THE JUDICIAL ADMINISTRATIVE POWER

Jonathan Petkun & Joseph Schottenfeld[*]

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Article III of the Constitution confines the "judicial Power of the United States" to the adjudication of "cases" and "controversies." In practice, however, federal judges exercise control over (and spend their scarce time on) a wide range of activities that traverse far beyond any individual adjudication. Typically classified as a form of "judicial administration," these activities span everything from promulgating the rules of the various federal courts to overseeing federal pretrial detention services or choosing federal public defenders.

This Article describes how judges became involved in these non-adjudicatory Article III activities, clarifies their relationship to Article III adjudication, and considers the role they play for the modern federal judiciary. When judges participate in judicial administration, they are ordinarily performing one of three actions: they are rulemaking; they are managing; and they are communicating. These categories are imperfect. But they provide a useful backdrop against which to demonstrate the federal judiciary's considerable administrative power, which ranges across an array of domains and affects the private litigants who come before the federal courts, the rights of the judges and judicial employees who run those courts, and the public more generally.

Based on these observations, we argue that the judicial administrative power has profound consequences that carry us far beyond baseline questions of whether or to what extent judicial administration improves federal adjudication. Judicial administration upends core notions of what makes the judiciary the judiciary. By freeing the judiciary from the constraints of an individual case or controversy, judicial administration shuffles the means through which certain rights-related problems reach the

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[*] Associate Professor of Law, Duke University School of Law; Assistant General Counsel, NAACP & Adjunct Professor of Clinical Law, New York University School of Law. We thank Jonas Anderson, Emilie Aguirre, Sara Sun Beale, Bobby Bishop, Jamie Boyle, Lauren Clatch, Zachary Clopton, Paul Grimm, Ben Grunwald, Monica Iyer, Nia Johnson, Maggie Lemos, Marin Levy, Josh Macey, Noah Marks, Ashlee Paxton-Turner, Jedediah Purdy, Judith Resnik, Mara Revkin, Jonathan Seymour, Amelia Thorn, and workshop participants at Duke Law School and the Bolch Judicial Administration/Judicial Process Roundtable for generous comments on prior drafts…

federal judiciary, empowers the judiciary to proactively solve problems of its own choosing, and alters the considerations viewed as appropriate for judges to weigh when their decisions affect people's rights. And, from the perspective of the coordinate branches, the judicial administrative power similarly unsettles traditional notions of the role of the judiciary in inter-branch decision-making. Judicial administration facilitates, aggregates, and channels judicial expertise, putting it to use throughout the whole of our government and making the judiciary a more forceful advocate for its own interests. Viewed through a separation-of-powers lens, judicial administration blurs the lines between legislative, administrative, and adjudicatory forms of governance and works to the detriment of certain higher-level values like democratic accountability, transparency, and the rule of law.

We conclude with a set of proposed reforms that would respond to these challenges by treating the judicial administrative power as administrative first and judicial second—and not the other way around. First, Congress should emulate the institutional design of the Sentencing Commission and assign certain judicial administrative responsibilities to new independent agencies. Second, generally applicable good-governance provisions—like the Freedom of Information Act and some APA requirements—should be extended to at least some extent to a variety of judicial administrative acts. Finally, Congress should reduce the Chief Justice's singularly powerful role in judicial administration by reassigning many of the Chief Justice's administrative duties to a more diverse group of Article III judges and judicial stakeholders.

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INTRODUCTION

The federal judiciary is, according to commentators, in the midst of a "legitimacy crisis,"[1] an "ethics crisis,"[2] and a "corruption crisis."[3] Some of the controversy focuses on how courts—and especially the Supreme Court—have resolved high-profile cases, of course. But many of the concerns raised about federal courts today are not directly tied to the judiciary's Article III power to decide cases and controversies. Questions about the power to *administer* the vast judicial apparatus, not strictly judicial adjudication, animate everything from debates over Supreme Court ethics reform, to high profile judge-shopping in single-judge district court divisions, to whether the federal trials of former President Trump should be televised.[4]

Concerns may be growing, but controversy over judicial administration is nothing new. We are at the beginning of the second century of federal judicial administration. Just over one hundred years ago, congressional legislation created the Senior Conference of Judges—what would eventually become the Judicial Conference of the United States Courts, but at the time was an unstaffed gathering of judges designed primarily to facilitate the temporary reassignment of district court judges to overburdened judicial districts. That modest charter did not prevent Senator John Shields, a democrat from Tennessee, from describing the legislation as having "a most revolutionary character" and arguing that "it contains the germs . . . of the most serious assault that has ever been made upon the integrity and independence of the judiciary of the country."[5]

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[1] Noah Feldman, *Ethics Code Wouldn't Fix Supreme Court Legitimacy Crisis*, WASH. POST (February 14, 2023), available at https://www.washingtonpost.com/business/ethics-code-wouldnt-fix-supreme-courts-legitimacy-crisis/2023/02/14/c834db3c-ac72-11ed-b0ba-9f4244c6e5da_story.html.

[2] Kierra Frazier, *Justices' quiet response to ethics crisis reveals a lesson in PR management*, POLITICO (May 5, 2023), available at https://www.politico.com/news/2023/05/05/supreme-court-ethics-crisis-00095473.

[3] Tatyana Tandanpolie, *"Staggering levels of grift": Experts say Clarence Thomas trips expose SCOTUS corruption "crisis*," SALON (August 20, 2023), *available at* https://www.salon.com/2023/08/10/staggering-levels-of-grift-experts-say-clarence-thomas-trips-expose-scotus-corruption-crisis/.

[4] Or, for those more attuned to news from the federal circuit, to the administrative and now judicial proceedings involving Judge Pauline Newman. *See* Blake Brittain & Nate Raymond, *Suspended US appeals judge warns her treatment could erode confidence in judiciary*, REUTERS (Sep. 21, 2023), available at https://www.reuters.com/legal/litigation/suspended-us-appeals-judge-warns-her-treatment-could-erode-confidence-judiciary-2023-09-21/.

[5] 62 Cong. Rec. 4855–65 (1922) (statement of Sen. John Shields), *reprinted in* DEBATES ON THE FEDERAL JUDICIARY: A DOCUMENTARY HISTORY, VOLUME II (1875–1939) 189–91 (Daniel S. Holt ed.) (2013).

Today, Senator Shields' wish that judges "be wholly judges, always judges, and nothing but judges"[6] has given way to a world in which federal judges shoulder an array of administrative responsibilities with consequences for everyday people. Consider the criminal defendant who faces charges in federal court. Judicial administration not only determines the rules that govern the procedural gauntlet he faces—through the Federal Rules of Evidence, for example, or local district court rules[7]—but also runs the apparatus that holds him pretrial, if he is detained, or supervises his release, if he isn't; oversees the representation that he receives, if he is indigent; sets the guidelines for his sentence, if he's convicted; and supervises his parole or his probation, if either factor into his sentence. If he's convicted and lucky, he may be offered counseling and transition services through one of the handful of Federal Reentry Courts, presided over by a federal judge. That's not all: Judicial actors might also lobby Congress for substantive legislation that could, for example, determine whether the crime he is accused of is a federal crime to begin with.

This Article clarifies the relationship between judicial adjudication and judicial administration writ large. Where others have documented and analyzed judges' increasingly administrative approach to managing and resolving individual cases,[8] our focus is the judicial administration that occurs outside the four corners of any specific case or controversy—what the Supreme Court has called the "nonadjudicatory activities [of] the Judicial Branch."[9] And our central contention is that these activities form a standalone judicial administrative power that creates an unaddressed set of challenges, both for the federal judiciary's ability to discharge its primary Article III

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[6] *Id*.

[7] *See, e.g.*, Ken Dilanian, *Can Trump and his legal team say whatever they want about Jack Smith's case? D.C. federal court has its own strict rules*, NBC NEWS (Aug. 10, 2023), *available at* https://www.nbcnews.com/politics/justice-department/trump-say-anything-wants-jack-smith-case-dc-federal-court-rule-rcna99180.

[8] *See, e.g.*, Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 445 (1982) ("Judges have also become concerned with problems of their own—the perception that the courts are too slow, justice, too expensive . . . Since the early 1900's, judge have attempted to respond . . . by experimenting with increasingly more managerial techniques."); David L. Noll, *MDL as Public Administration*, 118 MICH. L. REV. 403, 405 (2019) ("From the Deepwater Horizon disaster to the opioid crisis, MDL has become the preeminent forum for working out solutions to the most intractable problems in the federal courts. To do so, judges and lawyers devise ad hoc solutions to problems of organization, settlement, and management that arise in particular cases."); *see also* Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 320–21 (2011) (contrasting modern case management in the courts of appeals with the "traditional model" of adjudication).

[9] Mistretta v. United States, 488 U.S. 361, 386 (1989).

responsibility to decide cases and for the judiciary's relationship with the coordinate branches and the public more broadly.

The judiciary's administrative power flows through an array of judicial arrangements and actors—individual chambers, judicial districts and circuits, judicial councils that mix circuit and district judges, and national bodies like the Judicial Conference, the Administrative Office, the Federal Judicial Center, and the Sentencing Commission.[10] All told, more than two thousand federal judges participate in and oversee a judicial administrative apparatus with more than 30,000 employees.

To organize the many activities of judicial administration, we distinguish between three types of non-adjudicatory functions: rulemaking, managing, and communicating. By rulemaking, we mean the judiciary's capacity to establish generally applicable regulations and policies for the parties who appear in the federal courts and for the federal judges and judicial staff who oversee those courts; rulemaking, on our account, emanates not just from the advisory committees or the Sentencing Commission, but also from the Judicial Panel on Multidistrict Litigation, judicial councils, district courts, and individual chambers.[11] Managing refers to the judiciary's responsibilities to handle its own affairs, which today range from selecting, appointing, and overseeing the judges and judicial employees who perform judicial administrative tasks; to regulating and enforcing judicial conduct; to running entire judicial agencies, like the Federal Judicial Center or probation services.[12] And communicating involves the judiciary's efforts to engage in public affairs, including through "lobbying" the coordinate branches,[13] to elevate matters related to adjudication.[14] Although prior scholarship has explored aspects of judicial administration,[15] rulemaking, managing, and

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[10] *See* PETER GRAHAM FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION (1973).

[11] *See infra* Part II.A.

[12] *See infra* Part II.B.

[13] *See, e.g.*, Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74. S.CAL. L. REV. 269 (2000) (describing lobbying efforts by Chief Justice Rehnquist against key portions of Violence Against Women Act);

[14] *See infra* Part II.C.

[15] Judicial rulemaking and communicating have received the most scholarly attention. *See, e.g.*, Stephen Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) (discussing rulemaking); Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455 (1992) (same); A. Benjamin Spencer, *Substance, Procedure, and the Rules Enabling Act*, 66 U.C.L.A. L. REV. 654 (2019) (same); Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1171-80 (1996) (considering judicial communications); Jonas Anderson, *Judicial Lobbying*, 91 WASH. L. REV. 401 (2016) (same); Neal K. Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709 (1998) (same). Managing

communicating have typically been viewed as fragments, not part of a broader, dynamic form of judicial administration.[16]

Judicial administration is intended to facilitate the judiciary's ability to decide cases fairly, efficiently, and effectively.[17] But judicial administration poses its own challenges for Article III adjudication. The judicial administrative power upends many of our fundamental assumptions about what makes the judiciary the judiciary. Unlike exercises of Article III judicial power, which are bounded by Article III's case or controversy requirement and position the judiciary as a reactive actor, judicial administration puts the judiciary in the driver's seat as a proactive problem-solver, reshuffling how the judiciary can solve those problems and on what basis. Moreover, the judicial administrative power reclassifies portions of adjudication as administration, extending the ground over which the judiciary may act proactively, and, at times, even empowers the judiciary to directly enforce its own orders, an authority otherwise largely denied the judiciary.[18] But judicial administration is fundamentally entangled with substantive and procedural rights, which means that the judicial administrative power bears directly on adjudication, raising new questions over judicial integrity and role.[19]

The judicial administrative power similarly unsettles traditional notions of the role of the judiciary in inter-branch decision-making. Judicial administration empowers the judiciary—equipping it, for example, with the ability to marshal studies and statistics to communicate its perspective.[20] It combines and blurs the lines between legislative, administrative, and adjudicatory governance functions; at times, it even usurps functions that might otherwise be committed to other branches, either because of constitutional text or institutional fit.[21] All the while, judicial administration is largely shielded from democratic input and shrouded by claims of judicial independence—not because the nature of judicial administration calls for such protections, but because it is the judiciary that performs this work.

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has received less scholarly attention. *But see, e.g.*, Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000) (describing certain managing and communicating functions, like studies and trainings conducted by the Federal Judicial Center); David E. Patton, *The Structure of Federal Public Defense: A Call for Independence*, 102 CORNELL L. REV. 335 (2017) (describing federal judicial oversight of the "defense function").

[16] *But see* FISH, *supra* note 10 (offering seminal account of judicial administration); Michael C. Pollack, *Courts Beyond Judging*, 46 B.Y.U. L. Rev. 719 (2021) (considering judicial administration and non-adjudicatory judicial activities in state courts).

[17] *See infra* Part I (describing justifications for judicial administration).

[18] *See infra* Part III.A.

[19] *See infra* Part III.B.

[20] *See infra* Part IV.A.

[21] *See infra* Part IV.B.

All told, the judicial administrative power poses profound challenges for our constitutional and democratic order. But these challenges are not intractable; redressing them does not require divesting the judiciary of administrative responsibilities. Instead, to safeguard the integrity of the judiciary's Article III responsibilities and limit judicial administration's encroachment on other branches, Congress should make more judicial agencies independent; extend a variety of generally applicable administrative statutes to at least some aspects of judicial administration; and reassign many of the Chief Justice's administrative responsibilities to a more diverse range of judicial actors. In short, we propose that we treat judicial administration as administration first and as judicial second.

Part I defines what we mean by "judicial administration" and traces the rise of non-adjudicatory activities in the twentieth century, paying particular attention to the justifications for these activities. Part II organizes the key activities of modern judicial administration into three primary functions: rulemaking, managing, and communicating. Part III begins to describe the consequences of the judicial administrative power, starting with its effects on the judiciary and judicial adjudication. Part IV considers the judicial administrative power from the perspective of the federal judiciary's coordinate branches. Part V concludes by describing how Congress might resolve many of the tensions created by judicial administration.

I. JUDICIAL ADMINISTRATION AND ITS JUSTIFICATIONS

"Judicial administration" might refer to several aspects of the federal judiciary's role, including some that occur directly within the context of adjudication.[22] But we use the term to describe the subset of responsibilities that the Supreme Court has called the "nonadjudicatory activities that Congress has vested either in federal courts or in auxiliary bodies within the Judicial Branch":[23] That is, activities performed by judges or judicial employees that do not arise from within a case, but that nonetheless relate to the primary Article III function of the judicial branch—to decide cases.[24] In practice, as we describe further below, judicial administration of the sort we are concerned with encompasses nearly anything judges and judicial employees do in an official capacity that is not adjudicating cases.[25]

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[22] Judith Resnik's seminal article, *Managerial Judges*, *supra* note 8, for example, has launched forty years of research into how federal judges use forms of within-case administration, like pretrial conferences, to manage and resolve cases.

[23] Mistretta, 488 U.S. at 388.

[24] U.S. Const. art. III, § 1 ("The judicial Power shall extend to all Cases[.]")

[25] It does not, however, include the perhaps surprising number of "extrajudicial duties" judges and justices have performed and continue to perform today that have nothing to do with deciding cases. *See, e.g.*, Mistretta, 487 U.S. at 398-400, 400 n.24 (1988) (discussing early Supreme Court justices who served simultaneous appointments as high-

Since there have been federal courts, there has been some form of judicial administration within those courts.[26] But, until the start of the Twentieth Century, the opportunities for judicial administration were limited. Beyond creating lower courts and judgeships, Congress gave the federal judiciary few additional resources;[27] federal judges used what tools they had, like their inherent power to manage cases and dockets.[28] The Executive Branch, not the federal judiciary, performed most of the work of administering the federal judiciary, including paying judicial salaries and collecting court fees.[29]

By the end of the Twentieth Century, however, the judiciary had come to administer its business on its own.[30] Rather than simply expand the number of judges, which it did, or increase the tools available to those judges to adjudicate their cases more efficiently, which it also did,[31] Congress created

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level executive officials and Chief Justice's role today as a member of the Smithsonian's board).

[26] The Judiciary Act of 1789, for example, authorized federal courts to make "all necessary rules for the orderly conducting [of] business in the . . . courts" and empowered newly established district judges to "hold special courts at their discretion." Act of Sept. 24, 1789, ch. 20, §§ 3, 17. And early Supreme Court cases recognized federal courts' inherent authority to take certain administrative actions, because "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution." *United States v. Hudson*, 11 U.S. 32, 34 (1812); *see* Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 852-861 (2008) (discussing understanding of inherent procedural power between 1789 and 1820).

[27] Early "[c]ourt was not held in federal buildings but in rented facilities such as taverns, or local officials' homes." Charles G. Geyh & Emily Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI.-KENT L. REV. 31, 45 n.73 (1998) ("[T]he monies appropriated to the lower courts, over and above judicial salaries, were relatively meager in the early years of the federal judiciary."); *see* Thomas Schmidt, *Courts in Conversation*, 2022 MICH. ST. L. REV. 411, 423 (2022) (discussing hiring of first Supreme Court reporter in 1817).

[28] In the oft-quoted words of then Chief Justice William Taft, a federal judge "paddled his own canoe . . . subject to little supervision." HOLT, DEBATES ON THE FEDERAL JUDICIARY, *supra* note 5, at 187.

[29] FISH, *supra* note 10, at 93–96.

[30] The rise of federal judicial agencies in the Twentieth Century paralleled the much more prominent rise of federal administrative agencies. As others have pointed out, many of the latter type of agencies conduct "special adjudicative tribunals" with "the power to hold trial-type hearings that might otherwise have been placed in the article III courts." Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 574 (1984). By diverting cases, these tribunals represent their own version of efforts to reduce the strain of heavy caseloads on federal courts. *See* Thomas W. Merrill, Article III, *Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 942-3 (2011).

