

# Order in the Courts: A History of the Federal Court Clerk's Office

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# Introduction

On October 26, 1789, Revolutionary War veteran Henry Sewall was appointed clerk of the newly established United States District Court for the District of Maine. The appointment was made by his uncle, David Sewall, whom George Washington had named as the first judge of the district court a month earlier, and it transformed Henry, a 37-year-old store owner, into the chief administrator of one of a handful of federal trial courts. Under the express terms of the act establishing the position of federal court clerk (the Judiciary Act of 1789), Henry Sewall was responsible for maintaining the records of his court and for issuing the writs summoning jurors. But as indicated by the act's additional requirement that the clerks "faithfully and impartially discharge and perform all of the duties of [the] office," he was expected to provide other services as well.<sup>1</sup>

Sewall performed a variety of judicial and nonjudicial tasks, as did his fellow clerks of court, though the fact that his journey to the courthouse in Portland, Maine, for its quarterly sessions included a sail through what were occasionally icy waters may have made his experience unique. As he noted in his personal diary, he drafted various legal instruments (including a death warrant for a man convicted of "piratical murder"), issued subpoenas to witnesses, empanelled grand and petit jurors, recorded the orders and judgments of the court, and "worked on the courthouse chimney."<sup>2</sup> Others may not have practiced masonry in their capacity as court officers, but Sewall's work in this area is symbolic of the clerks' contributions to the construction of a strong federal judicial system—one that was struggling to define its role relative to the state courts and to achieve a measure of independence from the legislative and executive branches of the federal government.

1. *Statutes at Large* 1 (1789): 76, 88.

2. General Henry Sewall's Diary, Maine Historical Society, Portland, Maine.

Like the other judges of the lower federal courts, Sewall's uncle enjoyed the assistance of a U.S. marshal (appointed by the President) in executing his orders and in opening and adjourning the court at each of its sessions. It is clear, however, that David Sewall relied primarily on his nephew to conduct the court's business and to produce and maintain the records so crucial to the functioning of a legal tribunal in the Anglo-American, common-law tradition. As the volume of federal judicial business began to grow, moreover, judges like Sewall relied on their clerks to serve as liaisons between the courts and the increasing numbers of lawyers and litigants appearing therein and to screen the writs and motions submitted by those parties to determine whether they conformed to local rules.

Despite the important contributions of the clerks to the operation of the federal courts, and despite the fact that they have been the face of the courts for most of the jurors, litigants, lawyers, and others who have had contact with the national judiciary, there have been no serious efforts to bring that face into historical focus.<sup>3</sup> This study seeks to fill this gap by offering a composite picture of the clerks of the federal courts and of their historical role in judicial administration. The picture is drawn primarily from legislative history and from the reports and correspondence of the various administrative agencies that have been responsible for overseeing the work and accounts of the federal courts, and it is enhanced by biographical materials, by judicial opinions in federal cases affecting the rights and obligations of the clerks, and by secondary sources.<sup>4</sup>

The history of the federal court clerk's office resembles the history of other administrative institutions insofar as it can be told as a story

3. There is a short legislative history of the clerk's office in Erwin C. Surrency, *History of the Federal Courts* (New York: Oceana Publications, 1987), 373–78. For a much earlier account, see Alfred Conkling, *A Treatise on the Organization, Jurisdiction and Practice of the Courts of the United States*, 2d ed. (Albany: Gould, Banks, & Co., 1842), 101–06.

4. There is some treatment herein of the clerks of the Supreme Court of the United States and of the federal courts of appeal, but the focus is on the federal trial courts.

about professionalization, centralization, and specialization, but these general trends do not reveal how the judicial process has been, and continues to be, defined by the skills and personalities of federal court clerks, or how the customs and practices of those clerks have contributed to the vitality of judicial independence in our federal system. At the same time that the clerks have contributed to the local flavor of the justice administered by the federal courts, they have worked to promote uniform practices and procedures in those courts. This study emphasizes the clerks' contributions to a national legal culture while providing a framework within which others can reconstruct the role of clerks in individual courts.

To capture the development of the clerk's office as an institution, the discussion is organized chronologically, though there are several themes that guide the narrative. Among these themes are 1) the transformation of the clerks from relatively autonomous officeholders who earned their livings from the fees that their offices could generate and who answered only to the judges who had appointed them, to salaried employees of a federal judicial bureaucracy whose work was and is subject to a significant amount of oversight by various agencies of the government; 2) the impact on the clerks' offices of changes in the jurisdiction and structure of the federal courts and of the development and application of new procedures and technologies for record keeping and case filing; 3) the clerks' successful recasting of themselves as agents, as opposed to objects, of court reform through both individual and collective activities; and 4) their assumption of responsibility for personnel management and other functions not related to the screening or recording of documents filed with the federal courts. These themes reflect the dual purposes of this publication: to rescue from historical obscurity the efforts of a group of men and women who have worked to keep the federal judicial machinery running smoothly, and to reveal how their work has enhanced judicial independence while contributing to the development of a truly national court system.

