill suffered mortal blows, many of them emanating from the judici-

<sup>9</sup> Joseph Borkin, *The Corrupt Judge: An Inquiry into Bribery and Other High Crimes and Misdemeanors in the Federal Courts* (New York: Clarkson N. Potter, Inc., 1962), pp. 25-93.

<sup>10</sup> The members were: Arthur T. Vanderbilt (chairman); George M. Morris, chairman of the House of Delegates, American Bar Association; Herschel W. Arant, dean of law, Ohio State University; Assistant Attorneys General Alexander Holtzoff and Gordon Dean.

<sup>11</sup> S. 1392, 75th Congress. See William E. Leuchtenburg, "The Origins of Franklin D. Roosevelt's 'Court-Packing' Plan," *The Supreme Court Review: 1966* (Chicago: The University of Chicago Press, 1966), pp. 347-400.

<sup>12</sup> Samuel F. Rosenman, *The Public Papers and Addresses of Franklin D. Roosevelt*, Volume 6, 1937 (New York: The Macmillan Company, 1941), p. 52. Cited hereafter as *The Public Papers*.

<sup>13</sup> *Ibid.*, p. 35.

<sup>14</sup> See *The President's Committee on Administrative Management: Report of the Committee with Studies of Administrative Management in the Federal Government* (Washington: Government Printing Office, 1937). Cited hereafter as *Report of the President's Committee*.

<sup>15</sup> *Ibid.*, p. 2.

<sup>16</sup> *Ibid.*, p. 3.

<sup>17</sup> S. 1392, 75th Congress.

<sup>18</sup> *Report of the President's Committee*, p. 5.

<sup>19</sup> *Ibid.*

<sup>20</sup> Roseman (ed.), *The Public Papers*, Volume 6, 1937, p. 38.

<sup>21</sup> *Ibid.*, p. 65.

<sup>22</sup> William Denman, U. S. Congress, Senate, Committee on the Judiciary, *Hearings, on S. 1392, Reorganization of the Federal Judiciary*, Part 2, 75th Cong., 1st Sess., 1937, p. 482.

<sup>23</sup> *Ibid.*, p. 484.

ary itself. Chief Justice Hughes penned his famous letter to Senator Burton K. Wheeler in which he discredited arguments for an enlarged Supreme Court.<sup>24</sup> In September, 1937, he used the Judicial Conference to perform a similar operation on charges of congestion in the lower federal courts.<sup>25</sup>

Section 2 of the Court Bill likewise came under attack from the Chief Justice. He adamantly opposed enlargement of his own assignment power. Such power, he feared, would compel him to "practically determine who should try cases for the Government in the circuits or districts of the country."<sup>26</sup>

The Proctor proposal evoked sharp and widespread criticism. Judges saw it as a threat to an independent and decentralized judiciary. Years later, Judge D. Lawrence Groner, would attest to such forebodings. He said:

. . . It is well known that the effort to reconstitute the Supreme Court was only part of a general effort to appoint what was called a 'Court Proctor' to supervise the work of the district judges and generally exercise power in relation to their duties and functions which, in the opinion of most people, would have totally destroyed the independence of the courts.<sup>27</sup>

Following defeat of the President's bill, prominent federal judges reappraised the judiciary's adequacy as an administrative institution. Publicly, they acknowledged the validity of arguments founded on the existence of congestion and delay in the courts.<sup>28</sup> But in private they admitted the creditability of broader criticisms. At the 1938 Conference, Chief Justice Hughes noted the geographical isolation of federal judges, an environment which,

in some instances, tends to the creation of a disposition to exercise an individual will which some critics have characterized as 'czar-like and arbitrary.'<sup>29</sup>

Institutional means for meeting such administrative and ethical problems seemed desirable, if not vital.<sup>30</sup> Such a reorganization would also strengthen the Judicial Conference with a staff equipped to perform essential bureaucratic functions,<sup>31</sup> a goal favored by the Chief

Justice.<sup>32</sup> Hughes also saw in a permanent administrative agency a means for improving the judiciary's far-flung communications system established in 1922.<sup>33</sup>

To other judges a separate administrative agency seemed an ideal instrument for improving liaison with Congress.<sup>34</sup> With effective liaison, tangible results were anticipated. More money appropriated by a Congress whose heart would melt at the sight of the judiciary's miniscule requests was forecast by Judge William Denman of the Ninth Circuit.<sup>35</sup> Moreover, an administrator responsible only for the courts would, thought some judges, insure a more equitable allocation of funds finally appropriated.<sup>36</sup>

Undoubtedly, these positive advantages associated with a separate administrative institution motivated leading members of the courts. However, its appeal was a narrow one. Programs for building into the judiciary an efficient administrative agency and enhancing accountability held limited attraction for many judges. On the other hand, the Roosevelt onslaught elicited powerful negative responses founded essentially on ideological grounds. And in the crisis of 1937, the significance of the doctrine of separation of governmental powers came to the fore.