[31] *See* Peter S. Menell & Ryan Vacca, *Revisiting and Confronting the Federal Judiciary Capacity "Crisis": Charting a Path for Federal Judiciary Reform*, 108 CAL. L.

a number of new administrative actors: groupings and arrangements of judges or judicial staff empowered to act as agencies to handle a broadly-defined set of administrative matters *outside* of the context of specific cases or controversies.[32]

These institutional creations were not the product of chance. Instead, they were the result of concerted, often yearslong efforts to solve discrete problems affecting the federal judiciary. Spurred by a series of chief justices in particular,[33] new judicial agencies like the Judicial Conference, advisory committees for rulemaking, the Administrative Office, judicial councils, Federal Judicial Center, and Judicial Panel on Multidistrict Litigation sought to improve adjudication through changes not related to any specific, pending case.[34] Among these actors' shared goals were increasing judicial efficiency, improving judge and litigant quality, and promoting judicial independence. Whether and to what extent they have succeeded in advancing these goals[35]—and at what cost[36]—is debatable. What's clear is that the institutional arrangements that are the hallmarks of federal judicial administration today emerged, at least in theory, to advance what might be termed "the construction of a satisfactory process for adjudication."[37]

More effectively allocating judicial resources and improving the quality of judicial decision-making have, for example, justified some of the most significant judicial administrative developments—starting with the lynchpin of judicial administration, the Judicial Conference. At the insistence of then-Chief Justice Taft, Congress created what was originally named the Senior Conference of Judges in 1922 in large part to help alleviate imbalanced caseloads around the country and ensure a measure of judicial

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REV. 789, 803–840 (2020) (describing different forms of congressional intervention over Twentieth Century).

[32] The ABA sought to promote similar developments in state court systems. *See, e.g.*, Robert C. Finley, *Judicial Administration: What is this thing called legal reform?*, 65 COLUM. L. REV. 569 (1965) ("[A]dministration of the business or the operations of our courts has been allowed to develop as the winds of chance have blown.")

[33] *See* Henry P. Chandler, *Some Major Advances in the Federal Judicial System 1922-1947*, 31 F.R.D. 307, 321 (1962).

[34] As Judith Resnik has documented, "adjudication" has often come to mean something other than "trial on the merits"—in no small measure because of federal judicial administration. Resnik, *Trial as Error*, *supra* note 15, at 927-931.

[35] *See, e.g.*, Richard Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 763-69 (1993) (noting difficulties of measuring the success of procedural reforms).

[36] *See, e.g.*, Resnik, *Managerial Judges*, *supra* note 8, at 414-431("Judicial management [of cases] has its own techniques, goals, and values, which appear to elevate speed over deliberation, impartiality, and fairness.").

[37] John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 974 (2002).

supervision of other judges.[38] Part of broader legislation that established 25 new federal judgeships and made it easier for judges to be temporarily reassigned from one circuit or district to another,[39] the Senior Conference was designed to respond to a rising crush of federal cases by exercising, in Taft's words, the "power to go into the work that every judge does, and determine whether he needs help."[40]

To that end, the Senior Conference's initial statutory remit was limited to "mak[ing] a comprehensive survey of the condition of the business in the courts of the United States," "prepar[ing] plans for assignment of judges to or from circuits or districts where necessary," and "advis[ing] as to the needs of [the] circuit[s] and as to any matters in respect of which the administration of justice . . . may be improved."[41] Early conferences focused on creating committees to improve court functioning, responding to reports by the Attorney General about the rise in prohibition-linked cases,[42] and asking Congress to create new judges and appropriate funds for judicial assignments and court libraries.[43]

A flurry of activity followed, including the authorization of judicial rulemaking under the Rules Enabling Act in 1934[44] and the creation of the Administrative Office ("AO") and the judicial councils in 1939. The AO served to facilitate the allocation of judicial resources, improve judicial supervision, and increase judicial independence—a newly salient concern in the immediate aftermath of Roosevelt's court-packing scheme and effort to

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[38] Act of Sept. 14, 1922, ch. 306, § 2, 42 Stat. 837, 838; *see* FISH, *supra* note 10.

[39] Chandler, *supra* note 33, at 318. Congress did not, however, enact Taft's suggestion that there be "judges at large"—judges who belong to no specific district but could instead be assigned to help remedy docket pressure around the country. *Id*; *see also* Judith Resnik, *Constricting Remedies: the Rehnquist judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 275 (2003).

[40] Chandler, *supra* note 33, at 324, 331 (describing early efforts to promote temporary assignments). *See also* Daniel S. Holt, *Debates on the Federal Judiciary: A Documentary History (Vol. II: 1875-1939*) 181-85, https://www.fjc.gov/sites/default/files/2014/Debates-Federal-Judiciary-Vol-II.pdf (capturing Taft's early efforts in this space).

[41] One opponent of the Conference's advisory role suggested that "it will mean eventually that our Federal judiciary in conference assembled will become the propaganda organization for legislation for the benefit of the Federal judiciary." Chandler, *supra* note 33, at 328.

[42] Two of the new committees, for example, were the "Committee on Recommendations to District Judges of Changes in Local Procedure to Expedite Disposition of Pending Cases and to Rid Dockets of Dead Litigation" and the "Committee on Need and Possibility of Transfer of Judges." JUDICIAL CONFERENCE REPORT 2-3 (1922).

[43] *Id*. at 1.

[44] Pub. L. 73–415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072).

remake the federal judiciary.[45] Prior to the creation of the Administrative Office, the judiciary relied almost exclusively on the Executive Branch to manage most judicial functions, including disbursing funds for basic judicial equipment—a point of tension repeatedly raised by Senior Conference participants, who had agitated for greater administrative independence since the Conference's inception.[46] At the early year-end meetings of the Senior Conference of Judges, the Attorney General presented *to* the Conference about the state of the courts.[47] The Senior Conference, tasked with providing recommendations on the business of the courts, was largely without the means to study that business.[48]

As Homer Cummings, the Attorney General at the time, put it, the creation of the Administrative Office was intended to "[l]et the judges run the judiciary."[49] The Act creating the Administrative Office largely gave the federal judiciary the authority to determine the scope and structure of the new agency.[50] Where the Senior Conference met only episodically and dealt with policy-related issues, the Administrative Office provided the judiciary with full-time administrative support. As the AO's first director, Henry Chandler, described, the new office initially dedicated itself primarily to improving judicial statistics and taking control of judicial business.[51] Within a decade, the by-then renamed Judicial Conference proudly announced that "[u]nder [the Act creating the AO] the federal judiciary was freed from dependence upon an executive department of the government with respect to fiscal and administrative matters in federal courts and was given adequate power of self-regulation and supervision."[52]

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[45] *See* Peter Fish, *Crises, Politics, and Federal Judicial Reform: The Administrative Office Act of 1939*, 32 J. POL. 599, 615-616 (1970).

[46] *Id*. at 367–68 (quoting one judge as complaining in 1926 that "[w]e cannot get a bottle of ink without . . . authority" from the Department of Justice).

[47] Chandler, *supra* note 33, at 355–360.

[48] *Id*. (describing regular complaints by Senior Conference participants, including Chief Justice Hughes, about poor access to the information they needed).

[49] Chandler, *supra* note 33, at 376. *See* FISH, *supra* note 10, at 91, 112–113, 120-24, 130-3; *See also* Resnik, *Trial as Error*, *supra* note 15, at 937–38, 950. ("Congress created the Administrative Office … to take the administration of the judiciary out of the executive's Department of Justice.")

[50] *See* 28 U.S.C. §§ 601–612. The Act did, however, originally require that Administrative Office employees be subject to the Civil Service Commission's control with respect to how these employees should be classified for salary purposes. Chandler, *supra* note 33, at 398. And, as a more practical constraint, the Administrative Office was originally based in office space within the Department of Justice.

[51] *Id*. at 396-401. Before the end of 1940, the Administrative Office had also taken control from the Department of Justice of probation services. *Id*. at 408-410.

[52] JUDICIAL CONFERENCE REPORT 2 (1948).

In the same act, Congress also created the judicial councils, which Chief Justice Hughes championed as "a mechanism through which there could be a concentration of 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."[53] Composed of all of the active circuit judges within a circuit, the councils were authorized to supervise and speed up judicial operations in their circuits by directing district courts "as to the administration of the business of their respective courts."[54]

The combination of the Judicial Conference, the Administrative Office, the judicial councils—alongside the advent of judicial rulemaking under the Rules Enabling Act[55]—meant that, after 1939, the federal judiciary enjoyed "a complete administrative system," with the ability to make and set policy, conduct its own basic "housekeeping," and supervise judges and a growing number of judicial employees.[56]

Similar efficiency and quality-related motivations continued to drive subsequent judicial administrative innovations. In the 1960s, for example, with "congestion and delay in many courts of the United States" once again having "reached crisis proportions,"[57] Congress created both the Federal Judicial Center ("FJC") and the Judicial Panel on Multidistrict Litigation (the "Judicial Panel"). The FJC was designed to give the judiciary a more robust means of studying the federal judiciary and training federal judges and judicial employees. As Chief Justice Warren argued in support of its creation, "the answer [to growing dockets] does not lie in creating additional judge power," but "in attention to the practical problems of the administration of justice"—the "dispensation of justice with maximum effectiveness and minimum waste by means of thorough scientific study of judicial administration and through programs of continuing education for judges and the training of court personnel."[58]

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[53] Peter Fish, *The Circuit Councils: Rusty Hinges of Federal Judicial Administration*, 37 U. CHI. L. REV. 203, 205 (1970) ["*Rusty Hinges*"]; Chandler, *supra* note 33, at 379.

[54] 53 Stat. 1224 (codified as amended at 28 U.S.C. § 332). According to the federal judges who drafted the Act, the broad language of the text would allow Judicial Councils to direct other district court judges to help unwell judges or even require slow-moving judges to skip vacations. Fish, *Rusty Hinges*, *supra* note 53, at 207.

[55] *See* 295 U.S. 774 (order appointing first ad hoc rulemaking committee pursuant to the Rules Enabling Act of 1934).

[56] *Id*. at 203.

[57] S. Rep. No. 781, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U.S.C.C.A.N 2402, 2404.

[58] *Warren Asks Better Court Administration*, THE HARVARD CRIMSON (Sep. 29, 1967), *available at* https://www.thecrimson.com/article/1967/9/29/warren-asks-better-

The Judicial Panel offered the Federal Judiciary the ability to respond to an even more discrete efficiency-related problem: a spike in civil antitrust cases that threatened to inundate the federal judiciary.[59] Chief Justice Warren and the Judicial Conference initially created a committee within the Judicial Conference to help coordinate and centralize the pretrial phases of these cases. According to Warren, without that committee's work, "district court calendars throughout the country could well have broken down."[60] Warren and the Judicial Conference then drafted and successfully advocated for legislation creating the Judicial Panel, a formal institution that would consist of judges and be authorized to transfer civil actions to a single district court for pretrial proceedings.

Over the next few decades, the federal judiciary continued to accrue additional administrative actors—including some over the judiciary's opposition—as efforts to problem-solve around adjudication and, in particular, the judiciary's role in federal criminal matters. In 1982, for example, with encouragement from the Judicial Conference after a multiyear, Administrative Office-directed effort to pilot pre-trial service programs at select district court demonstration sites,[61] the federal judiciary gained control over a new set of pretrial detention services through the Pretrial Services Act.[62] Seeking to limit pretrial detention but provide for the protection of the public, the Act required the Administrative Office, with the Judicial Conference's supervision, to ensure that each judicial district established a pretrial service agency that would assist judges in making determinations over pretrial detention and then monitor individuals released into their respective communities.

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court-administrations-pifollowing/; *see* William W. Schwarzer, *The Federal Judicial Center and the Administration of Justice*, 28 U.C. DAVIS L. REV. 1129, 1130 (1995).

[59] *See* Tracey E. George & Margaret S. Williams, *The Judges of the U.S. Judicial Panel on Multidistrict Litigation*, 97 JUDICATURE 196, 197 (2014) (describing filing of nearly 2000 "electrical equipment" lawsuits at the start of the 1960s).

[60] John T. McDermott, *The Judicial Panel on Multidistrict Litigation*, 57 F.R.D. 215 (1973).

[61] *See* JUDICIAL CONFERENCE REPORT 1982 at 36 (March 1981); JUDICIAL CONFERENCE REPORT 1982 at 91 (September 1991); Elizabeth Ervin, *Pretrial Services—A Family Legacy*, 79 FED. PROBATION J. 21, 23 (2015). The views of the justices themselves about the purposes for pretrial detention or supervision may have changed over time. *Compare* Donna Makowiecki, *U.S. Pretrial Services: A Place in History*, 79 FED. PROBATION J. 18, 19 (describing Chief Justice Warren and seven Associate Justices' attendance at 1964 conference promoting pretrial release) *with* Warren Burger, *The Perspective of the Chief Justice of the U.S. Supreme Court*, 15 CRIME & SOCIAL JUST. 43, 45 (Summer 1981) (arguing for need to "reexamine statutes on pretrial release," because of problem of "bail crime").

[62] *See* Pretrial Services Act of 1982, Pub. L. 97-267, 96 stat. 1136 (codified as amended at 18 U.S.C. § 3152).

Two years later, Congress created the Sentencing Commission in response to disparities in federal sentencing first identified by federal judges.[63] Notably, although responsive to judicial concerns, the Commission's structure deviated from the Judicial Conference's proposal that the power to promulgate sentencing rules reside within the Conference: Unlike the other judicial actors we've discussed so far, the Sentencing Commission was created as "an independent commission in the judicial branch."[64] Both its independence and its fundamentally judicial character are reflected in its composition; the President appoints members by and with the advice and consent of the Senate, but at least three[65] of seven voting commissioners must be drawn from the federal bench, and the Judicial Conference—and, consequently, the Chief Justice—control the slate of judges from which the President picks.[66] But, like the other judicial actors that emerged before it, the Sentencing Commission was squarely targeted at solving a discrete form of adjudication-related problem.[67]

The accretion of these new problem-solving arrangements has transformed the federal judiciary. Today's federal judiciary is not just made up of judges—sitting individually, in three judge panels, in various en banc configurations, or together as the nine-members of the Supreme Court—who arrange their dockets as a part of their role deciding cases or wield their

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[63] Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.; U.S.S.C. organic statute codified at 28 U.S.C. § 991(a)(1)). Judge Marvin Frankel often receives credit for the idea behind the commission; in the early 1970s, Frankel published an influential law review article and book calling attention to judges' "arbitrary, random, [and] inconsistent" sentencing decisions and proposed a "National Commission" to study the problem and develop binding guidelines. *See* Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 46, 51 (1972). *See also* Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985-1987*, 45 HOFSTRA L. REV. 1167 (2017) (discussing Judge Frankel's role in sentencing reform). Frankel's observations were confirmed a few years later when the FJC conducted a study demonstrating wide sentetncing variance. *Id*. at 1179.

[64] 28 U.S.C. § 991(a). That independence provoked backlash from the Judicial Conference and the AO, which argued in support of draft text with full judicial control over guidelines. *See* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 236, 264, 266 (1993).

[65] Currently, a fourth commissioner is retired from federal judicial service. *See About the Commissioners*, US. SENTENCING COMMISSION (Sept. 21, 2023), https://www.ussc.gov/commissioners.

[66] *Id*.

[67] One of the early commissioners, Stephen Breyer, described the first sentencing guidelines produced by the Commission as "the most major reform of criminal law . . . in our lifetimes and probably a reform in terms of change equal to anything you've seen an agency do."

adjudicatory powers to expedite cases.[68] Instead, it is an institution composed of judges who adjudicate *and* a series administrative actors designed to facilitate adjudication from vantages beyond a case or controversy. In the next Part, we put this administrative machinery in motion to describe just how far and widely the federal judiciary administers—and begin to identify some of the clashes and tensions that animate our account.

II. THE CONTOURS OF MODERN JUDICIAL ADMINISTRATION

In this section, we describe and categorize many of the non-adjudicatory actions of modern judicial administration.[69] We group these activities according to three primary *actions* of modern non-adjudicatory judicial administration: *rulemaking*, *managing*, and *communicating*. These categories often overlap; we avoid narrow definitions or overly rigid taxonomies in favor of a broadly descriptive account. And our purpose here is not to be exhaustive—indeed, as others have noted, a "list" of the administrative tasks of a chief judge alone "could quickly result in a book manuscript"[70]—but to capture some of the breadth of federal judicial administration, so that we may begin to describe its dynamics.

A. Rulemaking

Our first category of non-adjudication judicial activity is also perhaps the best studied.[71] Of the numerous accounts of rulemaking, almost all focus on the formal process—now governed by the Rules Enabling Act—by which federal courts adopt a nationally uniform set of adjudicative procedures. But this type of big "R" rulemaking under the REA is just one corner of a much broader category of activity in which federal judges enacting prospective policy through quasi-legislative means. In this section we briefly catalog several forms of rulemaking: "Big R" rulemaking of all stripes, including the federal rules of evidence and rules for civil, criminal, appellate, and bankruptcy; the Judicial Panel's promulgation of rules governing

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[68] *See* Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 (1981) (discussing case management tools available to judges). Class action certifications offer a powerful efficiency-related example of intra-case adjudication, with clear parallels to the Judicial Panel's ability to order pre-trial consolidation.

[69] As discussed in Part I, judges also administer directly through acts of adjudication. *See supra* notes 22, 68.

[70] Marin K. Levy & Jon O. Newman, *The Office of the Chief Circuit Judge*, 169 U. PA. L. REV. 2425, 2436 (2021).

[71] *See generally, e.g.*, Stephen Burbank, *Rules Enabling Act*, *supra* note 15; Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 L. & CONTEMP. PROBS. 229 (1998); *see also* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1004, 1013–15 (2003).

multidistrict litigation and the United States Sentencing Commission's issuance of sentence guidelines; and a range of national, circuit, and district court rulemaking and policymaking over matters like judicial ethical obligations and public access to the courts.

The REA governs amendments to the nationally applicable rules of practice and procedure—including the Federal Rules of Civil Procedure, Federal Rules of Appellate Procedure, Federal Rules of Bankruptcy Procedure, Federal Rules of Criminal Procedure, and Federal Rules of Evidence. Today, "Big R" rulemaking under the REA is primarily the domain of the Judicial Conference's standing Committee on the Rules of Practice and Procedure ("the Standing Committee") as well as several advisory committees—one each for the federal rules of evidence and civil, criminal, bankruptcy, and appellate procedure.[72] The Chief Justice has absolute discretion to select members of the rulemaking committees,[73] each of whom serves for up to two three-year terms.[74] At present, each committee comprises between ten and fifteen members, including a chair,[75] who is always a federal judge.[76]

Of all the judicial administrative tasks, functions, and powers that we discuss in this article, Big R rulemaking is perhaps the most proceduralized.[77]

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[72] *See* 28 U.S.C. § 2073(b); JCUS, Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and Its Advisory Rules Committees (as codified in Guide to Judiciary Policy, Vol. 1, § 440), available at https://www.uscourts.gov/sites/default/files/guide-vol01-ch04-sec440_procedures_for_rules_cmtes_1.pdf.

[73] JUDICIAL CONFERENCE REPORT 60 (1987); *see also infra* notes 101-106 (discussing Chief Justice's appointment powers).

[74] JUDICIAL CONFERENCE REPORT 60 (1987).

[75] In addition to its chair and members, each committee is also served by one or two "Reporters," who are typically law professors. *See* Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 TEX. TECH. L. REV. 323, 329 (1991).