## Federal Court Clerks in the New Nation and the Early Republic, 1789–1839

During the last decade of the eighteenth century and the first decade of the nineteenth, Congress created the office of federal court clerk, assigned particular duties to its incumbents, and established the basic terms and conditions of employment therein. Notwithstanding the distinct requirements of a national judicial system, the responsibilities of these early court officers were quite similar to those of state court clerks at the time and to those of clerks in the colonial courts that existed prior to the American Revolution. The structures and practices of those clerks' offices, in turn, were modeled on those that had developed over centuries in English courts.

This section begins with a brief description of the antecedents of the federal court clerk's office, then examines the legislative enactments that refined the duties and contours of the office. There follows a discussion of some of the problems engendered by the compensation system that Congress adopted for clerks and other court officers and of how that system (along with several other characteristics of the federal court clerkship) shaped the experiences of some of the men who served as clerks in the early republic. The section concludes with the story of one clerk's effort to challenge the right of a judge to remove him from office and the Supreme Court's rejection of that challenge in 1839.

### Defining the Office: Antecedents and Early Legislation

By the middle of the fifteenth century, a variety of clerical officers served the courts in England, but the one most similar to the clerks of court that emerged in the American colonies was the "prothonotary," whose functions included entering records on the plea rolls and issuing judicial writs of process in actions at law. Unlike the prothonotary, the colonial clerk of court did not have a possessory interest in his office—he could not pass it on to his heirs or assigns—but he was

responsible for maintaining records of the decisions and orders of his court, and he thus played an important role in bequeathing judge-made law to future generations. Colonial clerks of court had additional functions as well, including administering oaths to jurors and witnesses, causing the crier to make various proclamations, taking juries' verdicts in open court, and providing certified copies of court records to the parties.<sup>5</sup>

State court clerks performed similar functions after the American Revolution, and Congress sought to provide each of the courts of the federal judiciary with an analogous officer. Thus, on September 24, 1789, it authorized the justices of the Supreme Court (collectively) and each of the judges of the district courts (individually) to appoint a "clerk" to "enter and record all the orders, decrees, judgments and proceedings of the said court[s]." The only other provision of this act relating to the clerks' duties required them to issue writs of *venire facias* (the instruments used to summon members of the jury pool to the courthouse). However, each clerk was required to post a \$2,000 bond to the United States, "with sufficient sureties," indicating that Congress expected them to be more than mere record keepers. The clerk for each district court was to also serve as clerk for the circuit court in that district.<sup>6</sup>

5. R.W. Bentham and J.M. Bennett, "The Office of Prothonotary: Its Historical Development in England and in New South Wales," *Sydney Law Review* 3 (March 1959): 47; Herbert A. Johnson, "Civil Procedure in John Jay's New York," in *Essays on New York Colonial Legal History* (Westport, CT: Greenwood Press, 1981), 168; Erwin C. Surrency, "Directions for Holding Court in Colonial Georgia," *American Journal of Legal History* 2 (1958): 311–50; Hugh F. Rankin, "The General Court of Colonial Virginia: Its Jurisdiction and Personnel," *Virginia Magazine of History and Biography* 70 (1962): 142–53.

6. *Statutes at Large* 1 (1789): 76, 88. The "circuit courts" were federal trial courts operating alongside the district courts, and they are to be distinguished from the "circuit courts of appeals" created in 1891. Until 1869, when Congress established the position of circuit court judge, each of the circuit courts was comprised of a district court judge and at least one justice of the Supreme Court, who was required to "ride-circuit" in order to attend circuit court sessions. Despite the onerous travel require-

Five days later, President Washington signed An Act to Regulate Processes in the Courts of the United States (“The Process Act”), which gave a more complete, but hardly explicit, statement of what was expected of the clerks. Just as it had required federal judges under section 34 of the Judiciary Act to apply the rules of decision of the several states in common-law cases brought in their courts, Congress directed the clerks in common-law cases to model their forms and modes of process on those of the supreme courts of the states in which they sat. With respect to the forms and modes of proceeding in equity and admiralty cases, the clerks were instructed “to follow the course of the civil law.”<sup>7</sup>

During the late-eighteenth and early-nineteenth centuries, Congress expanded the duties of the federal court clerks by assigning to them a number of ministerial and quasi-judicial tasks. These included the following: recording naturalization petitions pursuant to the Naturalization Act of 1790<sup>8</sup>; administering the “declaration of intention to become a citizen” to those filing such petitions<sup>9</sup>; accepting and re-

ments it imposed on the justices, the practice of circuit-riding was not completely eliminated until the abolition of the circuit courts in 1912.

