

CHIEF JUSTICE REHNQUIST

AS THIRD BRANCH LEADER



By all accounts, William Rehnquist undertook his role as administrative leader of the federal judiciary in a fair, even-handed, and thoroughly unpretentious way.

by **RUSSELL R. WHEELER**



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Chief Justice Rehnquist swears in Bill Clinton to his first term as President.

A chief justice's roles include the familiar (first among equals on the Court), the visible (administering the presidential oath of office) and the rare (presiding over presidential impeachments). Increasingly important, but little recognized beyond the federal courts, is the role of third branch leader and head of the administrative apparatus that sets judicial administration policy, deals with Congress, and determines the procedural rules that govern lawsuits in federal courts throughout the country.

The basic challenge facing the chief justice in this part of the job is to direct the branch's internal administration and relations with its environment in ways that will, as Chief Justice William Rehnquist said in 1989, "preserve the health of our system of justice."¹ Different people have different definitions of a healthy judiciary, but most agree at the least that it is one that resolves disputes independently and efficiently according to law and, to that end, attracts and retains good quality judges and support staff.

Measuring the health of the judicial branch, and the chief justice's contribution to it, is beyond the scope of this essay and a real challenge in any event. It would be difficult to isolate the overall effect of the chief justice's

actions as opposed to many other factors that affect federal judicial administration. And there have been so few chief justices to study—only six since William Howard Taft and the beginnings of the modern chief justiceship in 1921 and only three in the last half century (not counting Chief Justice John Roberts). By contrast, there have been 12 presidents, starting in 1933 with FDR and the modern presidency. We can, though, make some preliminary assessments about how William Rehnquist performed this aspect of the position.

Third branch administration

What is the context? The chief justice has, first, the pulpit that the nation's highest judicial office commands. He also is the presiding officer of the Judicial Conference of the United States, comprising the 13 chief circuit judges, 12 district judges elected by their colleagues in the respective regional circuits, and the chief judge of the Court of International Trade. The Conference oversees the Administrative Office of the United States Courts' performance of a long list of statutory duties in such areas as budget preparation and administration, person-

1. William Rehnquist, *Holiday Message*, The Third Branch, Dec. 1989, at 1.

nel management, technology procurement, and statistical reporting. The Conference also oversees the courts' legislative relations, the rules that govern judicial ethics, and the ongoing revision of the national procedural rules that govern federal court proceedings.

The chief justice appoints the more than 200 members of the Conference's committees. He appoints the Administrative Office's director and deputy director (in consultation with the Conference) and he chairs the Board of the Federal Judicial Center, the courts' research and education agency. Also, he names sitting judges to a few specialized panels, especially courts that act on applications for electronic surveillance in national security matters.² Outside the judicial branch, he is a member, and traditionally serves as chancellor, of the Smithsonian Institution's Board of Regents.

The federal judicial branch has some of the traits of an executive bureaucracy, including sometimes-hazy lines between policy and administration, tension between policy makers and administrators, and tension between central and local control. But the chief justice is hardly akin to a cabinet secretary. One difference is the substantial authority vested in the Conference itself, although the chief justice enjoys influence in Conference operations way beyond his one vote. Also, the main work of the judicial branch bureaucracy is not administering centrally directed programs but providing support to enable some 1,700 judges across the country manage and decide cases. On

the other hand, unlike a cabinet secretary, the chief justice typically serves well beyond the term of the president who appoints him.

Administrative style

By almost all accounts, Rehnquist undertook his spokesperson and chief executive roles in a fair, evenhanded, and thoroughly unpretentious way. Justice Stephen Breyer's tribute was characteristic: "He administered the Court, as he did the judicial system, effectively and with great fairness."³ I attended almost all Conference sessions from 1991 through 2005, and I can recall only a few instances in which he stepped down from the chair in order to express his views on a position (and even fewer times in all the meetings of the Federal Judicial Center Board since 1987).