[76] Authors' calculations based on JCUS, Membership of the Committee on Rules of Practice and Procedure and Advisory Rules Committees, available at https://www.uscourts.gov/rules-policies/about-rulemaking-process/committee-membership-selection. In practice, federal judges dominate the committees. For example, the Standing Committee currently comprises four district judges, three circuit judges, one California state judge, one DOJ official, three defense-side lawyers, one plaintiffs'-side lawyer, and one law professor. *Id*.

[77] Constraints on the rulemaking process are relatively new. Prior to 1983, rulemaking committees consisted primarily of lawyers and academics—not judges. *See* Richard D. Freer, *The Continuing Gloom about Federal Judicial Rulemaking*, *for Federal Civil Rulemaking*, 107 NW. U. L. REV. 447, 460 (2013). Their work was conducted outside the limelight, and the Standing Committee and advisory committees lacked their own rules of process. *Id.*; *see also* Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 467–68 (1993). Then, in 1983, the Standing Committee published a statement of "procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure," which sought to address

Since 1988, Congress has required the standing committee and each of the advisory committees to engage the public through open meetings "preceded by sufficient notice to enable all interested persons to attend."[78] Whenever a committee makes a recommended amendment to the rules, the committee must show its work with an "explanatory note" on the proposed rule and a "written report explaining the body's action, including any minority or separate views."[79]

In addition to these minimum statutory requirements, the Judicial Conference is also required to publish procedures governing the work of the rulemaking committees.[80] Current procedures require a multi-step process between the advisory committee and the standing committee, before proposed amendments ultimately reach the full Judicial Conference.[81] From the Judicial Conference, the rule change goes to the Supreme Court for a majority vote which, if successful, prompts transmittal to Congress. Amendments to the rules typically become effective at the end of six months, unless Congress acts to prevent them.[82]

"confusion and occasional criticism" of the rulemaking process by codifying the "evolve practice" of the rulemaking committees. *Id.* (citing Judicial Conference Reports 66 (1983)); COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES, PROCEDURES FOR THE CONDUCTION OF THE BUSINESS BY THE JUDICIAL CONFERENCE COMMITTEES ON RULES OF PRACTICE AND PROCEDURE (1983).[77] The 1983 procedures were lax, providing only that "an Advisory Committee shall normally require public hearings on all proposed rule changes after adequate notice." *Id.*

[78] 28 U.S.C. §§ 2073(c)(1), § 2073(c)(2); *see, e.g.*, Committee on Rules of Practice and Procedure; notice of open meeting, 88 Fed. Reg. 25,698 (Apr. 27, 2023). A rulemaking committee may, however, meet in private when a majority of the committee "determines [in open session]that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public, and states the reason[.]" *Ibid*.

[79] *Id.* § 2073(d).

[80] *Id.* § 2073(a)(1).

[81] To lay this out more fully: The advisory committee submits proposed changes and accompanying reports to the standing committee. The standing committee may then approve the rule change for publication, which should be "as wide as possible." Publication is ordinarily followed by a public comment period of six months. The proposal then returns to the advisory committee to be considered in light of comments. If the advisory committee chooses to proceed, it submits the proposed change back to the standing committee, along with a report on comments received and any changes made since initial publication. The standing committee may accept, reject, or modify a proposed rule change before transmitting any approved rule change to the Judicial Conference along with a report of the standing committee's own recommendations.

[82] 28 U.S.C. § 2074(a); *but see id.* § 2074(b) (requiring affirmative action by Congress for rules that involve evidentiary privileges). Even with these APA-like procedural guardrails in place, many have still criticized JCUS's rulemaking committees for their lack of transparency and accountability and inadequate representativeness. *See, e.g.*, Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261 (2009).

Individual courts[83] and judges[84] are also empowered to make their own rules of practice and procedure, a power they exercise enthusiastically.[85] Local rules are subject to periodic review by circuit judicial councils to ensure their consistency with federal rules and statutes, but are often the source of criticism because of their complexity and lack of uniformity.[86] And while local rulemaking formally requires notice and public comment,[87] the processes are generally less transparent than those followed for the nationwide rules.[88]

Beyond the Judicial Conference, the rulemaking committees, and the courts themselves, a variety of other judicial institutions engage in quasi-legislative rulemaking or policy-setting. The Judicial Panel on Multidistrict Litigation, for example, has the power to promulgate rules determining the procedures by which cases are consolidated.[89] At the other end of the case

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[83] *See* 28 U.S.C. § 2071(a) ("The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business."); FED. R. CIV. P. 83 (authorizing local rules not inconsistent with or duplicative of federal statutes and federal rules of practice and procedure).

[84] FED. R. CIV. P. 83 ("A judge may regulate practice in any manner consistent with federal law, [federal rules of practice and procedure], and the district's local rules."). For discussions of individual judges' standing orders, *see* Samuel P. Jordan, *Local Rules and the Limits of Trans-Territorial Procedure*, 52 WM. & MARY L. REV. 415, 441 (2010); Myron J. Bromberg & Jonathan M. Korn, *Individual Judges' Practices: An Inadvertent Subversion of the Federal Rules of Civil Procedure*, 68 ST. JOHN'S L. REV. 1 (1994).

[85] As of 2002, the ninety-four district courts followed 5,575 discrete local rules, not including "sub-rules," appendices, and local directives. Memorandum from Mary P. Squiers to Hon. Anthony J. Scirica, Chair of the Standing Committee (Dec. 12, 2002) (available at: https://www.uscourts.gov/sites/default/files/fr_import/ST2003-01%282%29.pdf).

[86] *See, e.g.*, A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567, 1567 (1991) (collecting criticisms); Jordan, *supra* note 84 at 436 (same). When commissioned by the Standing Committee to study the problem in 1988, the "Local Rules Project" identified more than 5,000 discrete local rules including more than 800 instances of "possible inconsistency" with federal rules or statutes. Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2023 (1989). A redux of the Local Rules Project in the early 2000s found that federal district courts' local rules had only continued to grow since the 1980s. *See* Memorandum from Mary P. Squiers, *supra* note 85.

[87] 28 U.S.C. § 2071(b)–(d); FED. R. CIV. P. 83(a)(1).

[88] Katherine A. Macfarlane, *A New Approach to Local Rules*, 11 STAN. J. C.R. & C.L. 121, 131 (2015).

[89] *See* 28 U.S.C. § 1407(f) (authorizing the JPML to "prescribe rules for the conduct of its business not inconsistent with the Acts of Congress and the [FRCP]"); *id.* at § 2112(a)(3) (authorizing the JPML to prescribe rules for the consolidation of certain appeals). But it may not issue rules for the procedures governing cases that have been consolidated, which would fall to the REA rulemaking committees; so far, they have not adopted MDL-specific rules. The lack of uniform, pre-established procedures for the conduct of MDLs has been widely debated. *See, e.g.*, Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767 (2017) (arguing that ad hoc rulemaking by MDL creates challenges

spectrum, the Sentencing Commission develops non-binding[90] federal sentencing guidelines through a public process that combines legislative, administrative, and judicial modes of policymaking.[91] The Commission's work affects judges and the criminal defendants sentenced by them around the nation.[92]

Finally, the judiciary engages in a wide variety of internal policymaking. Internal or not, these policies can involve matters of great consequence. Some of this "little 'r'" rulemaking occurs within the Judicial Conference committee structure. Take, for instance, judicial conduct and employment. Federal statutes, like the Ethics in Government Act of 1978 or the Judicial Disqualification Act, provide a broad substantive overlay of rules. But Judicial Conference committees do much of the work of issuing the policies that implement these statutes. The Committee on Financial Disclosure, for example, prescribes rules regarding financial disclosure by judicial officers,[93] and the Committee on Codes of Conduct promulgates an ethics code for lower court judges.[94]

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and opportunities for rule of law); Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669 (2017) (juxtaposing scholars' anxiety over MDLs' "procedural exceptionalism" with MDL judges' enthusiasm for the device).

[90] Although Congress initially conceived of a system of binding guidelines, in 2005 the Supreme Court held such a system unconstitutional and made the guidelines "advisory." United States v. Booker, 543 U.S. 220, 246–47 (2005).

[91] *See* U.S. SENTENCING COMMISSION, U.S. SENTENCING COMMISSION RULES OF PRACTICE AND PROCEDURE (Aug. 18, 2016), https://www.ussc.gov/sites/default/files/pdf/about/policies/2016practice_procedure.pdf. The Commission is designed to be in dialogue with other government actors. Like rules promulgated pursuant to the REA, Congress gets the chance to modify or disapprove sentencing guidelines before they go into effect, 28 U.S.C. § 994(p), and various stakeholder agencies from both the executive and judicial branches are statutorily required to participate in the Commission's work. 28 U.S.C. § 994(o); *but see* Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CALIF. L. REV. 1, 5 (1991) ("The Commission is less politically accountable than virtually any other federal agency . . . [it] therefore[] operates differently from other administrative bodies.").

[92] *See, e.g.*, Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523 (2007). In the early years, some judges cast doubt on the Commission's constitutionality—a position ultimately rejected in *Mistretta v. United States*, 488 U.S. 361 (1989).

[93] *See* JUD. CONF. OF THE U.S., GUIDE TO JUDICIARY POLICY [hereinafter JUDICIARY POLICY GUIDE], Volume 2, Part D, *Financial Disclosure*.

[94] *See* JUDICIARY POLICY GUIDE, Volume 2, Part A, *Code of Conduct for U.S. Judges*. Over time, the Judicial Conference's Committee on Codes of Conduct has augmented the Code with advisory opinions in response to individual judges' requests for clarifications over whether certain conduct is or is not permissible.

More policy still issues from judicial councils or individual courts. For example, where the Judicial Conference develops model employment dispute resolution plans for the federal judiciary, circuit judicial councils issue binding plans. Similar dynamics—guidance from actors like the Judicial Conference or the Administrative Office, binding policy from specific courts—play out over the federal judiciary's control of everything from public access to court proceedings to jury selection. Throughout the COVID-19 pandemic, for example, federal courts across the country each developed their own binding policies governing courthouse and courtroom access, transitions from in-person to remote proceedings, and access to remote proceedings.[95]

B. Managing

A second category of judicial action involves the many responsibilities judicial actors have to run what has become an expansive federal judiciary.[96] We mean "managing" here in the broadest sense. The judiciary, no less than any other governmental agency—or business—has staff to oversee and pay, buildings to operate, and policies and practices to implement. The judiciary's managerial role covers everything from studying, training, and implementing policies for judges and judicial employees; supervising many aspects of the federal criminal justice system, including the federal defender system, pretrial detention, and supervised release; and overseeing both physical and digital court facilities.

The Chief Justice is at the helm of these operations.[97] But, like the federal judiciary's other administrative powers, managerial work occurs at all levels and through a variety of combinations of judicial actors. Individual district court judges, for example, administer CJA panels, making them responsible in certain circumstances for appointing counsel and monitoring and approving counsel's expenditures.[98] The Chief Judge of the district oversees, among other matters, the pretrial detention and supervised release services for the district and can declare judicial emergencies, which suspend

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[95] *See Court Orders and Updates During COVID-19 Pandemic*, U.S. Courts, Apr. 2023, https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic.

[96] Just as there are adjudicatory analogs for communicating and rulemaking, judicial adjudication also provides the judiciary with the ability to supervise judicial administration through judicial review, mandamus actions, or contempt powers. *See, e.g.*, *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 227 (1821).

[97] *See* Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575, 1592-1619 (2006) (discussing array of Chief Justice's non-adjudicatory powers).

[98] *See infra* notes 131-137 and accompanying text; Patton, *supra* note 15, 338-39.

certain Speedy Trial Act requirements.[99] The circuit judicial council, led by the chief judge of the circuit, is the principle conduct regulator and disciplinarian of judges and judicial staff.[100] Nationally, the Judicial Conference, the Administrative Office, and the Federal Judicial Center manage the budget and personnel and implement and study the policy of what amounts to a sprawling judicial bureaucracy.

Take, for instance, the federal judiciary's ability to select and supervise judicial and administrative personnel. The most prominent manager in this sense is the Chief Justice, who has what Peter Fish has deemed the "the appointment prerogative" across an array of positions,[101] including new or ad-hoc committees that he stands up. The Chief Justice makes all intercircuit and intercourt assignments[102]—Taft's original proposed method for using administration to control caseloads—and he appoints judges to tribunals like the Foreign Intelligence Surveillance Act court and the Judicial Panel on Multidistrict Litigation.[103] With respect to the central elements of administrative governance, he appoints the chairs and members of Judicial Conference committees.[104] He appoints the director of the Administrative Office and chairs the board of the Federal Judicial Center.[105] And he makes a series of Supreme Court-specific appointments, such as hiring Supreme Court employees, and symbolic appointments, such as appointing judicial representatives to various federal commissions and councils.[106]

Other judicial actors wield significant appointment or appointment-like powers as well. The Judicial Panel on Multidistrict Litigation, for

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[99] *See In re Approval of the Judicial Emergency Declared in the District of Arizona*, 639 F.3d 970 (9th Cir. 2011); *United States v. Rodriguez-Restrepo*, 680 F.2d 920, 921 n.1 (2d Cir. 1982); *United States v. Bilsky*, 664 F.2d 613, 619-20 (6th Cir. 1981).

[100] *See* Stephen Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283 (1982).

[101] Fish, *Rusty Hinges*, *supra* note 53, at 274.

[102] *See, e.g.*, 28 U.S.C. § § 291(a); *id*. § 292(d); *id.* § 293(a); *id*. § 294(a); *id*. § 294(b), (d).

[103] Resnik & Dilg, *supra* note 97, at 1615-16.

[104] *See, e.g.*, JUDICIAL CONFERENCE REPORT 57-59 (1987) (reflecting changes to Judicial Conference committee structure and noting that "[t]he Chief Justice retains all appointment authority"); Charles Nihan, *A Study in Contrasts: The Ability of the Federal Judiciary To Change its Adjudicative and Administrative Structure*, 44 AM. U. L. REV. 1693, 1707 (1995) (discussing Rehnquist's appointment of nine-member committee to study Judicial Conference); Resnik & Dilg, *supra* note 97, at 1613–15, 1619 (describing Chief Justice Rehnquist's creation of Ad Hoc Committee on Gender-Based Violence).

[105] Resnik & Dilg, *supra* note 97, at 1596.

[106] *See* Daniel J. Meador, *The Federal Judiciary and its Future Administration*, 65 VA. L. REV. 1031 (1979), Appendix A (collecting duties of chief justice); Resnik & Dilg, *supra* note 97 (same).

example, assigns consolidated cases to individual judges for pretrial proceedings,[107] affecting hundreds of thousands of civil cases every year.[108] Under the Criminal Justice Act of 1964 (the "CJA"), individual judges appoint panel attorneys for the thousands of indigent defendants every year who do not receive federal defender services.[109] Circuit judicial councils select the Federal Defender for districts within their circuits that have federal defenders offices; under a separate statute, the district court may even appoint an interim U.S. Attorney for the district.[110]

Finally, the judiciary exercises near total control over the selection of judicial employees.[111] Most prominently, circuit judicial councils select bankruptcy judges, and district courts appoint magistrate judges. Circuit judicial councils may also appoint a circuit executive to manage personnel, budgets, and other circuit court administrative matters.[112] The chief judge of every circuit appoints a senior staff attorney for the circuit;[113] the chief judge of a district does the same for the district. And the CJA even empowers circuit judicial councils to appoint the federal defender for each district within the district with a federal defender office.[114]

The federal judiciary's administrative supervisory power—the ability to regulate and sanction both judges and judicial employees—is similarly broad. This wasn't always the case for either Article III judges or judicial employees. Impeachment, of course, provides Congress and only Congress with the sole, constitutionally-established power to sanction federal judges.[115] And, until 1948, the President had the authority to fire court clerks for cause; Administrative Office employees were initially subject to the same civil service protections as all other federal employees. But today, it is up to the judiciary to implement the codes of conduct, disclosure requirements, and employment regulations that it sets for judges and judicial employees.

Circuit judicial councils, for example, serve as the judiciary's most prominent disciplinarians. Under the Judicial Councils Reform and Judicial

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[107] 28 U.S.C. § 1407(a), (b).

[108] *See* Gluck, *supra* note 89, at 1672 ("Today, actions consolidated in MDLs comprise thirty-nine percent of … the federal docket.")

[109] *See infra* notes 131-137 and accompanying text.

[110] 28 U.S. Code § 546.

[111] 28 U.S.C. § 604 (1988 & Supp. V 1993) (giving Director of Administrative Office authority over personnel supervision and resources).

[112] 28 U.S.C. § 332.

[113] *See* Merritt E. McAlister, *Rebuilding the Federal Circuit Courts*, 116 NW. UNIV. L. REV. 1137, 1157-58 (discussing creation and role of appellate staff attorneys).

[114] District courts also create jury selection plans, determine the jury pool based on state voter lists, and run the federal jury selection process. *See* 28 U.S.C. §§ 1863–1866.

[115] *See, e.g.*, *Nixon v. United States*, 506 U.S. 224, 235 (1993) ("In our constitutional system, impeachment was designed to be the only check on the Judicial Branch by the Legislature.")

Conduct and Disability Act of 1980 Act, Judicial Councils investigate complaints, which may be filed by anyone, that involve "conduct prejudicial to the effective and expeditious administration of the business of the courts."[116] While Congressional impeachment is exceedingly rare,[117] circuit judicial councils consider more than a thousand complaints every year.[118] Some of those complaints are newsworthy, such as those about then-Judge Kavanaugh,[119] but even more run-of-the-mill complaints involve critical conduct-related questions about federal judges.[120]

The federal judiciary does not just select or sanction judges and judicial employees—it also studies itself, trains itself, and implements its own reforms. Doing so involves everything from gathering court statistics and data to administering trainings or pilot programs to test potential court reforms.[121] Nationally, the Judicial Conference, Administrative Office, and Federal Judicial Center all play leading roles in this work.[122] But judicial study occurs at all levels of the judiciary—and often simultaneously across all levels of the judiciary.[123]

Judicial management also involves judicial control over judicial infrastructure, both physical and digital. The Judicial Conference and Administrative Office exercise high-level oversight over judicial facilities; the courts themselves typically oversee individual courthouses (from new

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[116] For a in depth discussion of this process, see Dana Remus, *The Institutional Politics of Federal Judicial Conduct Regulation*, 31 Y.L. & POL'Y REV. 33, 34, 52 (2012); Burbank, *Procedural Rulemaking*, *supra* note 100.

[117] *See* Ferejohn & Kramer, *supra* note 37, at 980.

[118] *See* Judicial Conduct and Disability Act Study Committee, *Implementation of the Judicial Conduct and Disability Act of 1980 A Report to the Chief Justice*, September 2006 (*"*Breyer Committee Report"), *available at* https://www.supremecourt.gov/publicinfo/breyercommitteereport.pdf.