7. *Statutes at Large* 1 (1789): 93, 94. Many of the earliest federal clerks were drafted or loaned from the state courts, and they brought with them the record-keeping techniques they had acquired over the years as well as the forms for the various writs, summonses, and other judicial instruments that they had been using. John Tucker, the first clerk of the Supreme Court of the United States, for example, was clerk for the Supreme Judicial Court of Massachusetts at the time of his appointment. During his tenure at the federal court he established a file of draft orders and motions modeled, in many cases, on those he had been using in Massachusetts. *The Documentary History of the Supreme Court of the United States, 1789–1800, Volume One, Part 1: Appointments and Proceedings*, eds. Maeva Marcus and James R. Perry (New York: Columbia University Press, 1985), 160.

8. *Statutes at Large* 1 (1790): 103. One scholar has estimated that there were over 680 such petitions filed and recorded with the federal district and circuit courts between 1795 and 1800. Dwight F. Henderson, *Courts for a New Nation* (Washington, D.C.: Public Affairs Press, 1971), 48.

9. This declaration was required under the terms of a 1795 law that both repealed and replaced the Naturalization Act of 1790, but it was not until 1824 that clerks were authorized to administer the declaration. *Statutes at Large* 4 (1824): 69.

ording the title of printed works for which copyright protection was claimed<sup>10</sup>; taking recognizance of special bail *de bene esse* in any action pending in either a district or circuit court in the event of the judge's absence or disability<sup>11</sup>; conducting the sale at public auction of condemned goods seized from ships or vessels<sup>12</sup>; and making all necessary rules and orders preparatory to a final hearing in admiralty suits where a district judge was unable to discharge his duties.<sup>13</sup>

The clerks also performed a number of functions that were not delegated specifically to them by statute, but were crucial nevertheless to the evolution and operation of the federal judiciary. Some of these functions were similar to those that state and colonial court clerks had been performing throughout the eighteenth century, such as keeping a "minute book" (a day-by-day account of the proceedings of the court); safeguarding the funds deposited with the courts pending a judicial determination as to whom and how they should be dispersed; keeping track of the names, signatures, and character references of the attorneys admitted to practice before the courts; and drawing up the official records of court proceedings and arranging for the printing of copies of those records. Other tasks were simply assumed by the clerks in order to meet the demands of a national judicial system, such as distributing the text of newly enacted federal laws to judges and lawyers throughout the country and serving as bankruptcy commissioners and

10. *Statutes at Large* 1 (1790): 125. The clerks were not actually conferring copyright protection—that duty belonged to the Secretary of State—but their recording of an author's title was a necessary step in the process of obtaining such protection.

11. *Statutes at Large* 1 (1790): 278. The same section of this statute authorized the clerks to take the affidavits of surveyors relative to their reports and to administer oaths to persons identifying papers found on board of vessels or elsewhere to be used in admiralty trials.

12. *Statutes at Large* 1 (1799): 696. This authority was shared with the marshals, however, and with "other proper officer[s] of the court in which condemnation shall be had . . ." *Id.*

13. *Statutes at Large* 2 (1809): 535.

referees after the conferral of bankruptcy jurisdiction on the federal courts in 1800.<sup>14</sup>

Foremost among the nonstatutory duties of the clerks was the collection of fees from litigants for the services provided by the federal courts. These fees, in turn, were used by the clerks to pay the expenses of their offices and to compensate themselves for their labors. This method of remunerating court clerks had been used to defray the costs of running state and colonial courts for over a century, and most of the public officials within the executive branch at the time were paid by the fees they collected for the services that they rendered. The incorporation of the fee-based compensation scheme into the federal judicial system obviated the need for the government to provide the clerks with salaries and helped thereby to allay concerns about the potentially high costs of operating that system.<sup>15</sup> In fact, the clerks were to play an important role in generating and collecting revenue for the federal government after 1841, when Congress limited the amount of