Although the Department of Justice had been involved in judicial administration since 1870, feelings ran so high in the wake of the Court Fight that one leading spokesman for the legal community protested that "any influence over judicial administration by the department for prosecution is an odious usurpation."<sup>37</sup> Suddenly there was something insidious in the Justice Department's control of judicial finances. Warned one Judge:

The fact . . . is that if an Attorney General or a Budget Director or Secretary of the Treasury were hostile to the courts and their independence, he could cripple their independence seriously by refusing to include necessary items for their support and equipment. By a process of attrition upon the estimates of the courts he could ultimately cripple their powers seriously.<sup>38</sup>

24 U. S., Congress, Senate, Committee on the Judiciary, *Reorganization of the Federal Judiciary, Adverse Report to Accompany S. 1392*, Report No. 711, 75th Cong., 1st Sess., 1937, pp. 38-40.

25 *New York Times*, September 29, 1937, p. 17.

26 "Transcript of the Judicial Conference," 1937, p. 220. In Henry P. Chandler, "Some Major Advances in the Federal Judicial System: 1922-1947," *Federal Rules Decisions*, Volume 31 (January-February 1963), pp. 343-44. Cited hereafter as Chandler, "Some Major Advances."

27 D. Lawrence Groner to Orle L. Phillips, July 17, 1944, Duncan Lawrence Groner Papers (University of Virginia, Charlottesville, Virginia), Box 4. Cited hereafter as Groner Papers.

28 D. Lawrence Groner, U. S. Congress, Senate, Committee on the Judiciary, *Hearings, on S. 188, Administration of United States Courts*, 76th Cong., 1st Sess., 1939, p. 11. Cited hereafter as *Hearings, on S. 188*.

29 "Administration in the Federal Courts—Administrative Office Bill, Extract from the Proceedings of the Judicial Conference: September 30, 1938, pp. 174-92." mimeograph (Washington: Supreme Court, 1938), p. 10. Cited hereafter as "Extract, 'Administration in the Federal Courts.'"

30 Harold M. Stephens, *Hearings, on S. 188*, p. 33.

31 William Denman to Henry F. Ashurst, January 31, 1939, in U. S. Congress, Senate, Committee on the Judiciary, *Hearings, on S. 3212, Administrative Office of the United States Courts*, 75th Cong., 3d Sess., 1938, p. 69. Cited hereafter as *Hearings, on S. 3212*.

32 "Extract, 'Administration in the Federal Courts,'" pp. 19-20.

33 Act of September 14, 1922. 42 Stat. 838, Sec. 2.

34 Harold M. Stephens, U. S. Congress, Senate, Committee on the Judiciary, *Hearings, on S. 188*, p. 33.

35 William Denman to Martin T. Manton, September 26, 1936, Groner Papers, Box 8.

36 D. Lawrence Groner to Wiley Rutledge, April 17, 1939, *ibid.*, Box 22.

37 Herbert Harley, "Forced Retirement of Federal Trial Judges," *Journal of the American Judicature Society*, Volume 21 (October, 1937), p. 89.

38 Harold M. Stephens Papers to William H. King, March 14, 1938, Harold M. Stephens Papers (Library of Congress, Washington, D. C.), Box 208. Hereafter cited as Stephens Papers.

Favoring administrative separation of the judiciary, Attorney General Cummings took this same approach.<sup>39</sup>

The administrative tyranny argument contained some truth. The Bureau of the Budget had, in fact, revised and reduced the estimates for the courts.<sup>40</sup> The Department of Justice had, perhaps, treated the courts indifferently. Judge Denman charged that

The requirements of the courts for more judges, with properly salaried law clerks . . . and for their libraries and their chambers are lost in the unit consideration . . . with the executive need for assistant attorneys general, lawyers and clerical force all for the United States as litigant.<sup>41</sup>

Seemingly inequitable allocation of funds between courts as well as between branches of the government had occurred and was similarly protested by another eminent judge.<sup>42</sup>

Finally, normal administrative authorization of supplies and travel expenses had irritated many judges. But Learned Hand thought

The supposed determination of the Department of Justice . . . the most unreal spectre; theoretical talk, pure and simple. I have been a judge nearly thirty years, and I have come to be suspicious of executive pressure . . . but it has never come in the form of shutting off my stationery. This . . . is to me the veriest claptrap.<sup>43</sup>

With Hand's view, Chief Justice Hughes substantially agreed.<sup>44</sup>

Myth and reality merged imperceptibly. Nevertheless, to a large number of judges one thing was clear; their prestige had fallen. Whatever the fundamental cause, whether the Depression, administrative disorganization and indifference, or an outright executive conspiracy against the courts of which the Court Bill was an alleged manifestation, many judges felt a loss of self-esteem and status. They demanded "a restoration of the authority, jurisdiction, privileges and prestige of the district judges to what they were no longer than ten years ago."<sup>45</sup> To Senior Circuit Judge Kimbrough Stone, it appeared "that we were facing the danger . . . of a possible movement for centralization or control. . . and that it might be advisable if we built up ourselves, among ourselves, our own controlling organization as far as might be necessary."<sup>46</sup>

The need for adaptations in the judicial institution had become self-evident and the time for meeting it

perhaps short. Around the world the strident sounds of totalitarian political systems echoed. "We are living in a time when all legal processes, all processes of reason, here and abroad throughout the world, are more or less subject to attack," Chief Justice Hughes asserted; "We are living at a time when the disposition to exercise authority, to control by executive force, makes a strong appeal to a multitude of people."<sup>47</sup>