His most publicized effort to direct a Conference action came early in his tenure, when he supported recommendations of an ad hoc committee he appointed that would restrict capital habeas corpus proceedings in federal courts. The Conference resisted those recommendations and deferred action on the report. At its next meeting, it endorsed an amended version, much less to Rehnquist's liking. He cast votes on additional amendments in order to create tie votes and thus kill the amendments.⁴ (This incident is reminiscent of Chief Justice Earl Warren's charging the Conference's Habeas Corpus committee in 1959 to endorse his position that district courts, not the Supreme Court, should hear habeas cases in the first instance.⁵)

Rehnquist was a no-nonsense administrator and a delegator. Soon after taking office, he launched a review of the Conference operations and committee structure, producing, among other things, what he called "a notably strengthened Executive Committee."⁶ That committee performs many of the Conference administration tasks that former chief justices performed themselves. Although many viewed this approach of broader delegation in general as

an improvement in the day-to-day work of the Conference and its committees, over time some thought it also allowed too much autonomy to accrete to top-level third branch administrative officials.

The Conference's biennial meetings, and those of the Federal Judicial Center Board, became relatively brief affairs under Rehnquist, who believed that, at least among people who have read what they are supposed to read prior to a meeting, discussion quickly reaches the point of diminishing returns. He adhered strictly to parliamentary rules as a way to insure a level playing field. More than one judge who blurted out some comment or question without having been recognized saw a swift gavel and an admonition to "direct your comments to the chair." At one Conference session, he approved a request of the members to adjourn the formal meeting to a session of free-wheeling and relaxed discussion—no votes, no motions. Before leaving the room, he provoked laughter when he turned the gavel over to another judge, smiled, and said that he certainly didn't want to preside over that. Some chafed at his restrictions on extended discussion. Others applauded them.

Committee appointments

Committees have been the Conference's work engines at least since the 1940s. In December 2005, they numbered 25, including advisory rule-making committees, with well over 200 members, almost all of them federal judges. Committees deal increasingly with complicated, highly staffed matters in such areas as security, formulas for allocating supporting personnel, sentencing practices, courthouse design and technology, and procedural rules. Long-standing Conference policy firmly vests authority to appoint committees in the chief justice. Many judges seek appointments. Committee work can be interesting, offers a chance to do more than handle a docket, and lets judges stand out among colleagues. The Administrative Office receives

2. The 11-judge Foreign Intelligence Surveillance Court considers applications, 50 U.S.C. § 1803(a), and the three-judge Foreign Intelligence Surveillance Court of Review hears appeals from any applications denied by the FIS Court, 50 U.S.C. § 1803(b). For more information, see Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U. PA. J. CON. L. 341 (2004).

3. At www.supremecourtus.gov, "Press Releases," viewed September 12, 2005.

4. Linda Greenhouse, *Vote is Rebuff for Chief Justice*, New York Times, March 15, 1990 at A-16.

5. Peter Fish, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 293 (Princeton University Press, 1973).

6. William Rehnquist, *Holiday Message*, The Third Branch, Dec. 1987, at 8.

applications and recommendations through a formal process and vets them down to short slates submitted to the chief justice.

Chief justices have historically used their committee appointing authority to install in key positions judges in whom they have confidence and who share their general approach to the particular policy arena in question.

Did Chief Justice Rehnquist use his appointment authority in that way? One very crude measure might be whether he named judges who, like him, were appointed to the bench by Republican presidents. It is a crude measure because links between political party and judicial administration policies are generally weak, although they appear in some areas, such as rules of procedure, which can implicate contentious matters such as access to the courts.

With those caveats, and looking only at committee chairs, Rehnquist no doubt favored Republican-appointed judges, although not as much as meets the eye.⁷ Such judges constitute 78 percent of his Conference committee chair appointees, more than their proportion in the total population of likely candidates. But the proportion of Republican appointees, although always a majority, varied based on the selection pool—lower when Democratic appointees made up a larger proportion of the presumptively eligible candidates, higher when Republican appointees did.⁸ (He showed a similar tendency when selecting judges to serve on specialized judicial panels.)⁹

Looked at another way, 77 percent of the members of the September 2005 meeting of the Judicial Conference were Republican-appointed judges (20 of the 26). A chief justice has no control over Conference membership, but he does control committee membership. Fifty-eight percent of the committee chairs in September 2005 (all Rehnquist appointees) were named by Republican presidents (14 of 24).

All the same, were there a rule requiring chief justices to appoint

chairs to reflect their proportion of all judges appointed by Democratic and Republican presidents, Rehnquist would clearly have been out of compliance. Fortunately, there is no such rule. Numerous factors are in play, such as geographic and circuit balance, and, at least in Rehnquist's case, a desire to broaden the opportunity for committee service to judges throughout the system.