[119] *In re: Complaints Under the Judicial Conduct and Disability Act*, C.C.D. No. 19-01 (10th Cir. Aug. 1, 2019).

[120] *See* Breyer Committee Report, *supra* note 118.

[121] *See, e.g.*, Emery G. Lee III & Jason A. Cantone, *Pilot Project on Discovery Protocols for Employment Cases Alleging Adverse Action*, 100 JUDICATURE 6 (2016). (describing results of FJC pilot study).

[122] Recent FJC research topics include, e.g., consolidation under FED. R. CIV. P. 42(a); guidelines for administrative resource sharing between district courts and between bankruptcy courts; and, evaluating aspects of the District of Arizona's pretrial diversion program. *See* FED. JUD. CENTER, *Selected Current and Recently Completed Research Projects*, *available at* https://www.fjc.gov/research/selected-current-and-recently-completed-research-projects.

[123] For example, the Judicial Conference routinely authorizes district courts or bankruptcy courts to conduct pilot programs; the AO or FJC often help assess these pilots. *See also* 146 F.R.D. 507 (dissenting statement of Justice Scalia) ("It seems to me most imprudent to embrace such a radical alteration [to discovery rules] that has not, as the advisory committee notes, been subjected to any significant testing on a local level.").

construction to parking). The same is true for access to proceedings and court data. Under Judicial Conference policy, for example, federal courts must provide reasonable accommodations to individuals with disabilities.[124] It is also up to the judiciary to determine whether to broadcast or record proceedings: Pursuant to the Federal Rules of Criminal Procedure, criminal proceedings may not be broadcast, but the Judicial Conference has long piloted limited studies of broadcasting certain civil proceedings. And, as any lawyer who scrolls down to the bottom of a digital docket knows, the Judicial Conference sets the policies governing PACER usage.[125]

As the judiciary's management of access-related issues begins to make clear, federal judicial management—ostensibly a matter of internal affairs—directly affects those who come before the judiciary. Nowhere is that more apparent, however, than for criminal defendants and individuals convicted of federal crimes, because the federal judiciary plays an outsized role in running much of our federal criminal legal system up until the point of acquittal or conviction—and beyond, in the case of probation or reentry courts.

The judiciary now runs wrap-around "community correction" programs for pretrial supervision of criminal defendants and probation services for persons released on probation. The Administrative Office is required to ensure the operation of pretrial services across the country, but the services themselves are operated locally, as part of the district court; federal probation or supervision officers report to the chief district judge of the district in which they act.[126] Maintaining these services is a significant undertaking. In 2021, for instance, pretrial services prepared just over 73,000 pretrial reports, which were authored by hundreds of probation officers. Those reports contributed to the supervised release of over 26,000 people; for nearly all, federal pretrial services provided some form of supervision or monitoring.[127] At the national level, the Administrative Office, Federal Judicial Center, and Judicial Conference conduct and disseminate community corrections research,[128] support local pretrial and probation officers, and train

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[124] *See* JUD. CONFERENCE, *Guidelines for Providing Services to the Hearing-Impaired and Other Persons with Communications Disabilities*.

[125] For an examination of the federal judiciary's control over judicial data—including that held by PACER—see Zachary D. Clopton & Aziz Z. Huq, *The Necessary and Proper Stewardship of Judicial Data*, 76 STAN. L. REV. – (forthcoming 2024).

[126] Chief Justice Burger saw these programs as vitally important, because of his perception of the high incidence of bail-related crimes. Burger, *The State of the Judiciary—1970*, 56 AM. BAR ASSOC. J. 929, 934 (1970)..

[127] U.S. COURTS, *Pretrial Services — Judicial Business 2021*, available at https://www.uscourts.gov/statistics-reports/pretrial-services-judicial-business-2021.

[128] As noted, the Administrative Office even publishes *Federal Probation Journal*, a quarterly publication of "current thought, research, and practice in corrections, community

judges and judicial staff on matters relating to pretrial and probation services.[129]

The Judicial Conference's Committee on Criminal Law provides the highest level of oversight for these services.[130] The committee monitors the operations of pretrial and probation services, develops guidelines to implement statutory enactments, like the Bail Reform Act, and makes recommendations to the Judicial Conference or the Administrative Office, including with respect to the budget the Conference should propose to Congress or the service-related policies the Conference should adopt.

Judicial administration affects criminal defendants in other ways, too. Since *Johnson v. Zerbst* established a right to counsel for defendants charged with crimes in federal courts,[131] the federal judiciary has largely managed what services effectuate that right.[132] Under the CJA, the judiciary is directly involved with the provision of defender services to more than 80 percent of all federal defendants in over 200,000 cases a year.[133] The Act requires each district court to make "a plan for furnishing representation" to anyone who cannot afford counsel;[134] it also tasks the judiciary with implementing those policies. For example, the CJA tasks circuit judicial councils with appointing

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supervision, and criminal justice." The December 2022 volume of the journal, for instance, was dedicated to considering racial disparity across various aspects of federal pretrial detention, supervision, and bail. Kristin Bechtel & Christopher Lowenkamp, *Introduction to Special Issue on Addressing Disparity in Community Corrections*, 86 FED. PROBATION 3, 3 (Dec. 2022).

[129] *See, e.g.*, *Study: Federal magistrates, prosecutors misunderstand bail law, jailing people who should go free*, USA TODAY (Dec. 7, 2022), *available at* https://www.usatoday.com/story/news/politics/2022/12/07/federal-judges-misapply-bail-law-illegally-jail-arrestees-study-says/10798949002/ (noting Federal Judicial Center training on reducing pretrial detention).

[130] *See* Jurisdiction of Committees of the Judicial Conference of the United States (as approved by the Executive Committee, effective March 14, 2017).

[131] 304 U.S. 458, 462-64 (1938).

[132] Geoffrey Cheshire, *A History of the Criminal Justice Act of 1964*, FED. LAW., (Mar. 2013); John S. Hastings, *The Criminal Justice Act of 1964*, 57 J. CRIM. L. & CRIMINOLOGY 426 (1967) ("[T]he Administrative Office of the United States Courts became aware of the need for statistical information concerning probable costs as well as a plan for administering an assigned counsel system. Preliminary data was obtained through the use of experimental forms in the Seventh, Eighth, and Tenth Circuits.")

[133] Vera Institute of Justice, *Good Practices for Federal Panel Attorney Programs: A Preliminary Study of Plans and Practices*, 1 (Dec. 2002), *available at* https://www.uscourts.gov/sites/default/files/goodpractices.pdf.

[134] *See, e.g.*, 18 U.S.C. § 3006A(a) ("Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with this section.") As noted, the CJA authorizes the Judicial Conference "to issue rules and regulations governing the operation of plans formulated under this section." 18 U.S.C. § 3006A(h).

and supervising the Federal Defender in each district within the circuit that has a federal defender office.[135]

The CJA provides an even more direct role for individual district court judges when indigent defendants do not receive representation from a federal public defender office, typically because of a conflict of interest, and who therefore must be appointed counsel from private CJA "panel" attorneys.[136] The district courts determine the composition of the panels from which district court judges may appoint an attorney to represent an individual defendant. Once those appointments are made, district court judges also monitor panel attorney hours, approve pay, and grant or deny certain expenditures, like hiring an expert or an investigator.[137]

C. Communicating

Our final category, communicating, is perhaps the least obviously "administrative" of our three functions. But judges and judicial actors frequently communicate about judicial matters, and they often pursue administrative ends *by* communicating. As then-District Judge Bolitha Laws described in a law review article more than 50 years ago, "one of the cardinal objectives of courts is to convince those whom they serve that justice is being accomplished. This is another way of saying that we of the courts must have good public relations."[138]

For our purposes, communications involve instances in which judges or judicial actors are in dialogue with other government actors, themselves, or the public on a colorably official (i.e., not purely personal) matter that is not tied to the adjudication of a particular case or controversy. In other words, if judges or groups of judges are speaking or writing, and if it concerns the law or its administration, but not in the context of a particular adjudication, then there's a good chance the communication is at least partially intended to promote some goal of judicial administration.

There is in theory a strong norm that judges voice opinions about matters of public import only in the context of a case or controversy.[139] In

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[135] 18 U.S.C. § 3006A(g)(2)(A).

[136] According to a recent, Administrative Office-commissioned study, "panel attorneys are appointed to represent 40 percent of those who receive CJA counsel." Vera Institute, *Good Practices for Federal Panel Attorney Programs*, *supra* note 133, at 2.

[137] Patton, *supra* note 15, at 352-54.

[138] *See* Bolitha J. Laws, *Law and the Layman*, 4 WASH. UNIV. L. QUART. 327, 335 (1955).

[139] *See, e.g.*, Nancy Gertner, *To Speak or Not to Speak: Musings on Judicial Silence*, 32 HOFSTRA L. REV. 1147, 1147 (2004) ("The judiciary, more reticent [than Congress and the Executive] by temperament and rule, is supposed to speak only through formal opinions, general discourses on the administration of justice, and the occasional scholarly talk or article.").

practice, however, judges have been publicly expressing their opinions in ways other than written opinions since the founding.[140] And judicial communications of all types are commonplace today.[141] Judges and judicial actors, including the Judicial Conference, the Administrative Office, and the Federal Judicial Center, communicate constantly with Congress, the public, and amongst themselves to inform and shape the conversation around a broad set of issues that intersect with or touch upon the federal court system.

The most frequently discussed form of these communications is "judicial lobbying,"[142] which is typically defined as encompassing attempts by judges—outside of deciding cases—to influence decisions belonging to legislators or Executive Branch officials.[143] Lobbying often occurs at the invitation of Congress,[144] which frequently calls for the federal judiciary's input on a range of topics.[145] By statute, for example, the Chief Justice is required to submit to Congress "an annual report of the proceedings of the Judicial Conference and its recommendations for legislation."[146] Judges and justices are also often invited to testify about judicial appropriations, the

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[140] *See* Russell R. Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123, 123-31 (noting that the framers intended the judiciary to participate in legislative debates); Neal K. Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1741-43 (1998) ("Throughout the first decades of the Republic, judges, acting in their individual capacities, provided Congress with advice about legislative matters.").

[141] *See, e.g.*, Geyh, *Paradise Lost, supra* note 15, at 1171-80 (describing a variety of factors, including the creation of the FJC and the Judicial Conference's Office of Judicial Impact Assessment, as driving increased interbranch communications at the end of the Twentieth Century).

[142] By judicial lobbying, we mean lobbying efforts by judges and judicial actors, not efforts by non-judges to influence judicial decisions. *See* Sheldon Whitehouse, *A Flood of Judicial Lobbying: Amicus Influence and Funding Transparency*, 131 YALE L.J. F. 141 (2021-2022).

[143] *See* Anderson, *supra* note 15, at 410; *cf.* Resnik, *Constricting Remedies*, *supra* note 39, at 231 (defining lobbying more narrowly as involving instances in which the federal judiciary "seek[s] to persuade Congress to adopt certain policies about how to implement substantive rights").

[144] The federal judiciary does not always answer. Chief Justice Roberts, for instance, recently made headlines when—citing "separation of powers and the importance of preserving judicial independence"—he declined an invitation to testify before the Senate Judiciary Committee regarding Supreme Court ethics. *See* Letter from Chief Justice John Roberts to Senator Richard Durbin, April 25, 2023, *available at* https://int.nyt.com/data/documenttools/supreme-court-ethics-durbin/cf67ef8450ea024d/full.pdf.

[145] *See generally*, Christopher E. Smith, Judicial Self Restraint: Federal Judges and Court Administration 37-40 (1995) (discussing broad congressional deference to judicial lobbying regarding court administration).

[146] 28 U.S.C. § 331 (2012).

authorization of additional judgeships, or the structure of the courts.[147] Over the past two decades, for example, Congressional committees have asked on multiple occasions for district and circuit judges to weigh in on whether to split or otherwise reorganize the Ninth Circuit.[148]

Judges do not always wait for an invitation before making their voices heard. Since the 1970s, for example, the Chief Justice has taken it upon himself to offer his own annual musings on the state of the federal judiciary, which are now published on the Supreme Court's website. The practice began in 1970, when Chief Justice Burger delivered an address titled the "State of the Judiciary" to the American Bar Association.[149] While content and tone vary from year to year and Chief Justice to Chief Justice, exhortations to Congress for more funding or new judgeships are a mainstay, as are expressions of gratitude for appropriations-past.[150] In his 2022 report, for example, Chief Justice Roberts opened with a rousing recounting of the Little Rock Nine integrating an Arkansas high school in the aftermath of *Brown v. Board*, before using the anecdote to highlight the personal security risks faced by federal judges.[151]

When judges speak for an assemblage of their colleagues, they speak with what Judith Resnik has called the judiciary's "corporate voice,"[152] lending their statements special significance.[153] The Judicial Conference, for

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[147] *See, e.g.*, *Federal Judiciary: Is There a Need for Additional Judges? Hearing before the H. Subcomm. on Cts., the Internet, and Intell. Prop. of the H. Comm. on the Judiciary*, 108th Cong. 8–20 (2003) (statement of Circuit Judge Dennis Jacobs request for additional federal district and circuit judgeships); *see also* Thomas G. Walker & Deborah J. Barrow, *Funding the Federal Judiciary: The Congressional Connection*, 69 Judicature 45, 46–7 (1986) (describing the Judicial Conference's role in lobbying for additional judicial resources).

[148] *See, e.g.*, *Improving the Administration of Justice: A Proposal to Split the Ninth Circuit. Hearing before the Subcomm. on Administrative Oversight of the Cts. Of the S. Comm. on the Judiciary*, 108th Cong. 11–14, 14–17 (2004) (statements of Chief Judge Mary M. Schoeder, U.S. Court of Appeals for the Ninth Circuit, opposing proposal to split the Ninth Circuit, and Judge Diarmuid F. O'Scannlain, U.S. Court of Appeals for the Ninth Circuit, favoring the proposal).

[149] Burger, *supra* note 126.

[150] *See, e.g.*, 2000 YEAR-END REPORT ON THE FEDERAL JUDICIARY, *available at* https://www.supremecourt.gov/publicinfo/year-end/2000year-endreport.pdf ("Although Congress responded to many of the Judiciary's legislative priorities during this year, I will focus in this report on what I consider to be the most pressing issue facing the Judiciary: the need to increase judicial salaries.")

[151] 2022 YEAR-END REPORT ON THE FEDERAL JUDICIARY, *available at* https://www.supremecourt.gov/publicinfo/year-end/2022year-endreport.pdf.

[152] *See, e.g.*, Resnik, *Constricting Remedies*, *supra* note 39, at 273 & generally (2003) (describing "the judiciary as an institution using its corporate voice to advance specific agendas").

[153] Some communications are harder to pin down. In 2014, for instance, federal district judge John Bates made waves when he wrote several unsolicited letters to Congress

example, votes on the positions it would like to take with respect to pending legislation, which increases the heft of those positions,[154] and chooses who to "provide" Congress to offer the Judicial Conference's position.[155] Those positions are often further supported by statistics or reports prepared by the Federal Judicial Center or Administrative Office. Judges also create corporate voice by communicating internally, through constant informal communications[156] and frequent formal gatherings like their annual "circuit conferences."[157]

"on behalf of the Judiciary" to express opposition to the USA Freedom Act. *See, e.g.*, Letter from John Bates to Patrick Leahy, Chairman, Senate Comm. on the Judiciary (Aug. 5, 2014), https://www.eff.org/files/2014/08/15/08052014-bates-leahyletter.pdf; *see also* Anderson, *supra* note 15, at 402–403, 435-437 (describing Bates' letters and the controversy surrounding them). In addition to being a district court judge, Bates held several important titles at the time, including presiding judge of the Foreign Intelligence Surveillance Court and Director of the Administrative Office. Bates used AO letterhead and signed as Director of the AO, but the content of the letters derived from his work on the FISA Court; the proposed bill would have limited the government's ability to monitor citizens' electronic communications. Bates' letters were controversial for a number of reasons, but what rankled many observers was that Bates purported to speak "on behalf of the judiciary." *See* Letter from Chief Circuit Judge Alex Kozinski to Patrick Leahy, Chairman, Senate Comm. on the Judiciary (Aug. 14, 2014), https://cryptome.org/2014/08/kozinski-leahy-techdirt-14-0822.pdf ("I write to clear up any misunderstanding that might arise as to whose views the letter represents."); Nancy Gertner, *Op-Ed: Who Speaks for the Bench About Surveillance*, NATIONAL LAW JOURNAL, Sept. 15, 2014 ("What was troubling about Bates' letter was its scope, claiming to speak for all federal judges.").

[154] *See* Resnik, *Constricting Remedies*, *supra* note 39, at 229 ("[W]hen the official policymaking organ for the institution speaks, the positions taken gain status and have, in fact, produced results.")

[155] ADMINISTRATIVE OFFICE, *The Courts and Congress – Annual Report 2022*, *available at https://www.uscourts.gov/statistics-reports/courts-and-congress-annual-report-2022*.

[156] *See, e.g.*, Levy & Newman, *The Office of the Chief Circuit Judge*, *supra* note 70, at 2443 ("[S]everal judges said that Chief Judges need to be able to communicate well."); Ann E. Marimow, *A federal judge in D.C. hit 'Reply All,' and now there's a formal question about his decorum*, WASH. POST (Aug. 16, 2019), *available at* https://www.washingtonpost.com/local/legal-issues/a-federal-judge-in-dc-hit-reply-all-and-now-theres-a-formal-question-about-his-decorum/2019/08/15/ (describing email exchange between judges about a climate-change seminar sponsored by the FJC).

[157] *See* 28 U.S.C. § 333 (authorizing periodic gatherings of circuit, district, magistrate, and bankruptcy judges within a circuit, for the purpose of "considering the business of the courts and advising means of improving the administration of justice within such circuit." Justices will often use these conferences as platforms for lobbying their lower-court colleagues. *See, e.g.*, Josh Gerstein, *Kavanaugh: No warring camps at Supreme Court*, POLITICO (Jul. 7, 2023), *available at* https://www.politico.com/news/2023/07/13/kavanaugh-supreme-court-speech-partisanship-00106215.

Judicial communications also play a powerful role when directed more immediately at the public writ-large or the judiciary itself. The Judicial Conference, Administrative Office, and Federal Judicial Center all attempt to disseminate their reports and have plans for reaching the public to explain court functions. The Judicial Conference's most recent Strategic Plan, for example, dedicates an entire set of "strageg[ies]" toward "[p]reserving the public trust, confidence, and understanding."[158] Those strategies emphasize "improv[ing] the sharing and delivery of information about the judiciary"—by, for example, "[d]eveloping a communications strategy that considers the impact of changes in journalism"—and "[e]ncouraging involvement in civics education activities by judges and judiciary employees."[159]

As even these formal strategies recognize, far more of the federal judiciary's public affairs-related communications take place in informal or ad hoc manners. There are, for example, historical society[160] or administrative gatherings that convene judges and members of the public;[161] judges speak at law schools or public symposia; and judges frequently pen newspaper op-eds[162] and scholarly articles.[163]

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[158] JUDICIAL CONFERENCE, *Strategic Plan for the Federal Judiciary*, 9 (September 2020), *available at* https://www.uscourts.gov/sites/default/files/federaljudiciary_strategicplan2020.pdf. As the plan notes, "[c]hanges in social media and communication will continue to play a key role in how the judiciary is portrayed to and viewed by members of the public. These changes provide the judicial branch an opportunity to communicate broadly with greater ease and at far less cost."