14. Under the terms of a congressional resolution, it was actually the Secretary of State who was responsible for distributing copies of the text of federal laws to each of the judges of the district courts and to each of the federal marshals and district attorneys. *Statutes at Large* 1 (1797): 519. Correspondence between the clerks and the Secretary of State's office in the second decade of the nineteenth century, however, indicates that the compendia were, in fact, delivered to the clerks' offices on behalf of the judges and court officers named in the resolution, and that when they were not sent or received promptly, the clerks took it upon themselves to dun the appropriate officials at the Department of State and to remind them that the application of the federal laws depended on the clerks' ability to bring those laws to the attention of judges and lawyers in the field. *Calendar of Miscellaneous Letters Received by the Department of State from the Organization of the Government to 1820* (Washington, D.C.: Government Printing Office, 1897). While it is unknown just how many or what percentage of federal court clerks served as commissioners in bankruptcy during the early republic, the fact that Congress made a specific authorization for them to receive the sum of \$6 per day for attendance at bankruptcy proceedings indicates that it was not uncommon. *Statutes at Large* 2 (1802): 164.

15. For a discussion of this concern, see *The Documentary History of the Supreme Court of the United States, 1789–1800, Volume Four: Organizing the Judiciary*, ed. Maeva Marcus (New York: Columbia University Press, 1992), 19–30.

fees the clerks were allowed to retain and required them to submit any surplus to the Treasury Department.<sup>16</sup>

## The Fee System

Neither the Judiciary Act nor the Process Act decreed specifically that the clerks were to keep the fees they collected, but Congress gave its tacit approval to this compensation scheme by not making an appropriation for the clerks and by regulating the amount that they could charge for particular services. In an apparent effort to prevent court costs from discouraging litigants from filing suit in the federal courts, Congress instructed federal clerks to charge the same rates as those charged by the clerks of the highest courts of the states in which the federal courts were located.<sup>17</sup> This regulation had the effect of encouraging plaintiffs to file cases in the federal courts (or at least of not discouraging them from doing so), but it also ensured that the cost of doing business in those courts varied from one jurisdiction to another—a problem from the perspective of those who happened to be litigating in states with higher than average fee schedules. In October 1792, a group of South Carolina merchants petitioned the House of Representatives about the high costs associated with litigating federal admiralty suits in that state. In March 1793, Congress responded to their petition by enacting a uniform schedule of clerk's fees in such cases, but nothing was done to ensure uniformity of fees in common-law cases for another 60 years.<sup>18</sup>

The fact that federal court clerkships were established as self-supporting posts may have saved the government some money, but it also created a number of problems, not the least of which was the temptation and opportunity it presented to the clerks to increase their

16. *Statutes at Large* 5 (1841): 428.

17. *Statutes at Large* 1 (1789): 93.

18. Petition from the merchants of Charleston, South Carolina, October 8, 1792, cited in *The Documentary History of the Supreme Court of the United States, Volume Four*, ed. Marcus, 199 n.3; *Statutes at Large* 1 (1793): 332; *Statutes at Large* 10 (1853): 161.

incomes by overcharging litigants for services either unnecessary or not actually performed. This was a concern as early as 1793, when Representative Thomas Fitzsimons of Pennsylvania recommended that all public officers, including the clerks, be paid a salary given “how difficult it was to guard against abuses and frauds” under the fee system. It is hard to know whether and to what degree the clerks exploited this situation—at least until the middle of the nineteenth century, when it becomes clear that some were doing so.<sup>19</sup>

There simply was not enough federal judicial business at the time the federal courts were created to support a full-time clerk with fees alone. In December 1790, U.S. Attorney General Edmund Randolph addressed the subject of the clerks in a report on the judiciary he gave to Congress, and he reported that clerks’ posts “now produce mere trifles.”<sup>20</sup> Less than three months later, Congress established a fund based on fines and forfeitures and designated that a portion of that fund be used to provide court officers (as well as jurors and witnesses) with per diems for their attendance at court sessions and to reimburse them for associated traveling expenses.<sup>21</sup>

19. Leonard D. White, *The Federalists: A Study in Administrative History* (Westport, CT: Greenwood Press, 1948), 298. For a discussion of the evidence suggesting that clerks and other court officers were abusing the fee system for personal profit during the mid-nineteenth century, see *infra* text accompanying notes 47–51 and 70–75.

20. *Documentary History of the Supreme Court of the United States, Volume Four*, ed. Marcus, 173.

21. *Statutes at Large* 1 (1791): 217. Under the terms of this act, the clerks of the district and circuit courts were allowed \$5 per day for attending court sessions and ten cents per mile for traveling to and from their home to either court, in addition to the fees permitted under The Process Act. The clerk of the Supreme Court, by contrast, was entitled to \$8 per day for attending court, plus his fees, but nothing for mileage. The following year, Congress passed a new compensation act, one that provided the same remuneration to the lower court clerks but increased the amounts available to the Supreme Court clerk to \$10 per day and “double the fees of the clerk of the supreme court of that state in which the Supreme Court of the United States shall be holden.” *Statutes at Large* 1 (1792): 277.