Legislative connections are also important for some committees. Republicans have controlled both houses of Congress (with one brief interlude) since 1995. When Democrats controlled Congress, some key appointments were different than they might otherwise have been.

The Conference's Budget Committee, for example, is principally concerned with formulating the judicial branch's annual request for appropriations and lobbying it through Congress. Rehnquist appointed Judge Richard Arnold, a Carter appointee, as chair of the Budget Committee in 1987, where he stayed until 1996. Arnold remarked in 1995: "I was, in fact, appointed by the Chief Justice to this position precisely because I had been a legislative assistant to Senator Bumpers [D-Ark.], who was then and still is a member of" the appropriations subcommittee responsible for the federal courts' appropriations.¹⁰ Arnold had many more qualifications than that, but he describes a basic truth, confirmed by Rehnquist's appointing to succeed him a Republican appointee from the same state as

the congressman who, when the Republicans took control of the House in 1995, assumed the chair of that same subcommittee.

Means and ends

Every chief justice has to decide how much political capital the office has and how to spend that capital on Congress, the bar, the press, and others. Rehnquist recognized that the deep respect that most judges instinctively visit on any chief justice does not necessarily travel as well to Congress or beyond.

He spent his capital in a few areas. As he said in his 2003 year-end report on the federal judiciary, "I am struck by the number of issues that seem to crop up regularly, or perhaps they never go away—judicial vacancies, the need for additional judgeships, judges' salaries, judicial appropriations."¹¹ Salaries and workload may seem like parochial matters of self-interest, but concern over them responds to fairly pervasive views within the judiciary that they are discouraging good judges from staying and discouraging potentially good judges from entering. To urge Congress to provide federal judges with annual salary increases, he testified before a House committee,¹² and participated in three news conferences or public hearings about private sector reports advocating higher judicial salaries.¹³

His annual year-end reports, a practice that Chief Justice Warren Burger began, became a prominent part of Chief Justice Rehnquist's

7. These conclusions are drawn from a data base of Conference committee chairs assembled by Federal Judicial Center Senior Research Associate Patricia Lombard, with the help of summer 2005 research intern Teresa Davenport. Excluded from this analysis are short-lived ad hoc committees, and the occasional committee chairs who were not presidential appointees, e.g., bankruptcy judges. Additional data are from the Federal Judges Biographical Database, at www.fjc.gov.

8. During his first six years in office, 1987 to 1992, 23 of the committee chairs he named (66%) were Republican appointees. During those years, Republican-appointed judges in active status with at least five years experience on the bench were 51 percent of the total. Neither active status nor five years experience is a prerequisite for chairing a committee, but they represent factors that are generally considered. During 1993-2001, as the Carter appointees took senior status and the Reagan and Bush I

appointees gained experience, the proportion of Republican-appointed judges named as committee chairs rose appreciably (to 88 percent, or 51), and Republican appointed judges were 72 percent of the cohort described above. But in the last four years (2002-05), the proportion of Republican appointees named as committee chairs has dropped back to its earlier level (21 appointees, or 66 percent), and the comparable figure in the larger population dropped to 41 percent.

9. Ruger, *supra* n. 2, at 391-5.

10. Richard Arnold, *Money, or the Relations of the Judicial Branch with the Other Two Branches, Legislative and Executive*, 40 *St. L. L. J.* 19 (1996).

11. William Rehnquist, *2002 Year-End Report on the Federal Judiciary* (January 1, 2003), available at www.supremecourtus.gov.

12. Reported in the Third Branch, May, 1989.

13. Reported in the Third Branch, Feb., 2001, July 2002, and May 2003.

strategy, especially in speaking to Congress. His reports in earlier years often praised interbranch communications, but as elements in Congress stepped up their attacks on the federal judiciary and individual federal judges, he turned up his defense. In his 2003 report he chided Congress about the so-called “Feeney amendment” to the PROTECT Act,¹⁴ which curtailed judges’ sentencing discre-

in 2004, he responded, as he often did, with a history lesson. Noting recent “suggestions to impeach federal judges who issue decisions regarded by some as out of the mainstream,” he recalled federal judges’ “unpopular, some might say activist, decisions in the desegregation cases, [which] are now an admired chapter in our national history.” It is well established, he said,

that function in a blistering March 2004 attack regarding the 1980 Judicial Conduct and Disability Act. He cited several failures to investigate behavior that he thought merited investigation and warned that Congress might look into “whether the disciplinary authority delegated to the judiciary has been responsibly exercised and ought to continue.”¹⁷

The chief justice’s response: He quickly appointed a committee of two circuit judges, two district judges, and his administrative assistant, with Justice Breyer as chair, to study systematically how in fact the judicial branch has administered the act. That study is still in progress.