[159] *Id*. The judiciary has also developed internal actors—like the Supreme Court's Public Information Office—that help manage its coverage by independent press. *See* Jonathan Peters, *Institutionalizing Press Relations at the Supreme Court: The Origins of the Public Information Office*, 79 MO. L. REV. 985 (2014).

[160] Some of these have of course attracted considerable, negative attention recently. *See, e.g.*, Jo Becker & Julie Tate, *A Charity Tied to the Supreme Court Offers Donors Access to the Justices*, N.Y. Times, Apr. 11, 20223, *available at* https://www.nytimes.com/2022/12/30/us/politics/supreme-court-historical-society-donors-justices.html ("The charity, the Supreme Court Historical Society, is ostensibly independent of the judicial branch of government, but in reality the two are inextricably intertwined. . . . [O]ver the years the society has also become a vehicle for those seeking access to nine of the most reclusive and powerful people in the nation.").

[161] Judge Laws, for example, counseled that the judiciary include members of the public, including lay members, at administrative gatherings specifically to create good public relations organically. Laws, *supra* note **Error! Bookmark not defined.**, at 331 (discussing ABA committee that included federal and municipal judges, lawyers, and lay representatives and describing how committee members helped secure a new courthouse for the district court).

[162] *See, e.g.*, Ester Salas, *My Son Was Killed Because I'm a Federal Judge*, N.Y. Times, Dec. 8, 2020, at A25.

[163] *See, e.g.*, Stephen F. Williams, *The Era of "Risk-Risk" and the Problem of Keeping the APA Up to Date*, 63 U. Chi. L. Rev. 1375 (1996); Alex Kozinski, *Who Gives a*

As a recent example of judicial communications in action, consider the federal judiciary's response to the ongoing debate over Supreme Court ethics reform—culminating, for now, in the Code of Conduct adopted in late 2023.[164] In just the last several months, Chief Justice Roberts has rebuffed Congressional requests for his testimony;[165] the Supreme Court has published a brief statement in a show of unity;[166] multiple Associate Justices have shared their individual views in popular media and at law school symposia and judicial conferences;[167] and lower federal judges have offered their own two cents about their judicial superiors in their own op-eds and media appearances.[168] These communications span the gamut, but all share the same intent—to move the needle on a high-stakes matter of judicial administration.

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Our discussion so far of judicial administration has been relatively bloodless. But when the federal judiciary makes rules, manages, or communicates, it performs actions bound up with someone's rights—of the parties who appear in the federal courts, the judges and judicial officers of those courts, or the public more broadly. For example, any instance of Big-R rulemaking—regardless of where the rule lands with respect to the "procedure/substance dichotomy"[169] and whether it pushes the boundary of what's permissible under the REA or is an obviously appropriate judicial

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Hoot About Legal Scholarship, 37 Hous. L. Rev. 295 (2000); Nancy Gertner, *Women Offenders and the Sentencing Guidelines*, 14 YALE J.L. & FEMINISM 291 (2002).

[164] SUPREME COURT, CODE OF CONDUCT FOR JUSTICES OF THE SUPREME COURT OF THE U.S. (Nov. 2023), available at: https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf.

[165] *See supra* note 144.

[166] *Id.*

[167] *See, e.g.*, Abbie VanSickle, *Justice Barrett Calls for Supreme Court to Adopt an Ethics Code*, N.Y. TIMES (Oct. 16, 2023), https://www.nytimes.com/2023/10/16/us/politics/supreme-court-ethics-code-amy-coney-barrett.html; Adam Liptak, *Justice Kagan Calls for the Supreme Court to Adopt an Ethics Code*, N.Y. TIMES (Sept. 22, 2023), https://www.nytimes.com/2023/09/22/us/supreme-court-kagan-ethics.html; David B. Rivkin Jr. & James Taranto, *Samuel Alito, the Supreme Court's Plain-Spoken Defender*, WALL ST. J. (July 28, 2023), https://www.wsj.com/articles/samuel-alito-the-supreme-courts-plain-spoken-defender-precedent-ethics-originalism-5e3e9a7.

[168] Michael Ponsor, *A Federal Judge Asks: Does the Supreme Court Realize How Bad It Smells?*, N.Y. TIMES (July 14, 2023), https://www.nytimes.com/2023/07/14/opinion/supreme-court-ethics.html.

[169] *See* Burbank, *Rules Enabling Act*, supra note 15, at 1113.

"housekeeping rule[]"[170]—affects the rights of litigants.[171] Similarly, in light of the judiciary's power to make the rules governing and manage pretrial supervision and federal defender services, a criminal defendant could be forgiven if he often felt that, to put it in Kafkian terms, more than the law or the whims of the particular judge or jury before whom he's tried, he is subject to judicial bureaucratic control.[172] And it is the federal judiciary that decides whether to open or close the physical, virtual, or digital courthouse door to the public,[173] effectively determining the public's right of access under the common law or the First Amendment.[174]

That judicial administration is bound up with people's rights is not, on its own, cause for alarm: Almost all governmental acts affect our rights. But, in most administrative contexts, a fundamental principle is that right-determinative decisions are subject to judicial review.[175] Here, of course, the

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[170] *Hanna v. Plumer*, 380 U.S. 460, 473 (1965).

[171] *See Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 445 (1946) ("[M]ost alterations of the rules of practice and procedure may and often do affect the rights of litigants.")

[172] Franz Kafka, THE TRIAL (1925). Judicially-managed supervised release services, for example, "now control[] the lives of more than 100,000 people." Fiona Doherty, 88 N.Y.U L. REV 958, 958 (2013).

[173] The Federal Rules of Criminal Procedure, for instance, have long prohibited broadcasting criminal trials. FED. R. CRIM. PRO. 53. But, since 1994, the federal judiciary has experimented through Judicial Conference-approved studies and circuit and district court-implemented pilots with allowing limited forms of broadcasting for certain civil proceedings. *History of Cameras in the Courts*, *available at* https://www.uscourts.gov/about-federal-courts/judicial-administration/cameras-courts/history-cameras-courts.

[174] Of course, decisions not to regulate through judicial administration may have their own rights-related effects, typically by allowing individual judges to engage in more *ad hoc* decision-making. *See*, *e.g.*, Frankel, *supra* note 63 (describing judges complaining of "lawlessness in sentencing"); FED. JUD. CTR., *Sealed Cases in Federal Courts*, Oct. 23,2009, *available at* https://www.uscourts.gov/sites/default/files/sealed-cases.pdf (documenting discrepancies in sealing practices across district courts); Heather Abraham et al., *Suggestion 20-CV-T*, Sept. 3, 2021, *available at* https://www.uscourts.gov/sites/default/files/21-cv-t_suggestion_from_heather_abraham_alex_abdo_and_jonathan_manes_-_new_rule_5.3_0.pdf (proposal by Knight First Amendment Center and University at Buffalo Civil Rights and Transparency Clinic that Advisory Committee regulate sealing procedures); Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L. J. 1478, 1521 (2019) (describing discrepancies in district court judge grants *in forma pauperis* petitions).

[175] *See, e.g.*, 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 680–81 (1986) ("We begin with the strong presumption that Congress intends judicial review of administrative action.").

judiciary reviews its own decisions.[176] And that creates the wrinkles that animate our discussion in Parts III and IV.

III. UNINTENDED CONSEQUENCES: JUDICIAL POWER PUZZLES

The federal judiciary wields quite a bit of administrative machinery in the service of adjudication. But does this machinery matter beyond what are fundamentally empirical questions surrounding whether it is fulfilling the roles for which it has been designed? Does, for example, district court management of federal probation services, the judiciary's rulemaking over judicial conduct or employment, or the Judicial Conference's yearly reports to Congress do more than just make it possible for the federal judiciary to decide cases more efficiently or more effectively? In this Part and the next, we make the case that it does. The judicial administrative power doesn't simply serve as an adjunct of adjudication; it has profound consequences for the judiciary itself, and it alters the federal judiciary's relationship with the coordinate branches and the public more broadly.

We start with the ways judicial administration upends core notions of the federal judiciary. As we've discussed, judicial administration is intended to affect the federal judiciary's ability to decide cases. Our focus in this Part is on the under-accounted effects and the unexpected transformations. Freed from the constraints of a case, judicial administration shuffles the means through which certain rights-related problems reach the federal judiciary, alters the considerations that go into solving those problems, and augments the judiciary's power to solve them. We argue that these shifts ultimately profoundly affect the federal judiciary's ability to discharge its core function: In certain circumstances, the judicial administrative power compromises judicial integrity when deciding cases and introduces fundamentally non-judicial considerations into judicial decision-making.

A. Notional patterns of judicial administration

Two related notions underpin the role the federal judiciary plays when it decides cases: that it is a passive actor, responding to the case before it, and that it has limited means through which to enforce its decrees. Judicial administration is bound by neither of these principles; it creates its own dynamics alongside judicial adjudication.

At least in part because it is the courts that conduct final judicial review,[177] one of the bedrock principles of Article III adjudication is that courts are fundamentally reactive actors with respect to how cases come to

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[176] Or declines to do so altogether. District court denials of CJA attorneys' expense vouchers, for example, are unreviewable, because they are "administrative, not judicial, in nature." *See, e.g.*, U.S. v. French, 556 F.3d 1091, 1094 (10th Cir. 2009).

[177] *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-19 (1995).

them.[178] As Marc Galanter has put it, courts "do not acquire cases of their own motion, but only upon the initiative of one of the disputants. Thus, there is delegation of responsibility to the disputants to invoke the intervention of a court."[179] Or, as the Supreme Court stated more recently, "[c]ourts are essentially passive instruments of government. They do not, or should not, sally forth each day looking for wrongs to right. They wait for cases to come to them, and when cases arise, courts normally decide only questions presented by the parties."[180]

Judicial administration necessarily flips that core concept of party presentation—and with it, our understanding of the role of a reactive judiciary—on its head. Unconstrained by the confines of a specific case, judges *do* sally forth looking for problems to solve through administration. And, as we discuss further below, judicial administration invites judges to account for entirely different considerations than those at play when they are judging cases. They try to accommodate rising caseloads by developing better rules for consolidating cases, by describing the docket-related impacts of new statues, or by adopting new case-management methods or technologies; to improve sentencing outcomes by studying and piloting wholly new types of courts[181]; and so on.

By their nature, the problems judicial administration attends to should relate to adjudication, but that subject matter limit does not wash away the effects of this profound postural shift.[182] Sometimes, more proactive efforts raise explicit questions about role propriety or what matters are properly related to judicial decisionmaking—as when, for example, judges actively

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[178] "The judiciary . . . may truly be said to have neither FORCE nor WILL, but merely judgment." THE FEDERALIST No. 78; *see* Resnik, *Trial as Error*, *supra* note 15, at 1015 n.363 (suggesting potential import conveyed by the word "merely").

[179] Marc Galanter, *The Radiating Effects of Courts*, in EMPIRICAL THEORIES ABOUT COURTS 122 (Keith O. Boyum & Lynn Mather, eds.) (1983).

[180] *United States v. Sineneng-Smith*, 140 S.Ct. 1575, 1579 (2020) (citation and quotation marks omitted); *see also Osborn v. Bank of United States*, 22 U.S. 738, 808 (1824) (the judicial "power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States").

[181] Through what are often labeled "reentry courts," for example, judges use tools like group counseling and cognitive behavioral therapy to further goals like reducing recidivism. *See, e.g.*, Jeffrey A. Meyer & Carly Levenson, *Reflections on Reentry Court*, 102 JUDICATURE 42, 47 (2018) ("[B]y changing the way judges, lawyers, and probation officers view and relate to people who have been convicted of crimes, Reentry Court challenges us to rethink how we do our jobs and how we understand and relate to the people who are most impacted by our criminal justice system.").

[182] As others have described, substantive limits on the types of problems fit for redress through judicial administration may be difficult to pin down in practice. *See* Resnik, *Constricting Remedies*, supra note 39, at 291, 306.

wade into substantive rights debates as a part of, or in the guise of, judicial administration.[183] But, given judicial administration's pervasive entanglement with rights, even less overtly thorny administrative efforts still nonetheless involve the judiciary choosing whether, when, and how to invoke an intervention—if not of a court, then of a judge or judicial actor—with rights-related implications.

As a result, although the judicial administrative power exists to facilitate judicial decision-making, judges and judicial staff do more than follow in the wake of cases to try to resolve the problems identified or even created by those cases.[184] Administrative actions create their own challenges, which must subsequently be addressed by adjudication; the sequencing between adjudication and administration may be inverted or become mixed up over time. In the context of Big-R rulemaking or the sentencing guidelines, for example, the judiciary has repeatedly adjudicated cases involving rulemaking changes designed to facilitate some form of adjudication.[185] The same is true of judicial management—for example, the federal judiciary first weighed in on the validity of the Defense of Marriage Act ("DOMA") in a set of administrative decisions regarding the spousal benefits of judicial employees, which led to a federal case that was ultimately consolidated into *Windsor*.[186]

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[183] *See, e.g.*, Resnik, *Constricting Remedies*, *supra* note 39; Yeazell, *supra* note 71, at 229, 232–237 (describing inversion of rulemaking process over time).

[184] As a recent example of what we might think of as the "standard" sequence of administration, the Judicial Conference and Administrative Office sprang to action after *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), concluded that a significant portion of the state of Oklahoma consisted of parts of tribal reservations and so fell under the exclusive jurisdiction of federal courts for Major Crimes Act prosecutions. *See* JUDICIAL CONFERENCE REPORT 7 (Sept. 2021) (approving exception to space-related policies "for any space needed within the Tenth Circuit to accommodate increased workload requirements resulting from the Supreme Court's decision in *McGirt v. Oklahoma*"); *id.* at 15 ("The Committee also voted to approve the establishment of a new federal defender organization (FDO) in Oklahoma-Eastern . . . due to the substantial caseload increase as a result of the U.S. Supreme Court's decision in *McGirt v. Oklahoma*."); *id*. at 20 ("Judicial Conference agreed to recommend to Congress the addition of three permanent Article III judgeships for the Eastern District of Oklahoma and two permanent Article III judgeships for the Northern District of Oklahoma.").

[185] *See, e.g.*, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 597 (1997) ("This case concerns the legitimacy under Rule 23 of the Federal Rules of Civil Procedure of a class-action certification sought to achieve global settlement of current and future asbestos-related claims.").

[186] *See* In re Golinski, 587 F.3d 956 (9th Cir. 2009) (order by Judge Alex Kozinski in his role as administrative hearing office for Ninth Circuit employees); Matthew J. Franck, *Sneak Attack on Marriage*, NAT'L REV. (Feb. 12, 2009), *available at* https://www.nationalreview.com/bench-memos/sneak-attack-marriage-matthew-j-franck/ (describing administrative orders as "the work of judges-as-supervisors-of-HR-managers").

Proactive judicial administration may also reclassify entire judicial acts as administrative, not adjudicatory, which not only affects judicial discretion to decide cases but also expands the universe of opportunities for judges to act affirmatively rather than passively. Big-R rulemaking is, of course, the canonical example of this phenomenon.[187] But administrative control over sentencing offers an even better example, because of the longstanding judicial understanding that sentencing was a fundamental part of the individual adjudication of federal criminal cases. As *Mistretta* acknowledged in upholding the Commission against a separation of powers challenge, "[f]or more than a century, federal judges have enjoyed wide discretion to determine the appropriate sentence in individual cases and have exercised special authority to determine the sentencing factors to be applied in any given case."[188] But despite subsequently concluding in *United States v. Booker* that the Commission's guidelines are advisory, not mandatory, the Supreme Court's decisions regarding the Commission have only underscored that the Commission has supplanted what was traditional judicial sentencing discretion.[189] *Booker* itself established that, even though district court judges are not required to follow the guidelines, they must still consider the guidelines when sentencing and explain any departures they make.[190] According to one former district judge, the guidelines have transformed judges' relationship with sentencing from "omnipotence" to "impotence."[191] In their place, judicial administration has empowered the Commission proactively to determine sentence ranges.

Finally, judicial administration doesn't simply upend assumptions of the judicial role or the traditional sequencing of judicial action—at times, it offers the judiciary a power otherwise typically denied it: to enforce its decisions directly against actors outside of the federal judiciary.[192] As the Supreme Court has stated of the federal judiciary, "the judicial is the weakest [of the departments]. . . for the enforcement of the powers which it exercises. The ministerial officers through whom its commands must be executed are marshals of the United States, and belong emphatically to the executive department of the government."[193] But, at least in the context of the judiciary's management of probation and pretrial services, Congress has

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[187] *See* Burbank, *Rules Enabling Act*, *supra* note 15 (describing procedural rules before REA).

[188] 488 U.S. at 390.

[189] *See Stinson v. United States*, 508 U.S. 36 (1993) (concluding that the Commission's commentary on the guidelines is authoritative).

[190] 543 U.S. 220 (2005).

[191] *See* Gertner, *From Omnipotence to Impotence*, *supra* note 89.

[192] According to Ferejohn and Kramer, for example, "[t]he judiciary can accomplish nothing unless the Executive Branch enforces its orders." *Supra* note 37, at 982-83.

[193] *Cunningham v. Neagle*, 135 U.S. 1, 63 (1890).

given the courts their own robust enforcement power. Probation officers serve "as an arm of the United States District Court," acting as "the court's 'eyes and ears,' a neutral information gatherer with loyalties to no one but the court."[194] To be sure, many of the duties probation officers perform as the "eyes and ears" of courts are tethered to adjudication; when sentencing, for example, judges rely on probation officers' presentence reports.[195] But other responsibilities facilitate adjudication only in that they directly enforce compliance with judicial decisions. If a district court judge imposes a condition on release—for example, receiving substance use treatment or providing restitution—it falls to the probation officer to monitor compliance with that condition.[196] And, if the officer believes that the probationer has violated a court-imposed term, the officer has the power to arrest the probationer without a warrant[197]—or a check from any other governmental actor.[198]

So, aspects of the judicial administrative power—intended to facilitate the federal judiciary's ability to decide cases—unsettle underlying assumptions about the patterns and practices of the federal judiciary. These assumptions play a fundamental role in justifying the federal judiciary's distinct role.[199] These upended assumptions help to demonstrate the important ways in which administration does not flow neatly into adjudication; as we argue next, these altered dynamics ultimately bear directly on the judiciary's exercise of its power to decide cases.