To meet the challenge to a government of laws resting upon an independent judiciary and to maintain the people's confidence in their courts, the judges moved "to clean their own house, rather than be subject to the embarrassment and destruction of our theory of government by having it done by someone else."<sup>48</sup> To this end, the Administrative Office Act of 1939 would be the judiciary's substitute for the Court Bill introduced by President Roosevelt in 1937.<sup>49</sup>

#### *The Administrative Office Act*

The eventually-enacted Administrative Office bill, sponsored by the Judicial Conference and pressed on Congress by several of its members, had two major aspects. It established an administrative system under control of the judges and wholly separate from the Executive Branch. And, secondly, it formally decentralized real power within that system such that the Supreme Court and its Chief Justice would be better insulated than in 1937 from future politically-inspired attacks on the judiciary.<sup>50</sup>

"As stated by the Chief Justice," related Judge Kimbrough Stone, "one of the purposes of the Administrative Office Act was to decentralize control of the Judiciary," and to Stone that purpose was "of cardinal importance."<sup>51</sup>

In proposing creation of a decentralized administrative system, the Chief Justice was motivated by a desire to distribute responsibility to the far-flung circuits as a defense against political forays centered on the establishment in Washington. Perhaps, too, the philosophy and practice of federalism held a powerful attraction for him. "My thought," declared the former New York Governor,

is that . . . there should be greater attention to local authority and local responsibility. It seems to me that, as we have the States as *foci* of administration with regard to local problems pertaining to the States, we have in the various Circuits of the country *foci* of federal action from the judicial standpoint.<sup>52</sup>

<sup>39</sup> See *Hearings, on S. 3212*, p. 14.

<sup>40</sup> Harold M. Stephens to Charles E. Stewart, December 23, 1937, Stephens Papers, Box 208.

<sup>41</sup> William Denman, "Critical Study of What the Legislature Owes the Judiciary," *Journal of the American Judicature Society*, Volume 21 (December, 1937), pp. 122-3.

<sup>42</sup> D. Lawrence Groner, U. S. Congress, House, Committee on the Judiciary, *Hearings, on H. R. 2973, H. R. 5799, Administration of United States Courts*, 76th Cong., 1st Sess., 1939, p. 7. Cited hereafter as *Hearings, on H. R. 2973*.

<sup>43</sup> Learned Hand to D. Lawrence Groner, December 26, 1938, Groner Papers, Box 4.

<sup>44</sup> "Extract, 'Administration in the Federal Court,'" p. 8.

<sup>45</sup> Speech by Merrill Otis, "Conference of the United States Circuit

and District Judges of the Eighth Circuit," 1939, Stenographic Transcript, p. 343. Kimbrough Stone Papers (Western Historical Manuscripts Collection, University of Missouri, Columbia, Missouri), Box 26.

<sup>46</sup> *Ibid.*, p. 319.

<sup>47</sup> "Extract, 'Administration in the Federal Courts,'" p. 12.

<sup>48</sup> D. Lawrence Groner, *Hearings, on S. 188*, p. 9.

<sup>49</sup> D. Lawrence Groner to Orin L. Phillips, July 17, 1944, Groner Papers, Box 4.

<sup>50</sup> "Extract, 'Administration in the Federal Courts,'" pp. 5-6.

<sup>51</sup> Kimbrough Stone to John Biggs, Jr., November 14, 1940, D. Lawrence Groner Papers, Box 16; see also "Extract, 'Administration in the Federal Courts,'" p. 14.

<sup>52</sup> "Extract, 'Administration in the Federal Courts,'" p. 14.

To this end, the largely social and educational annual conferences in each circuit, composed of circuit and district judges and of members of the bar invited by the judges, were formalized.<sup>53</sup> With lawyers in attendance, the circuit judicial conferences were hardly intended as vehicles of administrative powers to which judges and other court offices would be subordinate. "Not even the Judicial Conference itself," remarked Senior Circuit Judge Stone, "can do more than make recommendations and suggestions which may or may not be followed, as the judges affected may elect."<sup>54</sup>

The Administrative Office Act of 1939 created, he declared, "one and only one agency with any disciplinary powers, that is, the Circuit Council."<sup>55</sup> Rather than centering such powers in the Chief Justice or the Supreme Court as proposed in the 1938 Ashurst bill<sup>56</sup> and the earlier Court Plan of 1937,<sup>57</sup> Chief Justice Charles Evans Hughes advocated "a mechanism through which there could be a concentration of [administrative] responsibility in the various Circuits . . . with power and authority to make the supervision all that is necessary to insure competence in the work of all of the judges of the various districts within the Circuit."<sup>57a</sup> Subsequently, Section 306 of the Act of August 7, 1939, vested in the circuit judicial councils, composed of all members of the several circuit courts of appeals, responsibility for insuring the effective and expeditious transaction of district court business. It required "the district judges promptly to carry out the directions of the council as to the administration of the business of their respective courts."<sup>58</sup>

As perceived by Chief Justice Hughes and the Senior Circuit Judges, the Judicial Conference of the United States and the eleven circuit judicial councils constituted the cornerstones of the federal judiciary's administrative institution. The former acted as policy-maker; it was the arbiter of "all questions which would require uniformity of action, or where there would be differences between the various organizations of the Circuits, or where there would be any need for the intervention of a central body. . . ."<sup>59</sup>

If the Conference and councils were the cornerstones, what role remained for the Administrative Office? The judges wanted an expert administrator, but one incapable of interfering with judicial independence. For them, the ideal model was that which segregated law from administration and which provided the federal

court system with an administrator who was ever "on tap," but not "on top". To insure preservation of impartial administration of justice, judges, not administrators, must reign over the judiciary's administrative institutions.