For another example, in spring 1996, a district judge in New York City granted a suppression motion in a drug case, commenting that police behavior in the neighborhood justified the defendants’ running from the police. The incident provoked a fury of reaction, with calls from legislators for the judge to resign or be impeached.¹⁸ In the heat of this brouhaha, the chief justice (who of course was always highly deferential to law enforcement in Fourth Amendment matters) delivered a lecture at a law school symposium on the future of the federal courts. He wasn’t really focused on the future, but rather on illuminating a misperception of the here-and-now, and he used, as he often did, historical examples.¹⁹

He recounted the unsuccessful effort to impeach Justice Samuel Chase for his judicial acts and the precedent that failure created. He then described President Roosevelt’s failure to obtain legislative authority to remake the Supreme Court by enlarging its size and Roosevelt’s success in remaking the Court by winning elections and thus appointing new justices through the normal process. “[T]his simply shows,” he said, that “there is a wrong way and a

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The Judicial Conference of the United States, presided over by Chief Justice William Rehnquist (seated center), in September 2004.

tion. Before passing the legislation, Congress, he said, first should have had judges’ views of the proposals, involving as they did “a delicate process that judges understand very well.” Even if consultation wouldn’t have changed the legislation, “at least judges would have known that the process included a meaningful opportunity to have their views heard.”¹⁵

As criticism of judges intensified

that “Congress’s authority to impeach and remove judges should not extend to decisions from the bench.”¹⁶

He also had a well-tuned tactical sense. Although he criticized Congress for lack of consultation, he recognized that Congress’s oversight of the courts is a legitimate legislative function. The chairman of the House Judiciary Committee reminded the Judicial Conference of

14. The Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, PL 108-21. See also Report of the Proceedings of the Judicial Conference of the United States, September 2003 at 5-6 and 19-20.

15. William Rehnquist, *2003 Year-End Report on the Federal Judiciary* (January 1, 2004), available at www.supremecourtus.gov

16. William Rehnquist, *2004 Year-End Report on the Federal Judiciary* (January 1, 2005), available at www.supremecourtus.gov.

17. U.S. House of Representatives, Committee

on the Judiciary, News Advisory, Sensenbrenner Remarks before U.S. Judicial Conference Regarding Congressional Oversight Responsibilities of the Judiciary, March 16, 2004 (<http://judiciary.house.gov/newscenter.aspx?A=409>)

18. Exchanges about this matter are in Jon Newman, *The Judge Baer controversy*, 80 JUDICATURE 156 (1997).

19. William Rehnquist, Keynote Address, *Symposium on the Future of the Federal Courts*, 46 AM. U. L. REV. 267 (1996)

20. *Id.* at 273.

Table 1. Judicial branch expenditures compared to selected other accounts*

	1971	1986	2005 (est.)
Judicial branch	\$145	\$1,071	\$5,741
Government wide	210,172 (.0007%)	990,441 (.0011%)	2,479,404 (.0023%)
Legislative branch	395 (38%)	1,665 (64%)	4,083 (141%)
Departments of			
Commerce	783 (19%)	2,083 (51%)	6,278 (91%)
Interior	1,345 (11%)	4,785 (22%)	9,433 (61%)
Justice	801 (18%)	3,336 (32%)	21,171 (27%)
State	680 (21%)	3,595 (30%)	11,934 (48%)

*In millions of dollars and as a percentage of Congress or departments listed.

right way to go about putting a popular imprint on the judiciary.”²⁰ He never mentioned the suppression motion and the turmoil it created, but his short lecture pricked the balloon immediately.

Too big a job?