This did very little to enhance the economic fortunes of the early federal court clerks. Whereas the average annual salary for a federal district court judge in 1792 was \$1,250, the fifteen federal court clerks who reported their incomes to the Secretary of the Treasury that year netted an average of only \$330 from their duties as clerks—a figure that included the per diems and travel reimbursements they received.<sup>22</sup> Recognizing that such a low income potential might discourage qualified individuals from serving as federal court clerks, Congress increased that potential the following year by allowing the clerks to earn a 1.25% commission on the money that was deposited in their courts in admiralty suits. Six years later, that potential was again increased, as the clerks were allowed to charge an additional one-third of the rates charged by the clerks of the state supreme court in common-law cases for their services.<sup>23</sup>

Thanks to these legislative measures and to a steadily increasing volume of federal judicial business, there were federal court clerks in certain districts in the second decade of the nineteenth century earning more money than the judges who had appointed them. This fact so annoyed one particular district court judge that he appealed to Congress to remedy the problem by raising his salary. Despite a report issued by the House Judiciary Committee acknowledging how “proper it may be to increase the salaries of some of the District Judges and to diminish the compensation of some of the District Attornies, Clerks, and Marshals,” Congress rejected the appeal.<sup>24</sup> It did take small steps

22. Henderson, *Courts for a New Nation*, 52. Unlike the clerks, marshals, and district attorneys, the judges of the federal courts received a fixed salary in lieu of fees. These salaries were not made uniform until 1891, however, and until that time they varied according to the territorial extent and population of the state in which the federal court was located and the estimated volume of business to come before that court. In 1792, the salaries ranged from \$800 (earned by the district court judge in Delaware) to \$1,800 (received by the judges in Virginia and South Carolina). *Id.*

23. *Statutes at Large* 1 (1793): 332; *Statutes at Large* 1 (1799): 625.

24. House Judiciary Committee Papers, 13th Cong., “Report on the Expediency of Increasing the Salary of the Judge of the U.S. for the District of Massachusetts” (22 March 1814), *General Records of the House of Representatives*, RG 233, National Archives, Washington, D.C.

to rectify the situation in 1814, however, by eliminating the per diems for the clerks of the district courts in Massachusetts, Rhode Island, Connecticut, Pennsylvania, and the Southern District of New York, and limiting the clerks' commission on money deposited with the district courts to 0.5%.<sup>25</sup>

### Called into Notice: Profiles of Some Early Court Clerks

However much a particular clerk in the early republic earned from his official duties, he was most likely to have additional sources of income because the job afforded both the time and the liberty to pursue other opportunities. During the course of his clerkship, Henry Sewall served as town clerk of Augusta, Maine, as a member of the state militia (eventually becoming Major General of the Eighth Division), and as referee in various state and local court cases. John Hannah was president of a local bank during his tenure as clerk of the District Court for the District of Kentucky (1807–1851), while Simeon Baldwin held positions as collector of revenue, city clerk, alderman, and mayor of New Haven while serving as the clerk of the federal courts in Connecticut (1789–1806).<sup>26</sup>

While not quite hereditary sinecures, as were the offices of English prothonotaries at the time, federal court clerkships could be delegated to deputies or surrogates when the clerks themselves were called away by other business. In 1803, for example, Baldwin was elected to the U.S. House of Representatives. In order to join that body, Baldwin assigned his clerkship on the agreement that his assignee forfeit the post when Baldwin's congressional term expired. Samuel Bayard, John Tucker's successor as Supreme Court clerk, exercised a similar prerogative when he was asked by George Washington to prosecute admiralty claims in London in 1794. Rather than resign his clerkship, Ba-

25. *Statutes at Large* 3 (1814): 133. Ten years later, Congress repealed the selectively imposed restrictions on the clerks' per diems. *Statutes at Large* 4 (1824): 8.