In the wake of the dramatic clash between the Executive and Judicial branches, all parties agreed on the desirability of separating judicial administration from the Justice Department and oversight by the Bureau of the Budget. In the eyes of the judges who had experienced the Department's depression-inspired economies, a primary objective was "to relieve the courts of Executive control over its finances."<sup>60</sup> The Act of 1939 would prohibit the Bureau of the Budget from revising the judiciary's estimates although it permitted that agency to make negative recommendations.<sup>61</sup>

No great controversy arose over transfer to the Administrative Office of various "housekeeping" and statistical compilation duties long performed by the Department and of administrative responsibility for most court employees. However, a proposed change in control of the probation service stirred a storm of protest.<sup>62</sup>

The same session of the Judicial Conference which directed the transfer of the probation system to the new Office also construed the language of the Administrative Office Act as charging the new agency "with the responsibility of supervising the administration of the Bankruptcy Act by all officers of the bankruptcy courts, including the referees in bankruptcy."<sup>63</sup>

#### *The Office and the Conference*

Once functions had been severed from the Justice Department and incorporated in the Administrative Office, the issue for the judges became that of controlling their own administrators. Who was to exercise ultimate administrative responsibility for the work of the new agency?

Convinced that real "control should remain unimpaired in the judiciary," the Judicial Conference, noted one judge "is the only existing central body representing the entire country."<sup>64</sup> It alone offered a bulwark "against development of a bureaucratic spirit in the [administrative] organization,"<sup>65</sup> and had the capacity, as Groner later put it, "to keep a rein on the 'Office' and maintain the theory on which the bill creating the Office passed, viz., to make it an agency, and not a master of the courts."<sup>66</sup> Chief Justice Hughes, likewise, supported the Conference as the locus of final

<sup>53</sup> Act of August 7, 1939, 53 Stat. 1224, sec. 307.

<sup>54</sup> Kimbrough Stone to John Biggs, Jr., November 14, 1940. Groner Papers, Box 16.

<sup>55</sup> *Ibid.*

<sup>56</sup> S. 3212, 75th Congress. Senator Harry Ashurst, Chairman of the Committee on the Judiciary, introduced this bill which embodied the recommendations of Attorney General Homer Cummings contained in the *Annual Report of the Attorney General of the United States for 1937*, issued on January 3, 1938. It had urged establishment of an administrative office with a director "under the supervision of the Chief Justice," pp. 5-6.

<sup>57</sup> S. 1392, 75th Congress, sec. 3.

<sup>57a</sup> "Extract, 'Administration in the Federal Courts,'" pp. 14-15.

<sup>58</sup> 53 Stat. 1224.

<sup>59</sup> "Extract, 'Administration in the Federal Courts,'" p. 19.

<sup>60</sup> Charles E. Stewart, Memorandum, May 21, 1939, p. 2. Legislative Files, S. 138, 76th Congress (National Archives, Washington, D. C.).

<sup>61</sup> Act of August 7, 1939, 53 Stat. 1224, sec. 305.

<sup>62</sup> See Peter G. Fish, "The Status of the Federal Probation System," *Crime and Delinquency*, Volume 12 (October, 1966), pp. 365-70.

<sup>63</sup> "Report of the Judicial Conference," Special Session, in *Annual Report of the Attorney General of the United States for 1940*, p. 16.

<sup>64</sup> "Suggestions of Judge (Kimbrough) Stone," October 14, 1938, p. 2. Groner Papers, Box 4.

<sup>65</sup> *Ibid.*

<sup>66</sup> D. Lawrence Groner to Harlan Fiske Stone, September 8, 1941, *ibid.*, Box 12.

administrative authority rather than himself or his court as had been proposed.<sup>67</sup> He told Arthur Vanderbilt and the Attorney General's Committee "that if he were ever called upon to administer this bill as an act, he would route the work through the senior circuit court judges, because they were the logical men to attend to it."<sup>68</sup>

The clearly articulated intent of key framers of the Administrative Office Bill<sup>69</sup> determined the eventual relationship between the Director of the Administrative Office of the United States Courts and the Judicial Conference. No opportunities for enhancing the Conference's checking capacities were ignored as judges strove to build into the judiciary's administrative institution the concept of a government of limited powers.

Before Chief Justice Hughes had removed himself from a position of ultimate responsibility, Assistant Attorney General Charles E. Stewart questioned the necessity for language in the 1938 Ashurst Bill placing the Director "under the supervision of the Chief Justice."<sup>70</sup> Presuming that the proposed administrator merely replaced the Attorney General as administrator of the federal courts, he suggested that the Director be "under the Chief Justice of the United States and Conference of Senior Circuit Judges, instead of 'under the supervision' of the same."<sup>71</sup>

In this way the Director's position would be analogous to that of the Attorney General who performed his duties "under the President of the United States."<sup>72</sup> Reasoned Mr. Stewart: "It would be absurd to require the Chief Justice and the Judicial Conference to supervise the preparation of the estimates. In order to do so they would have to familiarize themselves with every detail, and it would be a task quite beyond them if they performed judicial duties."<sup>73</sup> Such was decidedly not the view of the judges. They had not defended their independence against the proposed Court Proctor only to succumb to the self-inflicted consequences of a powerful Director.