B. Judicial administration's conflicts

In at least some respects, the judicial administrative power also exists in direct tension with the federal judiciary's ability to decide cases or

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[194] United States v. Reyes, 283 F.3d 446, 455 (2d Cir. 2002).

[195] FED. R. CRIM. P. 32 (c).

[196] *See Ex parte United States*, 242 U.S. 27, 41 (1916) ("Indisputably under our constitutional system the right . . . to impose the punishment provided by law[ ] is judicial."). Specific probation terms often straddle the line between imposing a punishment and enforcing it. Appellate courts have, for example, split over whether a district court may delegate to a probation officer certain aspects of determining the amount of restitution to be paid, but uniformly concluded that district courts may not allow the probation office to determine whether a defendant will participate in a treatment program. *See U.S. v. Heath*, 419 F.3d 1312, 1315 (11th Cir. 2005) (collecting cases).

[197] Compounding the absence of a warrant, proceedings to revoke supervised release are not considered "prosecutions," meaning that most procedural protections under the Fifth and Sixth Amendments do not attach. *See* Stefan R. Underhill & Grace E. Powell, *Expedient Imprisonment: How Federal Supervised Release Sentences Violate the Constitution*, 108 VA. L. REV. ONLINE 297, 306 (2022).

[198] 18 U.S.C. § 3606.

[199] *See, e.g.*, Mark Tushnet, *Dual Office Holding and the Constitution: A View from Hayburn's Case*, 1990 J. SUP. CT. HIST. 44, 49 (1990).

controversies in a manner consistent with its high ideals. Specific components of judicial administration potentially erode the judicial independence necessary to decide cases with integrity and, relatedly, introduce non-judicial concerns into Article III decision-making.

Article III's text and history, early practices of judicial administration, and precedent surrounding judicial administration offer only vague guidance as to what guardrails, if any, exist to secure Article III adjudication from non-adjudicatory judicial responsibilities. Article III is "maddeningly terse, vague, and open-ended."[200] Besides its few tentpoles—life tenure and salary protection; the existence and limits of Supreme Court jurisdiction—Article III expressly allows Congress to create "such inferior courts as [it] may from time to time ordain and establish." Jurists and scholars alike have similarly struggled to make much of the history behind the text.[201] As Chief Justice Burger once put it, "by the time the delegates to the Constitutional Convention reached Article III they were getting weary in the hot and humid Philadelphia summer. The entire judicial article contains only 369 words . . . Perhaps the feeling of those weary delegates was that a branch of government that would consist of only 19 judges did not call for much rhetoric or much attention."[202]

Today's doctrine is permissive—and largely unedifying as to any problems the judicial administrative power poses for federal courts' decision-making. In founding-era cases and continuing through the early 20th Century, the Supreme Court adopted what might have been a bright-line rule barring the judiciary, but not necessarily individual judges,[203] from being saddled with non-adjudicatory tasks that could otherwise be legislative or executive responsibilities.[204] But the Court never raised issues with judicial authority to make case-related rules and even recognized the existence of some inherent

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[200] Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1423 (1989).

[201] *See, e.g.*, CHARLES G. GEYH, WHEN COURTS AND CONGRESS COLLIDE 23 (2006) ("When it came to providing for a judicial branch, the founders of the United States not only painted with an unusually broad brush but left their work in dire need of additional coats, which they assigned Congress to apply.").

[202] Warren E. Burger, *How Can We Cope? The Constitution after 200 Years*, 65 A.B.A. 203, 206 (1979)

[203] For more on this distinction, see United States v. Ferreira, 54 U.S. 40 (1852).

[204] *See* Hayburn's Case, 2 Dall. 409 (1792). The tasks at issue in these cases—providing direct administrative review over certain pension applications, for example—were defined as much by the substance of the task as by the question of whether the outcomes were subject to some form of executive review. *See, e.g.* Note, *Executive Revision Judicial Decisions*, 109 HARV. L. REV. 2020, 2021-2025 (1996) (describing *Hayburn*'s case and subsequent precedent as involving "general rule against interbranch revision of judicial decisions"). And, as we've described, there was very little administration for the federal judiciary to deal with. *See* supra notes 26-29.

rulemaking powers.[205] More recently, the Court has adopted a functional approach toward all of the federal judiciary's extra-adjudicatory responsibilities.[206] *Mistretta*, for example, reasoned that so long as "extrajudicial activities" of the federal judiciary "are consonant with the integrity of the Judicial Branch"—defined vaguely to mean "appropriate to the central mission of the Judiciary"—they do not raise Article III problems for the federal judiciary.[207]

But, even if not necessarily easily declared unconstitutional, aspects of the judicial administrative power may nonetheless be dissonant, not consonant, with judicial integrity. Even when it comes to judicial administrative acts, it is still the judiciary that will ultimately review those acts. As a result—and unlike challenges that go to what others have called the "core" conception of judicial independence,[208] which revolves around the metes and bounds necessary to ensure that "judges [are] free of congressional and executive control . . . to determine whether the assertion of power against the citizen is consistent with law"[209]—judicial administration creates a class of its own integrity-related concerns that arise from the surprisingly robust array of powers we've described.

What should we make of the integrity of cases that involve the judiciary reviewing its own judicial administrative acts? As an initial matter, we might view the question from the perspective of institutional independence—that is, the effects of judicial review of judicial actions on the integrity of judicial processes generally.[210] On the one hand, federal judicial review of decisions by other judicial actors is run of the mill—that is, of course, the nature of hierarchical appellate review. On the other hand, to paraphrase the Supreme Court's description of the risks of courts determining the reach of judicial immunity, we might "reasonably wonder whether judges, who have been primarily responsible for developing the [specific

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[205] U.S. v. Hudson, 11 U.S. 32, 34 (1812).

[206] *See* Mistretta, 488 U.S. at 388-89 ("Our approach to other nonadjudicatory activities that Congress has vested either in federal courts or in auxiliary bodies within the Judicial Branch has been identical to our approach to judicial rulemaking.")

[207] *Id.*; *see also* Morrison v. Olsen, 487 U.S. 654, 677 n.16 (1988) (concluding that limited prosecutorial appointment power was not "inconsistent as a functional matter with the courts' exercise of their Article III powers").

[208] Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 320 (1999).

[209] Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 268 (1990).

[210] *See* Northern Pipeline Const. v. Marathon Pipe Line Co., 458 U.S. 50, ("[O]ur Constitution unambiguously enunciates a fundamental principle—that the 'judicial Power of the United States" must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence.")

administrative activities], are not inevitably more sensitive to the ill effects that [striking them down] can have on the judicial function."[211] Perhaps it should come as no surprise that, in the Big-R rulemaking context, the Supreme Court has never struck down a properly enacted nationwide rule of practice or procedure,[212] despite longstanding questions about the validity of certain rules.[213]

But a graver threat lurks. As the involvement of supreme court justices in the promulgation of Big-R rules begins to suggest, the judicial administrative power does more than just require judges to review someone else's administrative choices. In a variety of circumstances, it forces the judges who are deciding the case to review what amount to their own administrative decisions. The upshot is that judicial administration also raises questions of *individual* judicial independence, against which a variety of statutory prohibitions and the judicial code of conduct attempt to guard.[214]

Take, for example, the authority of the district court to appoint U.S. Attorneys in limited instances,[215] district court rulemaking,[216] or even the judiciary's supervision of pretrial and probation services or the federal

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[211] Forrester v. White, 484 U.S. 219, 226 (1988).

[212] For discussions of potential judicial self-interest when reviewing rulemaking, see Charles W. Grau, *Who Rules the Courts?: The Issue of Access to the Rulemaking Process*, 62 JUDICATURE 428, 430 (1979) ("The combination of rulemaking and rule applying roles renders the deciding judges unable to impartially decide the validity of their own rules."); Carrie Leonetti, *Watching the Hen House: Judicial Rulemaking and Judicial Review*, 91 NEB. L. REV. 72, 108 (2012) (discussing problems of judicial review of judicial rulemaking); *but see* Frazier v. Heebe, 482 U.S. 641 (1987) (striking down local rule of practice).

[213] *See* A. Benjamin Spencer, *Substance, Procedure, and the Rules Enabling Act*, 66 UCLA L. Rev. 654, 691, 714 (2019) (arguing that certain Federal Rules of Civil Procedure are impermissibly substantive under the REA and offering Rules 15(c)(1), 4(k), and 4(n) as examples).

[214] *See, e.g.*, 28 U.S.C. § 47 (2006) ("No judge shall hear or determine an appeal from the decision of a case or issue tried by him."); 28 U.S.C. § 455 (2006) ("Any justice, judge, or magistrate judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."); Administrative Office, *Code of Judicial Conduct for United States Judges*, Canon 2 (2019) ("A Judge Should Avoid Impropriety and the Appearance of Impropriety in all Activities."); *see also* Litecky v. U.S., 510 U.S. 540, 544-556 (1994) (discussing "'extrajudicial source' factor . . . in recusal jurisprudence").

[215] *But see* Morrison, 487 U.S. at 677 (approvingly citing lower court decisions upholding judicial appointments of U.S. Attorneys to justify special counsel appointment provisions, on the ground that the special counsel provisions had even greater safeguards for judicial independence); *cf.* Wilson v. Midland County, 89 F.4th 446, 449, 459 (5th Cir. 2023) (describing a more egregious instance, in which a state court judge secretly employed a member of a prosecution team as a clerk, as "utterly bonkers" and mocking "the very moral force underlying a just legal system").

[216] *See, e.g.*, Leonetti, *supra* note 212, at 108-115 (describing rarity of district judge recusal from review of district court rules).

criminal defense function. Each of these administrative responsibilities almost inevitably call on federal judges to review their own administrative choices or those of individuals whom the judges have selected or appointed through their administrative roles.[217] When they review those choices, it is possible that, as Justice Holmes wrote of judges exercising their own contempt powers, "[t]here is nothing that affects the judges in their own persons. Their concern is only that the law should be obeyed and enforced, and their interest is no other than that they represent in every case."[218] But there are few safeguards that determine how judges should review their own decisions or those of judicial staff[219]—there is no universal standard of review, for example, against which judges might consider their own administrative choices—and, outside of egregious instances of judicial misconduct, no means of discerning whether judges are motivated by interests other than those that are always at play when judges decide cases, like personal animosity toward a panel lawyer whom they've appointed to represent an criminal defendant.[220] And the integrity of the judicial process can be undermined as surely by non-judge actors who fail to perform their

[217] At times, there are multiple layers of administrative entanglement. When, for example, a chief judge of a district court reviews the recommendation of a probation officer about whether to terminate the probation of an individual probationer whose case the chief judge has assigned the probation officer, she is both managing the probation officer in the instant case—having done the assigning—and managing the probation office in her district more generally.

[218] U.S. v. Shipp, 203 U.S. 563, 574 (1906); *but see* Offutt v. U.S., 348 U.S. 11, 13 (1954) ("[J]udges also are human, and may, in a human way, quite unwittingly identify offense to self with obstruction to law.").

[219] For example, judges typically accept recommendations of pretrial services or probation officers, *see* Jennifer Skeem et al., *Place Matters: Racial Disparities in Pretrial Detention Recommendations Across the U.S.*, 86 FED. PROBATION J. 5, 5 (2022) (noting that "probation officers' detention recommendations strongly predict detention itself"), despite evidence from both pretrial and probation contexts demonstrating that those recommendations yield unlawful detentions and contribute to unnecessarily high rates of pretrial detention. *See* ALISON SIEGLER, FREEDOM DENIED: HOW THE CULTURE OF DETENTION CREATED A FEDERAL JAILING CRISIS 103, 187 (Oct. 2022) (discussing empirics and quoting one judge as stating "I think judges who don't want to make either the right or the hard decision to find release conditions consistent with the Bail Reform Act rely on Pretrial [Services'] recommendations as a basis to detain").

[220] In the context of judicial management of the federal defense function, for example, district judges are required to make numerous administrative decisions regarding the appointment and conduct of the individual panel attorneys they oversee—ranging from whether their pay is appropriate to whether an expert is called for—while simultaneously assessing the merits of key adjudication-related matters, like whether the testimony of an expert is admissible. *See, e.g.*, 2017 REPORT OF THE AD HOC COMM. TO REVIEW THE CRIMINAL JUSTICE ACT 88 (2018) ["CARDONE REPORT"].

assigned roles impartially because of pressure—real or perceived—from the judges who supervise them.[221]

A related, and final, source of dissonance between judicial administration and Article III adjudication is that judicial administration requires judges to consider issues and purposes distinct from those at stake in the cases before them, such that the shared "interests" assumed by Justice Holmes may at times be incongruent from the start. Managing the provision of federal defense services to indigent defendants, for example, requires judges to become "experts in defense," as one judicial review of the federal defense function put it, so that judges "can fairly compensate and reimburse [CJA panel] attorneys" or determine whether the defense may even hire an expert.[222] At a more fundamental level, it raises questions over whether the judicial management of the federal defense services should serve adjudication—or whether, instead, that management should serve other values, like the liberty interests of the defendants who are represented. The same is true of supervised release or probation services—which, although designed to be "arms of the court," also play community-protector roles[223]—or even, to an extent, Big-R rulemaking, which strikes a balance between the interests of the litigants and the needs of the judges.

So, the judicial administrative power relates to Article III judicial power. But the one is not the other.

IV. THE JUDICIAL ADMINISTRATIVE POWER AND JUDICIAL RELATIONS WITH THE COORDINATE BRANCHES

The expansiveness of modern federal judicial administration also has implications for the judiciary's relationship with the other branches of government.[224] When the federal judiciary adjudicates, it is ostensibly bound

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[221] For example, judicially appointed panel attorneys have obligations to their clients—those obligations may and often do conflict with judicial administrative prerogatives. *See id*.

[222] *See, e.g.*, *id*. at 70; *cf.* Morrison, 487 U.S., at 676, n. 13 ("This is not a case in which judges are given power . . . in an area in which they have no special knowledge or expertise.")

[223] *See* U.S. Courts, *Probation and Pretrial Services – Supervision*, available at https://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-services-supervision. By way of comparison, the Supreme Court has concluded that the judiciary may use inherent contempt powers "to preserve respect for the judicial system itself." *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787, 800–01 (1987) (holding that, when the Executive Branch refuses to act, a district court has the authority to appoint a prosecutor to investigate violation of court-ordered injunction). But pretrial and probation services both enforce court orders and protect a population not directly before the court.

[224] Our focus is the federal judiciary's relationship with other *federal* actors, but federal judicial administration also facilitates greater interaction between the federal judiciary and its state counterparts (and with state governments more generally). *See, e.g.*,

by the limits it has read into Article III to ensure that it does not "intrude into areas committed to the other branches of government" except through resolving the case or controversy that is before it.[225] But the judicial administrative power contains no such formal safeguards against the judiciary's intrusion on other branch action. It facilitates, aggregates, and channels judicial expertise, putting that expertise to use throughout the whole of our government and making the judiciary a more forceful advocate for its own interests. The consequences extend to our constitutional and democratic order. As we've noted, the Supreme Court has repeatedly and relatively recently approved major tenets of judicial administration, but we argue that the judicial administrative status quo is at least in tension with the underlying principles tha animate the separation of powers as well as certain higher-level constitutional values, like democratic accountability, transparency, and the rule of law.

The judicial administrative power raises these problems in an institutional straightjacket that is unlike the more ordinary context of executive agency administration. Nearly all the forms of judicial administration we discuss involve congressional authorization. But those delegations have different consequences when it is the judiciary, not the Executive Branch, that is their recipient. First, as discussed in Part III, there's the problem of judicial review. Individuals are ordinarily entitled to the impartial judicial review of rights-affecting administrative action.[226] But when it comes to judicial administration, the judiciary reviews its own decisions.[227] Second, judicial administration overturns the ordinary relationship between an agency and the administrative authorities delegated to it. Administration is at the heart of what executive agencies do; it is why they exist. But the Constitution is clear that the judiciary exists to adjudicate, whatever other administrative duties might be thrown the Courts' way. Finally, the institutions of judicial administration lack most of the mechanisms used to make agencies at least somewhat democratically

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Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure through a Collaborative Rule-Making Process*, 58 VAND. L. Rev. 1167, 1169 (2005) (discussing proponents boasting that states would see the wisdom of the federal rules and follow suit); *cf.* Stephen N. Subrin & Thomas O. Main, *Braking the Rules: Why State Courts Should Not Replicate Amendments to the Federal Rules of Civil Procedure*, 67 CASE W. RES. L. REV. 501, 504–505 (2016-2017) (arguing against state adoption of recent federal amendments).

[225] *See* Flast v. Cohen, 392 U.S. 83, 95 (1968) (observing that standing requirements are rooted partly in separation-of-powers concerns).

[226] Bowen, 476 U.S. at 670;. Goldberg v. Kelly, 397 U.S. 254, 271 (1970) ("And, of course, an impartial decision maker is essential.").

[227] Or determines that judicial review is not available. *See supra* notes 175-176 and accompanying text.

accountability and transparent. Judges enjoy life tenure; they—and the Chief Justice in particular—select most of the non-judge personnel of judicial administration.

A. Practical effects on interbranch relations

Judicial administration has reshuffled federal interbranch relations in two basic ways, both of which tend to empower the judiciary vis-à-vis other loci of government power. First, as the federal judiciary developed the capacity to handle its own affairs, the judiciary has taken on functions that once belonged to others. The judiciary now manages its own budget; it hires and fires its own employees; and it studies its own problems and implements its own reforms. Second, the judiciary has also developed greater capacity to insert itself into interbranch decision-making, including by directly lobbying other branches of government. As discussed elsewhere in this article—on issues like judicial appointments and appropriations, the creation of Article I courts, and the boundaries of federal court jurisdiction—the judiciary has developed various channels for lobbying Congress. In other words, judicial administration reconfigures responsibilities across the branches *and* builds pathways between the branches for both collaboration and contestation.[228]

Much of this, of course, is by design. As we've described, Congress has repeatedly empowered the judiciary to play a broader role—for a reason. Judges and other judicial personnel are subject-matters experts of their own domain; they are well-positioned to represent the values and interests of the judiciary.[229] An obvious advantage of the REA, for example, is that judges can write rules of practice and procedure in a way that leverages both practical judicial experience as well as their legal knowledge. Or take basic managerial tasks like reporting to Congress on the "business"[230] of the judiciary; the judiciary is already in possession of the raw information, so why not give it authority to communicate that information? Even in cases of obviously substantive legislation, judicial administration permits the

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[228] *See* Geyh, *supra* note 15, at 1176, 1183 (discussing "heightened interaction[s]" between Congress and the judiciary in statutory reform and rulemaking).