26. Undated article in the *Maine Farmer* (1872); Mary K. Bonsteel Tachau, *Federal Courts in the Early Republic: Kentucky, 1789–1816* (Princeton, NJ: Princeton University Press, 1978), 63; *American National Biography*, s.v. "Baldwin, Simeon."

yard secured the assistance of two deputies and reassumed his duties when he returned from England four years later.<sup>27</sup>

While this privilege ensured that the federal court clerks' offices would be occupied, at least nominally, at all times, there was some concern among both judges and legislators that the federal judicial business could be compromised by the absence or unavailability of the acting clerk. Accordingly, the first clerk of the Supreme Court was required by an order of that tribunal to live at the seat of the national government, while the clerks of the federal courts in North Carolina and Tennessee were directed by statute to reside and keep the courts' records in the place where their sessions were held.<sup>28</sup> Such measures indicate how important the clerks were to the operation of some of the early federal courts, as does the explanation given by the marshal of the District Court for the District of Georgia for the temporary closing of that court in November 1795. "The clerk who had custody [of the records] was lately dead," he wrote, "and no business could be proceeded upon."<sup>29</sup>

Not surprisingly, there was a certain amount of prestige that attended such an important office, and prospective federal court clerks were well aware that the experience could enhance their political and economic prospects. Prior to replacing Tucker at the Supreme Court and while considering whether to accept an appointment as clerk of the District Court for the District of Pennsylvania, Bayard was encouraged by his law partner to take the job because it "would not interfere

27. Simeon Eben Baldwin, *Life and Letters of Simeon Baldwin* (New Haven, CT: Tuttle, Morehouse and Taylor Co., 1919); *The Documentary History of the Supreme Court of the United States, 1789–1800, Volume One, Part 1: Appointments and Proceedings*, eds. Maeva Marcus and James R. Perry (New York: Columbia University Press, 1985), 160.

28. *The Documentary History of the Supreme Court of the United States, Volume One, Part 1*, eds. Marcus and Perry, 160; *Statutes at Large 2* (1802): 163, 165.

29. Thomas Glascock to the *Augusta Chronicle*, November 12, 1795, quoted in *The Documentary History of the Supreme Court of the United States, 1789–1800, Volume Three: The Justices on Circuit*, ed. Maeva Marcus (New York: Columbia University Press, 1990), 72.

with his professional pursuits in the state courts, would call him into notice, [and would] be a stepping stone to more important posts.”<sup>30</sup> William Cranch, who was a candidate for the position of clerk of the Supreme Court of United States in 1799, was advised to take the job because “the duties of the Clerkship are by no means arduous . . . and though the emoluments are inconsiderable, it serves as an introduction to other business.”<sup>31</sup>

Neither Bayard nor Cranch took a position as a lower federal court clerk, but during his clerkship Simeon Baldwin met and corresponded with politicians who consulted him about pending legislation affecting the compensation of court officers, and he worked with judicial nominees who requested his assessment of the scope and nature of the federal judicial docket in Connecticut.<sup>32</sup> While Baldwin used his connections to secure a state court judgeship, Robert Troup, the first clerk of the District Court for the District of New York, became a judge of that very court in 1796. Thomas Todd, the first clerk of the District Court for the District of Kentucky, became an associate justice of the Supreme Court of the United States in 1807.<sup>33</sup>

Given the degree to which having a clerkship in the late-eighteenth and early-nineteenth centuries was likely to call a man “into notice,” it is not surprising that the positions usually went to

30. William Bradford Jr. to Bayard, quoted in *The Documentary History of the Supreme Court of the United States, Volume One, Part 1*, eds. Marcus and Perry, 161.

31. Thomas B. Adams to William Cranch, July 15, 1790, quoted in *The Documentary History of the Supreme Court of the United States, Volume One, Part 2*, ed. Marcus, 873. Cranch did not accept the clerkship, but he had no trouble finding work. Not only did he become the reporter of the Supreme Court’s decisions from 1801–1816, but he served as chief judge of the Circuit Court for the District of Columbia from 1806 to 1855. (He was an associate judge on that court from 1801–1806.)

32. Senator Roger Sherman to Baldwin, January 30, 1792, quoted in Baldwin, *Life and Letters*, 403; Pierpont Edwards to Baldwin (undated), 1806, quoted in Baldwin, 448.

33. Jeffrey B. Morris, *Federal Justice in the Second Circuit* (New York: Second Circuit Historical Committee, 1987), 14; Tachau, *Federal Courts in the Early Republic*, 58.

those who were already endowed with a fair amount of social and political capital. After 1888, federal judges were prohibited from appointing members of their families to positions as court officers, but prior to that time nepotism was a common route to a federal court clerkship. Sewall, as noted earlier, was appointed clerk by his uncle; John H. Hanna, who became clerk of the federal courts in the District of Kentucky in 1807, was the son-in-law of Thomas Todd, who by virtue of his elevation to the Supreme Court earlier that year had become the circuit-riding justice in the state.<sup>34</sup>