Thus, even a later draft which actually placed the Director under the Conference's supervision evoked protests from Judge Groner. He assailed its failure to include language enabling the Conference to direct as well as to supervise the administrator.<sup>74</sup> This omission, observed his colleague on the Circuit Court, Harold M. Stephens, constituted an important limitation on the

power of the Conference over the new agency. Supervision was defined as overseeing or inspection; but he noted that the word "direct" meant "to give direction; to point out a course; to act as a guide or director."<sup>75</sup>

His presiding judge easily grasped the significance of this omission, and two months later wrote several key congressmen then completing their consideration of the legislation. "The whole scheme of the bill," he stated, places the Director under the supervision of the Conference of Senior Circuit Judges and it would be unfortunate if, after his appointment, he were to assume that he would be entirely independent of the slightest control, for that would strike at the very heart of the purpose of the bill.<sup>76</sup>

Although made in the last stages of the legislative process, this appeal proved successful. The opening lines of Section 304, Act of August 7, 1939, would read:

The Director shall be the administrative officer of the United States Courts . . . under the supervision and direction of the Conference of the Senior Circuit Judges. . . .<sup>77</sup>

#### *The Administrator's Powers*

Establishment of a superior-subordinate relationship between the Judicial Conference and the Administrative Office was strengthened still more by a careful delineation of the administrator's formal powers. In the hands of Judge Groner's Committee, powers once contemplated for the Court Proctor and even for the Director described in the Ashurst Bill, underwent drastic revision. So extensive was the change that Judge Stephens could assure a vacillating Senator who had fought the President's Court Plan that "the bill has no connection whatever, either in source or in content, with the so-called court packing bill. The Director to be established under the bill has no such powers as were thought to exist in the Proctor."<sup>78</sup>

The language of the 1939 bill in final form specifically prohibited the Director from controlling the appointment or removal of subordinate personnel in the various courts.<sup>79</sup> This provision had been inserted after Judge Manton, who favored a highly centralized administrative system, intimated that such functions might lie within the scope of the Director's power.<sup>80</sup> Nor did the measure sponsored by the Judicial Conference mention any role for the Director in the assignment and designation of judges. A feature of the Ashurst Bill,

<sup>67</sup> See: n. 58 and 59.

<sup>68</sup> Arthur Vanderbilt, U. S. Congress, House, Subcommittee of the House Committee on the Judiciary, *Hearings, on the General Subject of the Administration of the Federal Courts*, Stenographic Transcript, 75th Cong., 3d Sess., 1938, following p. 47, p. 9. In Legislative Files, House, H.R. 2973, 76th Congress. Cited hereafter as *Hearings, on the General Subject*.

<sup>69</sup> See: D. Lawrence Groner, *Hearings, on H. R. 2973*, pp. 56-7.

<sup>70</sup> S. 3212, 75th Congress, sec. 304.

<sup>71</sup> Charles E. Stewart to Martin T. Manton, June 29, 1938, Department of Justice Files (National Archives, Washington, D. C.), No. 236508, Section 2.

<sup>72</sup> Charles E. Stewart to Harold M. Stephens, July 1, 1938, Stephens Papers, Box 208.

<sup>73</sup> Charles E. Stewart to Martin T. Manton, June 29, 1938.

<sup>74</sup> See H. R. 5999, 76th Congress, sec. 304. Compare H. R. 2973, 76th Congress, sec. 304.

<sup>75</sup> Memorandum, Harold M. Stephens to D. L. Groner, May 4, 1939, pp. 2-3. Legislative Files, S. 188, 76th Congress (National Archives, Washington, D. C.).

<sup>76</sup> D. Lawrence Groner to House Conferees on S. 188, July 22, 1939, Groner Papers, Box 4.

<sup>77</sup> 53 Stat. 1223.

<sup>78</sup> Harold M. Stephens to William H. King, March 14, 1938, Stephens Papers, Box 208.

<sup>79</sup> Sec 53 Stat. 1223, sec. 304 (1).

<sup>80</sup> Martin T. Manton, *Hearings, on S. 3212*, p. 38; see also D. Lawrence Groner to Martin T. Manton, December 27, 1937, Groner Papers, Box 21.

its existence had led Judge Manton to argue that the Director could act "without embarrassment . . . as assignment commissioner."<sup>81</sup> But his colleagues on the Conference regarded this interpretation as "exceedingly dangerous."<sup>82</sup> In the face of their opposition, a legislative draftsman in the Department of Justice deleted the power of the Director to "recommend" the transfer of judges even before introduction of the 1939 bill in Congress.<sup>83</sup>

Naturally, the capacity of the Director to coerce individual judges came under sharp scrutiny. Statements made at the hearings on the Ashurst Bill aroused apprehensions over such power lodged in an aggressive administrator. Then, Attorney General Cummings had told the assembled Senators that

if you want continuous administrative pressure brought to bear to bring the business of the judiciary up to date, you have got to have a continuous administrative officer, clothed with authority and so completely independent of the Department of Justice, so completely a part of the judiciary itself that his suggestions and recommendations . . . will be regarded as amounting to directions.<sup>84</sup>