For at least 25 years there have been proposals to relieve the chief justice of many of the office’s accumulated administrative duties by creating some type of auxiliary administrative post.²¹ There have been more recent proposals to distribute those duties to a broader range of persons. Those proposals reflect concern that the chief justice is expected to do more than one person can do,²² or that one person should do.²³ There has been relatively little interest in pursuing them within the judicial branch. The 1990 Federal Courts Study Committee recommended analysis of the idea of a “chancellor” to assume many of the chief justice’s administrative tasks, noting that Chief Justice Rehnquist himself thought the concept merited study.²⁴ However, the Conference’s 1995 Long Range Plan for the Federal Courts firmly rejected the idea, unlikely had Rehnquist favored it.²⁵

The federal judiciary in 2005, however, is, in budgetary terms, much larger than it was when Rehnquist joined the Court in 1971 or when he became chief justice in 1986. Table 1 shows that in 1971, federal court out-

lays, at \$145 million, were less than one-tenth of one percent of all federal outlays, about a third of Congress’s, and about one-fifth of those of the smallest executive departments (Commerce and State).

When he became chief justice, judicial branch outlays were about one-tenth of one percent of all outlays, about two thirds of Congress’s and half of what Commerce spent. By 2005, the federal courts, at about \$5.7 billion, were spending two-tenths of one percent of total outlays, over one and a third as much as Congress, 90 percent of Commerce’s outlays, and about half of State’s.²⁶ Congress provided these increased funds in response to needs created by growing criminal prosecutions, among other factors. Third branch personnel doubled while Rehnquist was chief justice, to almost 32,000, by

far the biggest increases coming in support personnel.

Some may ask whether the judicial branch—tiny as it is budgetarily in the whole scheme of things—will some day reach the point that administrative policy making should no longer reside solely in the chief justice, and other judges, who have full time jobs on the bench. Others will respond that judges serving full time as administrative policy makers could not appreciate current realities in federal courthouses across the country.

At some point, we might also expect debate on a somewhat different question—whether the considerable administrative power that has accumulated in the chief justice should remain lodged in one lifetime individual or be distributed in part to the Conference or the entire Court.

Whether or not he would have favored a re-examination of the federal judicial branch governance structure and the chief justice’s role in it, William Rehnquist would have presided over any such debate efficiently and fairly. ❧

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21. E.g., Warren Burger, *Address before the American Enterprise Institute Conference 8* (Dec., 14, 1978) (transcript on file with the Federal Judicial Center), A bill to establish a National Court of Appeals, and for other purposes, S. 2035, 97th Cong., §2 (including Establishment and duties of the Chancellor of the [National] Court [of Appeals] (1982) and Legislation for the Improvement of the Judiciary, Hearing on Judicial Survivors Annuities, Establishment of a National Court of Appeals [and other bills] Before the Subcomm. on Courts, S. Comm. on the Judiciary, 97th Cong., (1982). Pros and cons are discussed in White Burkett Miller Center of Public Affairs, *THE OFFICE OF THE CHIEF JUSTICE*. (Charlottesville: University of Virginia Press, 1984) esp. at 139ff; and Russell Wheeler and Gordon Bermant, *FEDERAL COURT GOVERNANCE: WHY CONGRESS SHOULD—AND WHY CONGRESS SHOULD NOT—CREATE A FULL-TIME EXECUTIVE JUDGE, ABOLISH THE JUDICIAL CONFERENCE, AND REMOVE CIRCUIT JUDGES*

FROM DISTRICT COURT GOVERNANCE, 30-32 (Federal Judicial Center, 1994).

22. E.g., Daniel J. Meador, *The Federal Judiciary and Its Future Administration*, 65 U. VA. L. REV. 1031, 1055-59 (1979)

23. E.g., Jeffrey Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529 (2001); Judith Resnik and Theodore Ruger, *One Robe, Two Hats*, New York Times, July 17, 2005 (Op-Ed pg.).

24. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, 145-46 (1990)

25. Judicial Conference of the United States, *LONG RANGE PLAN FOR THE FEDERAL COURTS*, 77 (1995).

26. Data drawn from Table 4.1—Outlays by Agency, 1962-2009, in Office of Management and Budget, *HISTORICAL TABLES, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2006* (www.whitehouse.gov/omb/budget/fy2006/pdf/hist.pdf).