Patronage could work against the clerks as well, as it did in the case of Baldwin, who lost his position as clerk of the federal courts in Connecticut in 1806 upon the death of Richard Law (the Federalist judge under whom he had been serving) and Law's replacement by Pierpont Edwards (the nominee of President Thomas Jefferson). That Baldwin's ouster was politically motivated is evident from the warning he received from fellow Federalist, Representative Timothy Pitkin, just before Edwards' appointment. "[W]hether he [Edwards], or some other Democrat fills the place of the late Judge Law," wrote Pitkin, "I presume it is not hard to conjecture with some degree of certainty who will not be Clerk."<sup>35</sup>

Despite the office-seeking claims of family and party members, federal judges in the early republic were reluctant to replace incumbent clerks. Those clerks possessed invaluable knowledge about judicial forms and procedures, and their experience was essential to the smooth disposition of the federal caseload. Most of the clerks in the first half of the nineteenth century were lawyers, including William Brent, the clerk of the District Court for the District of Columbia from

34. *Statutes at Large* 25 (1888): 427; Tachau, *Federal Courts in the Early Republic*, 63.

35. Pitkin to Baldwin, February 25, 1806, quoted in Baldwin, *Life and Letters*, 446–47.

1805 to 1848, who actually represented clients before the very judges for whom he worked during his tenure as a court officer.<sup>36</sup>

This kind of experience gave the first few generations of federal court clerks a high status within the legal profession and a significant influence over the legal process as compared with their successors. Whereas today's clerks continue to ensure that federal court filings comply with jurisdictional and stylistic requirements, their predecessors actually drafted many of the writs, warrants, and other legal instruments that are now drafted by the parties' lawyers. Moreover, though today's clerks of court may assist their judges with the formulation and interpretation of local rules of court, such assistance is different in kind from that which clerks must have supplied in the early republic. Entire bodies of these rules were being developed and codified at that time, and many clerks had as much or more legal experience than did the judges whom they served.<sup>37</sup>

### Judicial Authority and the Clerks' Tenure

No matter how much legal experience they had, clerks were subordinate to the judges who appointed them, and clerks' decisions on matters pertaining to the proper form of legal instruments, the scheduling of depositions and trials, and even the eligibility of particular persons for naturalization or jury service, could be overruled by those judges. The judges also possessed some economic control over the clerks because Congress required judges to certify the mileage and per diem returns of all federal judicial officers before such returns could be passed along to the Treasury Department for payment.<sup>38</sup> In addition, judges could fine clerks for failing to perform their duties in accordance with the judges' wishes. In 1800, for example, Judge Innes of

36. Jeffrey Brandon Morris, *Calmly to Poise the Scales of Justice: A History of the Courts of the District of Columbia Circuit* (Durham, NC: Carolina Academic Press, 2001), 20.

37. A useful study of the clerks' contributions to the development of local rules of court could be derived from an examination of the extant editions of these rules.

38. *Statutes at Large* 1 (1791): 217.

Kentucky ordered his clerk, Thomas Tunstall, to have the minutes of each court session drawn up before the succeeding session or else pay a \$5 fine.<sup>39</sup>

No one, it appears, questioned the judges' authority with respect to such day-to-day matters of court administration, but the failure of the Judiciary Act of 1789 to specify the tenure of office of the federal court clerks invited a challenge to what had been considered the judges' prerogative to appoint and replace clerks of court as they pleased. The controversy began in May 1838, when Judge Philip K. Lawrence of the recently established District Court for the Eastern District of Louisiana informed Duncan N. Hennen, who had been the exclusive federal court clerk in the state since 1834, that Hennen was being removed from office and replaced with Judge Lawrence's close personal friend, John Winthrop. Not only did Lawrence take this action over the objection of Supreme Court Justice John McKinley, who was the circuit justice of the corresponding circuit court, but Lawrence informed Hennen that he had been completely satisfied with the manner in which Hennen had performed his duties and that the sole reason for the removal was Judge Lawrence's "feelings of kindness" for Winthrop.<sup>40</sup>

Facing the prospect of losing the income of his office, Hennen challenged the right of Judge Lawrence to remove him from his post without demonstrating that he had been negligent in the performance of his duties. The suit was heard, initially, by none other than Judge Lawrence and Justice McKinley, sitting together as the circuit court. Not surprisingly, the two jurists divided on the issue of Lawrence's authority to replace their shared clerk. The case was certified to the U.S. Supreme Court, where it was argued in January 1839. In the interim, no business was conducted in either the district or circuit court

39. Tachau, *Federal Courts in the Early Republic*, 85.

40. Carl B. Swisher, *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: Volume V, The Taney Period, 1836-64* (New York: Macmillan, 1974), 252.