At the same time the Attorney General mentioned the possibility of a Director's writing letters to judges on the sad condition of their dockets,<sup>85</sup> roving around the country and recommending changes in a court's administration,<sup>86</sup> and spreading the derelictions of inferior federal judges on records submitted to the Supreme Court.<sup>87</sup>

Strategically placed judges sought an effective and innocuous administrator; they wanted someone who confined his orders to his own staff and interfered not at all with the work of independent judges.<sup>88</sup> Least of all did they want him to encourage coercion by external agencies such as the bar, labor and civic organizations. To this end Chief Justice Groner successfully secured removal from a draft of the House Judiciary Committee's *Report* of language which appeared to permit this kind of pressure on the judges; pressure which could emanate from outside the legal community.<sup>89</sup>

The Administrative Office was "not an executive establishment."<sup>90</sup> The Director, an official of the new Administrative Office would say, possessed

no authority to tell any judge what he should or should not do, nor will he have any authority to

recommend to the Chief Justice of the Supreme Court in regard to the assignment or designation of judges to serve temporarily in circuits or districts other than those for which they were appointed.<sup>91</sup>

As the framers conceived it, the Administrative Office was a medium for improved intra-judiciary communications rather than a source of real administrative power. Its Director would, in the opinion of a member of the Attorney General's Committee, "simply be a compiler and adjuster, a person who acts as a go-between or intermediary."<sup>92</sup> It was the information he conveyed and the "good offices" he provided which would promote more effective administration—by the judges themselves. *The Bankruptcy Controversy of 1940-41*

The intentions of the Administrative Office Act's framers were unambiguous, but the path which development of the new agency would take appeared uncertain in the first year of its existence. That it would not be permitted to undergo a metamorphosis and transform itself into a central executive organization became manifest in a major controversy over administration of the bankruptcy system. The issue surfaced shortly after establishment of the Office when, late in 1940, the Attorney General's Committee on Bankruptcy Administration, headed by Assistant Attorney General Francis M. Shea, released its findings.<sup>93</sup>

The Committee's *Report* chronicled a long list of administrative shortcomings in the bankruptcy system and concluded that "the present system of supervision and coordination does not work. There are far too many illegal acts, far too much unjustified expense, . . . far too much unwarranted delay, far less confidence in bankruptcy than it should and can have."<sup>94</sup> The solution lay in reform. And the Committee made numerous suggestions to that end. Among them it urged that the Director be empowered to make recommendations for changes in the bankruptcy system directly to Congress, the Supreme Court, and especially to the district judges who appointed the referees in bankruptcy.<sup>95</sup> Whether the Conference wished to pass on every such recommendation or permit him to act alone subject to their supervision was left open.<sup>96</sup>

Agreeing with one district judge that "suggestions emanating from the Administrative Office . . . may not enjoy the self-enforcing quality that would attach to suggestions emanating from the Court itself," the Com-

<sup>81</sup> Martin T. Manton, *Hearings, on S. 3212*, p. 37.

<sup>82</sup> Kimbrough Stone, *Hearings, on S. 188*, p. 23.

<sup>83</sup> Charles E. Stewart to Harold M. Stephens, July 1, 1938, Stephens Papers, Box 208.

<sup>84</sup> Homer S. Cummings, U. S. Congress, Senate, Committee on the Judiciary, *Hearings, on S. 3212*, p. 13.

<sup>85</sup> *Ibid.*, pp. 16-17.

<sup>86</sup> *Ibid.*, p. 19.

<sup>87</sup> *Ibid.*

<sup>88</sup> Curtis D. Wilbur. Quoted in *San Francisco Examiner*, July 6, 1940, p. 12. In Stephen S. Chandler, "The Role of the Trial Judge in the Anglo-American Legal System," *American Bar Association Journal*, Volume 50 (February 1964), p. 130.

<sup>89</sup> D. Lawrence Groner to Walter Chandler, May 27, 1939, Groner Papers, Box 4.

<sup>90</sup> "Address of Chief Justice Charles Evans Hughes," *American Law Institute, Proceedings*, Volume 17 (Philadelphia: American Law Institute, 1940), p. 29.

<sup>91</sup> Will Shafroth, "New Machinery for Effective Administration of Federal Courts," *American Bar Association Journal*, Volume 25 (September, 1939), p. 738.

<sup>92</sup> *Hearings, on the General Subject*, p. 2 following p. 47.

<sup>93</sup> *Report of the Attorney General's Committee on Bankruptcy Administration, 1940.*

<sup>94</sup> *Ibid.*, p. 50.

<sup>95</sup> *Ibid.*, Part III.