[229] *See, e.g.*, Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 113–14 (1926) ("[T]he legislature, informed only casually and intermittently of the needs and problems of the courts, without expert or responsible or disinterested or systematic advice as to the workings of one rule or another, patches the fabric here and there, and mars often when it would mend."); Walker, *supra* note 15, at 459-60 ("[T]he merits of judicial rulemaking far outweigh the demerits, largely because trial and appellate judges bring expertise to the task.").

[230] *See* 28 U.S.C. §§ 331, 604(a).

judiciary to provide Congress with important information about how such legislation has or likely will to play out in practice.[231]

But judicial administration doesn't simply allow the judiciary to weigh in where and how Congress directs.[232] And, regardless of whether the judiciary is cast as ally, competitor, or neutral interlocutor to coordinate branches, the judicial administrative power almost certainly shifts the equilibrium outcome. As Stephen Burbank and Sean Farhang describe in the context of the campaign by interest group actors to retrench private rights enforcement, interbranch dialogue inevitably yields "different results[,] different winners and losers"[233] on matters of shared interest across branches.

Beyond providing the judiciary a seat at the table for interbranch decision-making, judicial administration allows the judiciary to set the agendas, shape the debates, and affect the implementation of certain governmental actions.[234] The ongoing debates over judicial misconduct offer an illustrative example with respect to a set of issues that lie at the heart of interbranch relations.[235] Since the early 1970s, when the federal judiciary first adopted a Code of Conduct for lower court judges, judicial ethics regulation efforts have followed the same rough pattern: unethical or what's perceived to be unethical behavior whets Congress's appetite to regulate the judiciary with legislation; judges, citing concerns over "judicial independence" and "separation of powers," lobby to be left alone to address the problem internally through acts of judicial rulemaking and managing; subsequent events demonstrate potential inadequacies of the prior regulation.[236] Even Congress's boldest action on the matter, the Judicial Conduct and Disability

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[231] Jurisdictional legislation is a common subject of judicial advice. *See, e.g.*, JCUS, LONG RANGE PLAN FOR THE FEDERAL COURTS 31 & nn. 13, 16 (1995) (reiterating the Judicial Conference's long-standing support for abolishing diversity jurisdiction as while as its more recent support for the minimal class action diversity requirement like that ultimately enacted in the Class Action Fairness Act of 2005).

[232] *See, e.g.*, *supra* notes **Error! Bookmark not defined.**-**Error! Bookmark not defined.** and accompanying text (discussing Judge Bates' unsolicited correspondence with Congress regarding FISA bill).

[233] Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1593 (2014).

[234] *See generally, e.g.*, Resnik, *Programmatic Judiciary*, *supra* note 13 (discussing effects of judicial lobbying—especially Chief Justice's lobbying—on debates over the Violence Against Women Act).

[235] *See, e.g.*, Lara A. Bazelon, *Putting the Mice in Charge of the Cheese: Why Federal Judges Cannot Always be Trusted to Police Themselves and What Congress Can Do About It*, 97 KY. L.J. 439 (2008).

[236] *See, e.g.*, Anthony J. Scirica, *Judicial Governance and Judicial Independence*, 90 N.Y.U. L. REV. 779 (2015) (chronicling congressional involvement in judicial accountability as well as "judicial self-regulation" and arguing against recent legislation on the grounds of judicial independence).

Act of 1980, was significantly watered down by judicial lobbying.[237] Two decades later, when Congress had grown impatient with perceived underenforcement and mishandling of complaints under the relatively lax standards of the Act, the judiciary again lobbied externally and rallied itself internally to quell calls for more aggressive legislation.[238] Chief Justice Rehnquist appointed a committee chaired by Justice Breyer to investigate the judicial enforcement,[239] and the "Breyer Committee's" findings and recommendations—made possible by research carried out by the FJC and the Administrative Office[240]—were ultimately sufficient to diffuse congressional support for more aggressive legislation.[241]

The same robust form of judicial administrative action, and the same cycle of judicial reaction and intervention, has played out with respect to more recent calls for Supreme Court ethics reform, which appear to be at least temporarily quieted by the Court's adoption of a non-binding "Code of Conduct" for justices of the Supreme Court.[242] And even if Congress were ever to pass more aggressive oversight measures, it would ultimately be up to the judiciary to adjudicate the measures' validity.[243]

In short, the judicial administrative power means that, in practice, the judiciary can in fact at times "attack with success either of the other two

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[237] *See* Arthur D. Hellman, *An Unfinished Dialogue: Congress, the Judiciary, and the Rules for Federal Judicial Misconduct Proceedings*, 32 GEO. J. LEGAL ETHICS 341, 348 (2019) (describing success of judicial lobbying efforts to, among other changes, exclude justices of the Supreme Court from the bill's coverage and drop a provision that would have allowed for removal of judges without formal impeachment).

[238] Charles Gardner Geyh, *The Architecture of Judicial Ethics*, 23 U. PA. J. CONST. L. 2289, 2310 (2021). Judges were particularly concerned by the possibility that Congress would establish an Inspector General within the judiciary. *Id*.

[239] Arthur D. Hellman, *Judges Judging Judges: The Federal Judicial Misconduct Statutes and the Breyer Committee Report*, 28 JUST. SYS. J. 426, 427 (2007).

[240] *See* JUD. CONDUCT & DISABILITY ACT STUDY COMM., IMPLEMENTATION OF THE JUDICAL CONDUCT AND DISABILITY ACT OF 1980: A REPORT TO THE CHIEF JUSTICE (2006) ("BREYER COMM. REPORT").

[241] Geyh, *supra* note 238, 2310.

[242] SUPREME COURT, CODE OF CONDUCT FOR JUSTICES OF THE SUPREME COURT OF THE U.S. (Nov. 2023), available at: https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf.

[243] In a sit-down interview with the Wall Street Journal, Justice Alito already expressed his view that "[n]o provision in the Constitution gives [Congress] the authority to regulate the Supreme Court—period." David B. Rivkin Jr. & James Taranto, *Samuel Alito, the Supreme Court's Plain-Spoken Defender*, WALL ST. J. (Jul. 28, 2023), https://www.wsj.com/articles/samuel-alito-the-supreme-courts-plain-spoken-defender-precedent-ethics-originalism-5e3e9a7?st=4765zed61auy3j2&reflink=desktopwebshare_permalink.

[branches]"[244]—it can intervene in interbranch decisions, make its positions known, and support those positions over time.

B. Consequences for the constitutional order

Judicial administration's practical effects for interbranch relations are the tip of the iceberg: Beneath them lie the profound consequences the judicial administrative power has for the constitutional order that undergirds those relationships. Here, as elsewhere, our purposes are not to argue that core aspects of federal judicial administration violate the constitution under current doctrine.[245] But to say that judicial administration passes constitutional or doctrinal muster is not the same as saying that it causes no mischief from a separation-of-powers perspective.

To borrow from Jeremy Waldron, aspects of the judicial administrative power either run afoul of or call into question "an important principle of our [constitutionalist] political theory."[246] In fact, they invert a variety of the principles Waldron and others have identified as lying at the core of the separation of powers: that the exercise of governmental powers be articulated and distinct, rather than combined or blurred; that governmental actors check each other's power; and that, for the most part, these powers be situated in governmental institutions designed to wield them. And judicial administration's separation of powers-related inversions carry their own, deeper consequences related to the rule of law and democratic accountability.

The framers argued that the articulated exercise of power serves a central role in securing the rule of law, by ensuring that the basic modes of governance (and therefore, the ways in which government power are brought to bear) are kept conceptually and practically distinct.[247] That distinction ensures that laws of general applicability are duly enacted prior to being

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[244] THE FEDERALIST NO. 78 (Alexander Hamilton) ("[I]ncontestably, . . . the judiciary is beyond comparison the weakest of the three departments of power [and] can never attack with success either of the other two.").

[245] As the Court reiterated in *Mistretta*, "while our Constitution mandates that 'each of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or indirect, of either of the others,' the Framers did not require—and indeed rejected—the notion that the three Branches must be entirely separate and distinct." 488 U.S. 361, 380 (quoting *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935)).

[246] WALDRON, *supra* note **Error! Bookmark not defined.**, at 47.

[247] THE FEDERALIST NO. 47 (James Madison) (quoting Montesquieu) ("Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for THE JUDGE would then be THE LEGISLATOR. Were it joined to the executive power, THE JUDGE might behave with all the violence of AN OPPRESSOR."); *see* Waldron, *supra* note 233, at 46, 63 (describing purposes of "articulated, as opposed to undifferentiated, modes of governance").

enforced; that officials act pursuant to those identifiable laws, not through some "inherent" authority ripe for abuse; and that individuals subject to those laws have an opportunity to air before a neutral arbiter their arguments against the executive's enforcement. Whether these functions—typically styled something like "legislative," "executive," and "judicial"[248]—fall within a single branch or are spread across all three,[249] distinguishing between their exercise at least allows an individual subject to that exercise to name *which* of the powers she has suffered (or benefitted) from.

Judicial administration, however, blurs and combines exercises of governmental power. That is, judicial administration allows the judiciary to exercise power in ways that can be hard to neatly categorize, and it permits the judiciary simultaneously to exercise power through all three modes of governance. The end result is that a number of judicial administrative decisions are made in a way that is less transparent, less democratically accountable, and less attentive to the rule of law than might otherwise be the case.

The judiciary's oversight of federal pretrial and probation services offers one example. As discussed, the judiciary runs both probation and pretrial services for the whole of the federal system as the "eyes and ears" of the federal courts. Yet, the judiciary itself describes probation and pretrial officers as "law enforcement officers," "help[ing to] ensure" that defendants and offenders "obey the law" and "commit no crime" when released to the community.[250] At times, probation and pretrial officers work hand-in-glove with other Executive Branch law enforcement officials to investigate crimes being committed by defendants or offenders under supervision.[251] Probation and pre-trial services officers can warrantlessly act on tips received from federal law enforcement officials—without regard to whether those tips give rise to a reasonable suspicion that the individual under supervision is in violation of conditions of supervision, and even under circumstances where federal law enforcement would ordinarily need a warrant.[252] In short,

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[248] *See, e.g.*, JEREMY WALDRON, POLITICAL THEORY: ESSAYS ON INSTITUTIONS 45 (2016) (distinguishing governance functions of "legislation, adjudication, and executive administration"); Strauss, *supra* note 30, at 577 (distinguishing functions of "legislating, enforcing, and determining the particular application of law").

[249] *See, e.g.*, Mistretta, 488 U.S. at 380-81 ("[T]he Framers did not require—and indeed rejected—the notion that the three Branches must be entirely separate and distinct.").

[250] Probation and Pretrial Officers and Officer Assisstants, U.S. Courts, https://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-officers-and-officer.

[251] *See, e.g.*, U.S. v. Jennings, 2009 WL 4110852 (N.D.N.Y. 2009).

[252] Under the "stalking horse" theory followed by some federal circuits, parole or probation officers and police officers can work together as long as the parole or probation officer "is pursuing parole[or probation]-related objectives and is not merely a 'stalking horse' for the police." U.S. v. Cardona, 903 F.2d 60, 65 (1st Cir. 1990); *cf. U.S. v. Reyes*,

probation and pretrial services are neither wholly judicial nor wholly executive in nature; officers of these programs act in ways that neither judges nor law enforcement officers ordinarily could.

Other forms of judicial administrative activities, from Big-R Rulemaking[253] to judicial management of the federal defense function, similarly blur or combine governance functions—often in ways that redouble concerns we discussed with respect to judicial administration's effects on the integrity of judicial adjudication. Judicial participation in ethics debates, which spans rulemaking, managing, and communicating, offers a particularly vivid example of judicial administration enabling the combination of legislative, executive, and judicial functions. Through their own internal rulemaking and, to an extent, lobbying of Congress, the federal judiciary exerts influence over the prospective rules of judicial ethics; by processing and investigating complaints, the courts are responsible for enforcing current rules; and, by adjudicating complaints and potentially adjudicating challenges to ethics rules themselves,[254] the courts are responsible for resolving disputes over the rules' meaning or application. From the perspective of a judicial employee, litigant, or even member of the public complaining of judicial misconduct, this co-location of governance functions—even when formally articulated—likely discredits the idea that judges are bound by a set of consistent ethics rules, dispassionately applied and neutrally adjudicated.

That Congress has freely chosen to delegate many of these responsibilities to the judiciary does not necessarily wash away potential separation-of-powers problems. Indeed, the inherent risk of a robust and well-resourced judicial administrative apparatus is that Congress will almost unthinkingly locate certain tasks within the judiciary not because the judiciary is the "right" place for the work to occur, but because it is the most convenient, or because doing so unburdens legislative and executive branch

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283 F.3d 446, 463 (2d Cir. 2002) (rejecting the stalking horse theory because "the objectives and duties of probation officers and law enforcement personnel are unavoidably parallel and are frequently intertwined.").

[253] The nine justices who sign off on an amendment to the rules are the same nine who will adjudicate the meaning, application, or validity of an approved rule. What they cannot accomplish through legislative rulemaking, they can accomplish through their judicial decisions. *See generally* Stephen B. Burbank & Sean Farhang, *Class Actions and the Counterrevolution Against Federal Litigation*, 165 U. PA. L. REV. 1495 (2017) (discussing interplay between rulemaking and Supreme Court interpretations of Rule 23); Burbank & Farhang, *Litigation Reform*, *supra* note 233, at 1606-12 (using original dataset of Supreme Court decisions to show that a justice's ideology is more predictive of vote in Rules-based cases than non-Rules-based cases.

[254] *See, e.g.*, Hastings v. Judicial Conference of the United States, 770 F.2d 1093 (D.C. Cir. 1985) (rejecting challenge to Judicial Councils Reform and Disability Act and refusing to enjoin judicial council investigation into judicial misconduct).

officials. As the Supreme Court observed when approving the Sentencing Commission in *Mistretta*, proper administrative activities not only may not be dissonant with the judiciary's Article III powers, but also may "not [be] more appropriate for another Branch."[255]

Some aspects of judicial administration may well be more appropriate for another Branch because they are seemingly constitutionally-committed to that Branch.[256] Courts have held, for example, that it does not "usurp the Executive Branch's prosecutorial function" for probation officers to share tips with federal law enforcement, investigate or arrest probationers, or recommend further detention.[257] But it is the Executive Branch that "shall take Care that the Laws be faithfully executed. . . ."[258] And, historically, the U.S. Marshals Service, which "belong[s] emphatically to the executive department of the government,"[259] has performed similar functions to those pretrial and probation services perform today.[260]

The more prevalent and deeper issue related to the propriety of locating an administrative function in the judiciary involves institutional fit. Powers are not only kept separate in our constitutional system, they are also specifically entrusted to purpose-built institutions and actors whose make-up and incentive structures reflect the tasks before them.[261] The enactment of laws, for example, calls for a greater degree of democratic input than the enforcement of laws;[262] by contrast, the adjudication of legal disputes typically calls for independence from the democratic process. When the judiciary engages in legislation or executive administration, it does so

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[255] Mistretta, 488 U.S. at 389 (emphasis added); *see also* Morrison, 487 U.S. at 680-81 (tasks that are more properly accomplished by [other] branches

[256] For example, David Patton has criticized the judicial appointment of federal defenders on the ground that "it would be inconceivable to have judges decide who is hired in a prosecutor's office." *Supra* note 15, at 342. But federal judges *do* possess the authority to appoint federal prosecutors under certain circumstances.

[257] *See, e.g.*, U.S. v. Jennings, 652 F.3d 290 (2d Cir. 2011).

[258] U.S. Const. art. II, § 3.

[259] Cunningham v. Neagle, 135 U.S. 1, 63 (1890).

[260] Marshals "service[] both the Executive and Judicial Branches." Pennsylvania Bureau of Corr. V. U.S. Marshals Serv., 474 U.S. 34, 44 (1985) (Stevens, J., dissenting). Statutorily, Marshals are split between a "primary role and mission" of "provid[ing] for the security . . . and enforc[ing] all orders of" the lower federal courts, 28 U.S.C. § 566(a), as well as additional duties of "assist[ing] State, local, and other Federal law enforcement agencies" in various law enforcement activities. *Id.* at § 566(d)–(e).

[261] *See, e.g.*, Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 247-49 (1986) (identifying institutional features of Congress that guard against institutional capture).

[262] *See, e.g.*, JOHN LOCKE, TWO TREATISES OF GOVERNMENT, 157 (II, § 143) (Thomas Hollis ed., 1764) ("[T]he legislative power is put into the hands of divers persons who, duly assembled, have . . . a power to make laws, which when they have done, being separated again, they are themselves subject to the laws they have made.").

without the structural advantages that make Congress and the Executive Branch well-suited to those tasks.[263] As Judge Bork explained in a case concerning the courts' ability to intervene in a dispute between House Republicans and House Democrats, "all of the doctrines that cluster about Article III"—including constitutional standing—"relate . . . to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected unrepresentative judiciary in our kind of government."[264] A fundamental puzzle of judicial administration, then, is that it is largely shielded from democratic input and shrouded in judicial independence, not because of the nature of the work, but merely because of the happenstance of where (institutionally) the work is assigned.

The most consequential demonstration of the potential mismatch between judicial administration and the judiciary is the role of the Chief Justice. The Chief Justice may be "first among equals" when it comes to matters of Supreme Court adjudication, but, on matters of judicial administration, the Chief Justice is without parallel. As noted, the Chief Justice enjoys the "appointment prerogative" across an array of judicial agencies and committees, including the rulemaking committees and any ad-hoc committees he chooses to stand up,[265] and wields a particular form of the bully pulpit; the result is that the Chief Justice has the unrivaled power to set and execute the agenda of the judiciary's administrative power.[266]

From the perspective of institutional fit, allocating so much power to an unelected Chief Justice makes little sense. The Chief Justice, like all his Article III colleagues, enjoys life tenure. But, while a full court or a committee of judges experiences natural turnover, a *single* life-tenured judge or justice can persist for multiple generations. When you combine his life tenure with his unilateral authority, the office of the Chief Justice is singular in our constitutional order.[267] In two and half centuries, the nation has experienced 59 presidential elections (yielding 45 individual presidents) and

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[263] *See, e.g.*, Leonetti, *supra* note 212, at 75–79 ("The framers specifically designed the legislative process to include safeguards against factions, safeguards that judicial rulemaking lacks.").

[264] Vander Jagt v. O'Neill, 699 F.2d 1166, 1178–79 (D.C. Cir. 1982) (Bork, J., concurring) (urging the panel to dismiss for lack of standing and rejecting the majority's reliance on "equitable discretion").

[265] *See supra* text accompanying nn. 147-152.

[266] *See, e.g.*, Resnik & Dilg, *supra* note 68, at 1626 (describing Chief Justice Rehnquist's success passing habeas-related rule changes despite initial "revolt" by Judicial Conference).

[267] *See* Resnik & Dilg, *supra* note 68, at 1631 (noting that Chief Justice's roles are anomalous in United States and internationally).