<sup>96</sup> *Ibid.*

mittee urged that the Director be given limited power to request that a recommendation not accepted by a district judge be reviewed . . . and, if accepted on review, be enforced, by the appropriate Circuit Court Judicial Council.<sup>97</sup> In addition, the Director, acting alone, would determine "the exact number of referees and the territory over which each shall exercise jurisdiction."<sup>98</sup> Again the role of the Judicial Conference was omitted although the Committee believed it might wish to approve the Director's initial determination, but not subsequent modifications and adjustments.<sup>99</sup>

Finally, the Director would play an important part in the removal and reappointment of referees. Removal was "to be by the district judge or judges who appointed him, upon the written recommendation of the Director to the district judge or judges, or by such judge or judges."<sup>100</sup> Either the referee affected or the Director might then appeal a district judge's action or lack thereof to the circuit council.<sup>101</sup> Similar recourse existed following rejection or acceptance of the Director's recommendations for or against reappointment of incumbent referees.<sup>102</sup>

These proposals gave the nascent Administrative Office a dramatic infusion of power. They would foster development of a hierarchical authority operating directly on judges and referees in bankruptcy. As Shea explained: "Some central administrator should . . . be in a position to see that the suggestion of negligence or loose practice on the part of the referees and bankruptcy officials are eliminated and that some kind of uniform practices are followed."<sup>103</sup> Not unexpectedly, his statements and the Committee's proposals generated heated controversy among federal judges and the referees. Arrayed on one side were the judges who had played a role in shaping the Administrative Office Act; on the other, were those, especially in the Justice Department, who saw in the emergent agency a step toward a more centralized, more integrated administrative institution. But the Committee's critics seized the offensive in the intra-judiciary struggle which ensued.

The attack was led by Duncan Lawrence Groner, Chief Judge of the United States Court of Appeals for the District of Columbia Circuit and a key actor in framing and promoting passage of the Administrative Office Bill. Well before release of the Attorney General's report, Groner made his position abundantly clear to the new Director of the Administrative Office,

Henry P. Chandler. "There is no problem," he asserted,

in the control of referees in bankruptcy. If each District Judge discharges his responsibility, there will be nothing for an administrator appointed for this particular purpose to do. The answer to the referee problem is simple enough and depends upon the ascertainment of a few statistical facts.<sup>104</sup>

The Shea Committee's devastating attack on the state of bankruptcy administration reduced the force of this argument, but not the resolve of Judge Groner to prevent the development of "an overlordship of bankruptcy administration in the Administrative Office."<sup>105</sup>

In a furious exchange of letters with his colleagues on the Judicial Conference, Groner defended his position. He lectured Judge John J. Parker:

The District Judges are just as much judges as the Supreme Court Judges and just as much entitled to their independence and not to have somebody snooping at their heels. The referee is as much an officer of the court as the clerk or the commissioner, and they should be held to responsibility that these under-officers do their job, but they shouldn't be threatened by having some understrapper in the Administrative Office tell them how much to pay them or what to do with them after they are appointed.<sup>106</sup>

To encourage such a sweeping change would, he thought, "create a feeling of tremendous opposition to the Office itself both on the part of judges and their friends in Congress."<sup>107</sup>

Moreover, there was no certainty when or where the growth of this administrative power might end. Judge Groner perceived in separate establishments, like the Administrative Office, a "tendency . . . to draw power to themselves,"<sup>108</sup> and to expand and proliferate like a cancer.

"If you lived in this atmosphere as I do," declared the Washington-based judge in a letter to Parker, "and saw these new agencies grow and grow and expand and expand and demand and demand, you would understand the danger."<sup>109</sup> Like guardians on the ramparts, the judges must remain "alert that the power is not extended so as to impinge upon the complete independence of the courts."<sup>110</sup>

Echoing Groner, Senior Circuit Judge Kimbrough Stone opined that the Attorney General seemed "hell bent' on augmenting the power of the Director and in

<sup>97</sup> *Ibid.*, pp. 131-32.

<sup>98</sup> *Ibid.*, Part III, sec. IIIB (1), p. 139.

<sup>99</sup> *Ibid.*, p. 141.

<sup>100</sup> *Ibid.*, Part III, sec. IIID (2), pp. 163-64.

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*, Part III, sec. IIID (2), pp. 163-64.

<sup>103</sup> Francis M. Shea, U. S. Congress, House, Subcommittee of the House Committee on Appropriations, *Hearings, on Department of Justice Appropriation Bill for 1942*, 77th Cong., 1st Sess., 1941, p. 649.

<sup>104</sup> D. Lawrence Groner to Henry P. Chandler, March 28, 1940, Groner Papers, Box 15.

<sup>105</sup> D. Lawrence Groner to John J. Parker, November 9, 1940, *ibid.*, Box 21.

<sup>106</sup> *Ibid.*

<sup>107</sup> D. Lawrence Groner to John Biggs, Jr., November 13, 1940, *ibid.*, Box 16; see also D. Lawrence Groner to Kimbrough Stone, November 12, 1940, *ibid.*

<sup>108</sup> D. Lawrence Groner to John Biggs, Jr., November 13, 1940, *ibid.*

<sup>109</sup> D. Lawrence Groner to John J. Parker, November 9, 1940, *ibid.*, Box 21.

<sup>110</sup> D. Lawrence Groner to John Biggs, Jr., November 13, 1940, *ibid.*, Box 16.



centralizing matters in Washington." He told Groner: "I am entirely and aggressively in sympathy with your position to combat lodging too much power in the Administrative Office. Nothing," he agreed, "could be more dangerous to the independence of the Judiciary than a concentration of any effective method of control in the Administrative Office or elsewhere."<sup>111</sup>

To inhibit the development of such control, these judges, assisted by Chief Justice Hughes, who likewise favored a purely staff role for the Administrative Office,<sup>112</sup> went to work on the Attorney General's bankruptcy bill, largely emasculating it.

#### *The Judicial Conference Acts*

A Special Session of the Judicial Conference met early in 1941 to consider the judiciary's response to the Attorney General's bankruptcy plan. It suggested that the Conference and the circuit judicial councils be interposed between the Director and both the individual judges and Congress. Recommendations to Congress for changes in the Bankruptcy Act would first reach the Conference for its approval.<sup>113</sup> The Conference, not the Director, would be

vested with authority to determine, in the light of recommendations from the Director as well as from the Circuit Councils, the exact number of referees to be appointed, the territory over which they shall exercise jurisdiction, the salaries they shall receive, and any changes which may be made thereafter as to their respective numbers, territories or salaries.<sup>114</sup> This modification reflected Judge Stone's belief that "the Director should have no power of *determination* even though qualified."<sup>115</sup> Others agreed that the Conference should not rely solely on the Director's findings.<sup>116</sup>

At the same time the role of the circuit councils was expanded by requiring the Director to transmit his recommendations for changes in local bankruptcy rules, particular practices and procedures in any court or before any referee in bankruptcy to the relevant circuit council rather than directly to the judges or referees involved.<sup>117</sup> Chief Justice Hughes pressed this modification, contending that "the responsibility of having

the administration of justice proper and appropriate is not that of the Director in the various districts," but that of the council.<sup>118</sup> The Director, said Hughes, was an investigator and once he obtained the required data, "the responsibility is with the circuit council of the circuit."<sup>119</sup>

Finally, the Conference diluted the Director's power to "recommend" the removal of incumbent referees by directing him to report to the district court and to the circuit council any knowledge of incompetency, misconduct, inefficiency, or neglect of duty on the referee's part.<sup>120</sup> This change coincided with Chandler's

strong desire . . . that the function of the Director in reference to the removal or reappointment of a referee, would be completed when he makes his report which will go to the district court and judicial council of the circuit. He will be in no sense a prosecuting officer but rather in the nature of a special master, presenting facts as he sees them for appropriate action of the court.<sup>121</sup>

Said the Director: "I look to the court; I must look to the court . . . to take such measures as [it] may deem necessary."<sup>122</sup>

The modifications made by the 1941 Conference ultimately were written into law;<sup>123</sup> they largely drew the teeth from the Attorney General's proposals. His goal of a strong central administrator<sup>124</sup> dissolved in the hands of the Senior Circuit Judges. In the process, key judges made clear the degree and kind of power lodged in the Administrative Office. It was not an independent agency subject only to subsequent supervision by the Conference, but a staff office with strictly advisory power. It could not act directly upon the entire range of court personnel from the senior circuit judges to the court clerks;<sup>125</sup> it reached them, if they were reached at all, only through and with the authorization of judge-controlled agencies—the Judicial Conference, the councils, and the individual courts.<sup>126</sup> The supervisory power of such organs would not, declared Judge Groner "be considered as impinging in any respect on the dignity and prerogatives of the District Judges."<sup>127</sup>

<sup>111</sup> Kimbrough Stone to D. Lawrence Groner, November 14, 1940, *ibid.*

<sup>112</sup> See "Transcript of the Judicial Conference," January, 1941, p. 153. In Chandler, "Some Major Advances," p. 461.

<sup>113</sup> "Report of the Judicial Conference," Special Session, in *Annual Report of the Attorney General of the United States for 1941*, p. 20; see sec. IIE.

<sup>114</sup> *Ibid.*, p. 21; see sec. IIIB (1).

<sup>115</sup> Kimbrough Stone to Henry P. Chandler, March 13, 1941, Groner Papers, Box 16.

<sup>116</sup> Statement of Henry A. Bundschu, *Journal of the National Association of Referees in Bankruptcy*, Volume 15 (July 1941), p. 133.

<sup>117</sup> *Report of the Attorney General's Committee on Bankruptcy Administration*, p. 20; see sec. IIE.

<sup>118</sup> Judicial Conference Transcript, Special Session, January, 1941, p. 153, in Henry P. Chandler, "The Beginning of a New Era in Bankruptcy Administration: 1939-1947," *Journal of the National Association of Referees in Bankruptcy*, Volume 34 (January 1960), p. 25.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Report of the Attorney General's Committee on Bankruptcy Administration*, p. 21; see sec. IIID (1).

<sup>121</sup> Henry P. Chandler to John M. Niehaus, Jr., November 14, 1941, Files of the Administrative Office, 59-A-532, Box 3.

<sup>122</sup> Remarks of Henry P. Chandler, "Proceedings," *Journal of the National Association of Referees in Bankruptcy*, Volume 17 (October 1942), p. 26.

<sup>123</sup> Act of June 28, 1946. 60 Stat. 324, Section 34 (b); 60 Stat. 325, Section 37; 60 Stat. 326, Section 40; 60 Stat. 328, Section 43.

<sup>124</sup> Francis M. Shea, *Hearings, on Department of Justice Appropriation Bill for 1942*, p. 649.

<sup>125</sup> Henry P. Chandler, "The Administrative Office," *Journal of the National Association of Referees in Bankruptcy*, Volume 16 (October 1941), p. 18.

<sup>126</sup> Henry P. Chandler, "The Administrative Office of the United States Courts," *ibid.*, Volume 15 (October 1940), p. 50.

<sup>127</sup> D. Lawrence Groner to Hatton Summers, June 12, 1941, Groner Papers, Box 16.