129 elections for Speaker of the House (yielding 56 new Speakers).[268] A President has selected a new Chief Justice only 17 times. Since Earl Warren's tenure began in 1954, no Chief Justice has served for fewer than 15 years. As a result, the Chief Justice has a political and professional time horizon unlike any other individual or institution in our democratic order. [269] Life tenure may be necessary for judges to decide cases independently—and perhaps for he judiciary's institutional independence[270]—but there is no justification for its application to much of the rights-entangled, active problem-solving that makes up modern judicial administration.

All told, the consequences of modern judicial administration go well beyond making adjudication more effective or efficient. In allocating such significant administrative authorities to the judiciary, we have collectively allowed judicial administration to function as if everything the judiciary does is inextricably intertwined with adjudication. The challenges that poses—for the judiciary itself and for the coordinate branches—are not intractable.

V. TREATING ADMINISTRATION AS ADMINISTRATION

Were we able rigorously to analyze the various costs and benefits—and, as importantly, reach societal consensus over what weight to give to variables like efficiency, accountability, or independence—of the federal judiciary's administrative responsibilities, we suspect our conclusions might in many cases support the status quo. In other words, many of the "tools" of federal judicial administration likely "make our system work better," as Chief Justice Burger once put it.[271]

For now, we propose a series of reforms we believe would strike the balance between alleviating the central problems we argue course through judicial administration, while still allowing the judiciary (and all of us) to realize its benefits. To make the judicial administrative power less of a threat to the judiciary's Article III decision-making powers and better situated within our separation of powers landscape, we believe congress should create more independent agencies within the federal judiciary, extend certain generalized agency regulations, and diffuse the Chief Justice's authority. We're less concerned at this stage with the specific metes and bounds of these reforms than with their broad effect. If, as we argue, the judicial administrative power is distinct from the federal judiciary's ability to decide

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[268] U.S. House of Reps., *Speaker Elections Decided by Multiple Ballots*, https://history.house.gov/People/Office/Speakers-Multiple-Ballots/.

[269] The Chief Justice is named just once in the whole of the Constution. *See* U.S. Const. art. I, § 3, cl. 6 (naming the Chief Justice to preside over presidential impeachments).

[270] *See* Ferejohn & Kramer, *supra* note 37, at 965 (differentiating notions of judicial independence).

[271] Nomination of Warren E. Burger Hearing Before the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 5 (1969)

cases, and creates distinct problems, then we ought to treat it as administrative first and judicial second—rather than the other way around.

A. Independent Agencies

As we've described, federal judicial administration is comprised of what amounts to an array of agencies—from the judicial conference all the way down to the district courts or even single district court judges. But, of the more than fifty independent agencies across the federal government, only one, the Sentencing Commission, is situated within the federal judiciary. Many of the challenges that plague the judicial administrative power could be eliminated, or at least reduced, by replicating the Sentencing Commission's structure more widely.[272]

In a variety of circumstances, independent agencies would help to disentangle administrative and adjudicatory decisions, better delineating each and freeing adjudication from compromises judicial administration forces upon it. *Mistretta* recognized as much in upholding the Sentencing Commission. As the Court explained, because of the clarity that separating the Sentencing Commission's rulemaking powers from adjudication creates, "the constitutional calculus is different for considering nonadjudicatory activities performed by bodies that exercise judicial power" and those performed by "independent nonadjudicatory agencies."[273]

Mistretta spoke to the issue in the context of rulemaking powers, but an independent agency might be particularly justified for many aspects of the federal judiciary's management role. We're not the first, for example, to call for federal defender services to become an independent agency[274]; the federal defender function—ranging from district court judge control of CJA panel appointment and pay to judicial council selection of federal defenders to Administrative Office and Judicial Conference oversight and budgeting—creates challenging integrity-related problems at every level of

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[272] For our purposes, it is not terribly important whether these agencies replicate the exact structure of the Sentencing Commission. The power to remove the head or heads of any newly created agency could, for example, reside with the President, as is the case for the Sentencing Commission, *see* 28 U.S.C. § 991, or the Supreme Court more generally. But, for the reasons we describe further below, we believe it would be prudent to constrain the Chief Justice's involvement in either the appointment or removal of agency heads.

[273] 488 U.S. at 394 n.20 ("[A]n independent agency located within the Judicial Branch may undertake without constitutional consequences policy judgments . . . that, if undertaken by a court, might be incongruous to or destructive of the central adjudicatory mission of the Branch.").

[274] *See* JUDICIAL CONF., REPORT OF THE COMM. TO REVIEW THE CRIM. JUSTICE ACT PROGRAM 75-100 (1993) ["PRADO REPORT"] (arguing for the creation of an independent agency within the judiciary and offering complete rendition of agency structure); Patton, *supra* note 15, at 340, 382 (advocating for the creation of the "Center for Federal Public Defense," a "boundary organization" outside of both the Executive and Judicial Branches).

administration. As we've described, so do pretrial probation services. These responsibilities could be combined into a single independent agency—perhaps called the Ministry of Justice, to repurpose a suggestion first popularized by Justice Cardozo.[275]

Doing so wouldn't fully resolve the issue of institutional independence that arise from the judiciary's management of these services; ultimately, judges would still review judicial administrative decisions made in these contexts. But the adjudications would occur at one level of remove and formally distinct from the administrative choices, correcting for some of the individual independence-related problems that we think untenable under the current status quo. District court judges, for example, would not be forced to review either their own administrative choices or recommendations or actions by a subordinate administrative actor, like a probation officer, in the context of adjudicating weighty matters.

Creating a separate independent agency to handle the judiciary's management of and rulemaking governing judicial conduct and workplace matters would also have salutary benefits. Moving conduct issues out of circuit judicial councils, for example, would likely not only improve the federal judiciary's actual compliance with ethical or employment obligations,[276] but it would also limit instances in which judges review the conduct of close colleagues and ease subsequent judicial review of any disciplinary decisions.[277]

We could even envision all or part of core judicial agencies like the Administrative Office, Federal Judicial Center, and the rulemaking committees becoming an independent agency or agencies. Moving these outside of the direct control of the judiciary—and, in particular, away from the chief justice—would redound especially to alleviating separation of powers-related concerns discussed in Part 4. Big-R rulemaking committees,

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[275] Benjamin Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113 (1921); *see* Larry Kramer, '*The One-Eyed Are Kings': Improving Congress's Ability to Regulate the Use of Judicial Resources*, 54 J. L. & CONTEMP. PROBS. 73, 92 (1991) (describing origins of Cardozo's proposal).

[276] For instance, to help monitor judicial compliance with judicially-promulgated ethics codes, some congressional representatives have long proposed creating an inspector general for the federal judiciary. *See* Steve Vladeck, *Bonus 49: An Article III Inspector General*, ONE FIRST (Oct. 19, 2023), available at https://stevevladeck.substack.com/p/bonus-49-an-article-iii-inspector.

[277] The recent legal imbroglio involving Judge Newman of the Federal Circuit offers a compelling—and fairly high profile—example of the benefits of creating a separate entity to assess the conduct of judges and non-judge employees. *See, e.g.*, Blake Brittain & Nate Raymond, *Suspended US appeals judge warns her treatment could erode confidence in judiciary*, REUTERS (Sep. 21, 2023), available at https://www.reuters.com/legal/litigation/suspended-us-appeals-judge-warns-her-treatment-could-erode-confidence-judiciary-2023-09-21/.

for example, combine legislative power with judicial expertise; making the committees part of an independent agency, rather than a component of the Judicial Conference, would further increase opportunities for democratic accountability, while still ensuring the transfusion of judicial expertise into the rulemaking process.[278]

In general, locating more of the judicial administrative power in independent agencies would strike a balance between allowing the judiciary to provide its considerable expertise on matters that relate to adjudication while creating a degree of separation between administration—with its distinct posture and considerations—and adjudication. To return to Senator Shields' opposition to what would become the Judicial Conference, federal judges might still be more than "wholly judges, always judges, and nothing but judges,"[279] but judging might at least more closely resemble "nothing but judg[ing]."

B. Extend Generally Applicable Good Governance Laws

Our second proposal is to extend some administrative laws to some forms of judicial administration. Executive agencies are subject to a series of generally applicable federal statutes that ensure that these agencies act with Congress' guidance not just on what to do but also how to do it. Agencies must make certain records available to the public[280] and act according to a series of common procedural and substantive rules, like notice and comment rule making.[281] The judiciary, by contrast, is largely free from these constraints.[282] "Courts" are explicitly excluded from administrative laws like the Administrative Procedure Act[283] and Freedom of Information Act.[284] And, in case after case, federal courts have determined that these exclusions extend to judicial agencies that are not courts but that "perform administrative

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[278] Insofar as judges have come to dominate the rulemaking process, *see* Yeazell, *supra note* 71, switching to an independent agency model based on the Sentencing Commission would allow non-judicial actors to serve more prominent roles alongside judges or judicial actors.

[279] 62 Cong. Rec. 4855–65 (1922) (statement of Sen. John Shields).

[280] 5 U.S.C. § 552.

[281] 5 U.S.C. § 553.

[282] Some forms of judicial rulemaking, however, are subject to notice and comment-like requirements, as we discuss below, and federal judges are subject to a limited number of generally applicable statutes, such as the Ethics in Government Act. 5 U.S.C. §§ 13101–13111, 13141.

[283] *See* 5 U.S.C. §§ 551, 701 (defining "agency" to exclude "courts of the United States" for the purposes of APA sections on rulemaking, adjudications, public disclosure, judicial review of agency actions, and more).

[284] *Id.* at § 552(f) (incorporating definition of "agency" under § 551 and further limiting law's effect to agencies in the executive branch).

and auxiliary functions for the federal courts,"[285] like the Administrative Office, judicial councils, or federal defender offices.[286]

The judiciary is exempted from these requirements to protect judicial independence and out of respect for the judicial role.[287] But neither independence nor the nature of judicial decision-making is especially persuasive as a reason to resist transparency or procedural safeguards when it comes to the almost entirely Congressionally-delegated, non-adjudicatory activities that we have described.[288] Although judicial administration is designed to facilitate and is often commingled with adjudication, it is nonetheless distinct—both formally and in terms of its inputs, processes, and limits—from adjudication. Indeed, as we've argued, administration creates its own class of problems for the integrity of judicial decisions and interbranch relations. Instead of further compromising judicial decisional independence, extending the types of procedural and transparency-related requirements that are common to executive agencies to some forms of judicial administration would separate administrative decisions from Article III adjudication and allow policy decisions to be made with greater transparency and democratic input.

So, rather than categorically exclude the Judicial Branch from standard administrative and employment law requirements, we think the applicability of these requirements should turn on the nature of the judicial action.[289] We would exclude anything directly related to Article III decision-making but extend some statutory protections to more purely administrative actions and actors. The APA's treatment of military departments demonstrates the feasibility of such an approach. A variety of key military

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[285] Strickland v. United States, 32 F.4th 311, 368 (4th 2022); *see* In re Fidelity Mortg. Investors, 690 F.2d 35, 38 (2d Cir. 1982) ("[I]t is clear that Congress intended the entire judicial branch of the Government to be excluded from the provisions of the [APA].").

[286] *See, e.g.*, Strickland, 32 F.4th at 368-69.

[287] *See id*. at 368 (notion "of subjecting federal courts' decisions to 'judicial review' under the APA . . . is nonsensical"); *see also* JUDICIAL CONFERENCE, STUDY OF JUDICIAL BRANCH COVERAGE PURSUANT TO THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995, 4 (1996) ("[T]he judicial branch must have control over its employee and workplace management in order to ensure both the independence, and the appearance of independence, of its decisions.").

[288] *See, e.g.*, Resnik & Dilg, *supra* note 97, at 1649 ("[T]he judiciary can properly invoke judicial independence as a justification for its freedom only if it does not act like an ordinary agency pursuing programmatic ends.").

[289] *Cf*. Pickus v. U.S. Bd. of Parole, 507 F.2d 1107, 1112 (D.C. Cir. 1974) (declining to exempt executive agency from APA requirements and rejecting analogy to federal probation service because "exemption of the latter is warranted not by the functions it performs . . . but by its status as an auxiliary of the courts").

functions are excluded from the APA,[290] but the military is not protected by a blanket exemption.[291] Instead, as the legislative history of the APA explained, "it has been the undeviating policy [of the law's drafters] to deal with types of functions. . . . Manifestly, it would be folly to distinguish between 'good' agencies and others."[292]

The same should be true for judicial agencies. FOIA-like production requirements could, for example, extend to national agencies like the Federal Judicial Center, the Administrative Office, and the Judicial Conference all the way down to district-level probation offices or federal defender offices—with broadly-drawn exemptions designed to avoid requiring disclosure of materials related to individual cases. Congress could likewise extend notice and comment requirements to more exercises of rulemaking. A few forms of judicial rulemaking, like the issuance of Sentencing Commission guidelines or Big-R rulemaking, are subject either to the APA's notice-and-comment requirements[293] or their own forms of notice and comment.[294] But the Judicial Conference's many non-rulemaking committees, the AO, and even individual circuits and districts engage in a variety of acts of prospective policymaking that can directly affect the public or all of the litigants who come before them, without any mechanism for public input.[295] Finally, mirroring provisions in the APA and potentially evolving judicial doctrines over how to review executive agency action,[296] Congress could also provide for a baseline standard of review against which the judiciary might assess its own administrative decisions. Even if highly deferential, that standard would help insulate judicial review from the administrative choices that often

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[290] Kathryn E. Kovacs, *A History of the Military Authority Exception in the Administrative Procedure Act*, 62 ADMIN. L. REV. 673 (2010).

[291] The APA specifically *includes* military departments under its definition of an "agency"—excluding them only to the extent they are convening courts martial or military commissions or else exercising military authority "in the field in time of war or in occupied territory." 5 U.S.C. §§ 551(1)(F)–(G), 701(b)(1)(F)–(G). Subsequent provisions of the APA are then tailored to accommodate the military setting. *See* 5 U.S.C. §§ 551(1)(F)–(G), 701(b)(1)(F)–(G).

[292] Senate Comm. on the Judiciary, Administrative Procedure Act Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 191 (1947) (emphasis added).

[293] 28 U.S.C. § 994(x).

[294] *See supra* note 73 and accompanying text. Circuit judicial councils use similar notice and comment procedures for "[a]ny general order relating to practice and procedure." 28 U.S.C. § 332 (d)(1), as do district courts for local rules, FED. R. CIV. P. 83.

[295] As just one example, circuit judicial councils can suspend certain Speedy Trial requirements for yearas based on an application from a district regarding a "judicial emergency"—without providing any formal opportunity for stakeholders like the public or the Federal Defenders Office to weigh in. *See* 18 U.S.C. 3174.

[296] *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

proceed it by helping to rationalize how judges should consider non-adjudicatory decisions made by judges or non-judge judicial actors.

The devil, of course, is in the details. Congress need not and should not fully import the safeguards of administrative law into judicial administration.[297] But, recognizing that judicial administration relates to but is distinct from—and distinctly challenging to—adjudication would allow Congress productively to regulate it further.

C. The Chief Justice

Our final proposal is our most surgical: As others, including previous Chief Justices, have proposed, Congress should narrow the administrative duties of the Chief Justice.[298] The Chief Justice exercises enormous power across the judiciary's rulemaking, managing, and communicating. He commands public attention through his ability to "address the nation" in his annual year-end reports[299]; holds executive positions over the Judicial Conference and the Federal Judicial Center; and, perhaps most consequentially, selects individuals for many of the most influential judicial administrative posts.[300] But the Chief Justice operates on political and professional timelines altogether different from any other constitutional actor; once confirmed, he is almost completely immune from democratic accountability and able to influence nearly all aspects of judicial policy through both administrative choices and Supreme Court decisions. The Chief Justice's ability to execute decades-long agendas intensifies the challenges created by locating administrative responsibilities—like Big-R rulemaking—in the judiciary, as opposed to one of the other coordinate branches.

Congress could relocate many of the Chief Justice's administrative powers. Moving more administration to independent agencies would provide one opportunity to do so organically.[301] But Congress should consider further

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[297] For a recent critique of administrative law procedural safeguards, see Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019).

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[298] *See* Resnik & Dilg, *supra* note 97, at 1647-48. Chief Justice Burger, for example, advocated for the creation of a "Circuit Justice for Administration." *See* Meador, *supra* note 106, at 1047-48 (providing a framework for how to devolve certain responsibilities of Chief Justice). Others have argued for setting limits on chief justiceships or rotating the position among the justices. *See* Judith Resnik, *Democratic Responses to the Breadth of Power of the Chief Justice*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 181 (Roger C. Cramton & Paul D. Carrington eds., 2006); Alan B. Morrison, *Opting for Change in Supreme Court Selection, and for the Chief Justice, Too*, in REFORMING THE COURT 41.

[299] Resnik & Dilg, *supra* note 97, at 1608.

[300] *See supra* notes 147-152 and accompanying text.

[301] But Congress would need to be cautious when determining how stakeholders are chosen. With the Sentencing Commission, for example, the Judicial Conference—and, by

devolving the Chief Justice's responsibilities. Some could be directed to the full Supreme Court; for example, all justices could vote to create new commissions or committees and to determine who staffs those committees. Other administrative responsibilities could be lodged with the lower courts, either in the circuit judicial councils or the circuit and district courts themselves. For example, by statute, the Chief Justice currently has sole authority to select the director of the Administrative Office;[302] Congress should provide the judicial councils or chief judges the power to weigh in on this vitally important post. In addition to diffusing the Chief Justice's administrative power, redistributing these responsibilities would provide a greater opportunity finally to take advantage of the growing diversity of perspectives on the federal bench.

CONCLUSION

Today's federal judiciary does much more than decide cases or controversies: It makes rules that govern procedure, judicial conduct, and sentencing; it manages judicial agencies and employees, supervising services as disparate as the provision of federal criminal defense and access to our digital court system; and it communicates with other branches of government and the public. These administrative functions are intended to further the judiciary's ability to exercise its judicial power; together, they form the judicial administrative power, which sits alongside Article III decision-making. Freed from the confines of a specific case or controversy, the judicial administrative power upends staid understandings of the judiciary and entangles judicial administrative actions with adjudicatory decisions in ways that complicate the integrity of judicial decisions. The exercise of the judicial administrative power alters the judiciary's relationship to the coordinate branches and packages the judiciary's decisions in ways that run counter to a variety of underlying separation of powers-related principles.

We have a few thoughts as to how to begin addressing the challenges that judicial administration creates—most importantly, we should treat judicial administration as administration first and judicial second, rather than privilege the judicial location of these many administrative responsibilities above all else. But an article like this one necessarily raises more questions than answers. As much as any specific argument we advance about the nature of the judicial administrative power, our primary ambition is to place federal judicial administration—all of it—slightly closer to center stage.

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extension, the Chief Justice—can effectively control three of seven total commissioners. *See supra* note 61 and accompanying text.

[302] 28 U.S.C. § 601.