in New Orleans, underscoring the crucial role of the clerks in the operation of the federal courts.<sup>41</sup>

In an opinion written by Justice Smith Thompson, the Court upheld Judge Lawrence's actions by a unanimous vote, ruling that the clerks of the federal courts were "inferior officers" under the Constitution and that they thus served at the pleasure of the judges of those courts.<sup>42</sup> In declining to restore Hennen to his clerkship, the Court not only rendered tenuous the job security of all the federal court clerks (including William Thomas Carroll, the clerk who signed the Court's order denying Hennen's challenge), but it declared, in effect, that the justices of the Supreme Court were powerless to prevent their district court brethren from determining who administered the business of the circuit courts.<sup>43</sup>

A few months later, Congress authorized separate clerks for the circuit courts to be appointed jointly by the district court judge and the circuit court justice, and it gave the latter the ultimate authority to choose the clerk in the event the two judges disagreed on a particular candidate.<sup>44</sup> It appears that few circuit court justices actually exercised this authority. The district court clerks apparently continued to administer most of the circuit courts even after Congress established the position of circuit court judge in 1869 and authorized each such judge to appoint a clerk without the concurrence of the district court judge.<sup>45</sup> This may be an indication that there was a shortage of people

41. *Ibid.*

42. *Ex Parte Hennen*, 13 Pet. 225 (1839). Interestingly, Justice McKinley did not dissent in the case.

43. A copy of the Court's order in the *Hennen* case appears in the *Papers of Justice Henry Baldwin*, which, in turn, are part of the *Records of the Supreme Court of the United States*, RG 267, National Archives, Washington, D.C.

44. *Statutes at Large* 5 (1839): 322.

45. *Statutes at Large* 16 (1869): 45; Surrency, *History of the Federal Courts*, 374. Professor Surrency provides no evidence for his assertion that it was common for the same clerk to be appointed to administer the district and circuit courts both before and after 1839, but examination of the registers maintained by the Department of Justice after it had assumed responsibility for supervising the accounts and personnel of the federal courts in 1870 corroborates his claim. More than two thirds of the men

qualified to handle a federal court clerkship during the middle decades of the nineteenth century, but it also ensured that most of those who were appointed to the post would be entitled to collect the fees and emoluments of two offices rather than one. This was a significant and controversial entitlement during the Jacksonian era—an era characterized by steadily rising federal judicial caseloads.<sup>46</sup>

listed as circuit court clerks in the register for the year 1871, for example, were also listed as the clerk of the corresponding district court. *Register of the Department of Justice, 1871* (copy on file with the Department of Justice, Office of Policy Development, Washington, D.C.).

46. Precise information about the size of the dockets of the lower federal courts before the Civil War is unavailable, as no agency collected this data. Scholars have suggested that there was a steady increase in the number of federal cases as a result of a significant rise in the volume of American business. See Felix Frankfurter and James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* (New York: Macmillan, 1928), 45.

## Pure and Honest Beyond Suspicion: The Clerks and the Emergence of Executive Branch Supervision of the Federal Courts, 1839–1869

As the federal government attempted to centralize its operations and to regulate the conduct of its officers during the three decades spanning the middle of the nineteenth century, the clerks' relationship to that government was transformed. This transformation was effected by three separate legislative initiatives: a resolution requiring the clerks to submit regular reports of their fees to the Secretary of the Treasury; a pair of laws limiting the total amount of fees each clerk was allowed to retain; and another law establishing a uniform fee schedule. This section describes these initiatives in more detail while providing an account of some of the difficulties encountered by officials within the executive branch in enforcing them.

### The Reporting Requirement of 1839

The need for some kind of oversight of the clerks and the fee system had been apparent since at least 1818, when it was discovered that Theron Rudd, the clerk of the District Court for the Southern District of New York, had absconded with more than \$117,000 he had embezzled from the court.<sup>47</sup> The incident exposed the inherent problem of entrusting court administration to fee-collecting clerks supervised almost exclusively by the judges who appointed them.<sup>48</sup> Occurring as it did, however, during a decade in which Congress conducted no fewer than nineteen investigations into the alleged misconduct of vari-

47. *Report of the House Judiciary Committee*, "Embezzlement of the Funds of the District Courts of New York," 15th Cong., 1st sess., 1818, H. Doc. 408.

48. Rudd had been appointed clerk in 1814 by Judge William Peter Van Ness, who apparently assisted him with his malfeasance. *Ibid.*

ous public officials, Rudd's crime did not receive the kind of attention that it might otherwise have received.<sup>49</sup> It was not until the late 1830s, in fact, that something was done to address the problems posed by the clerks and the fee system by which they were compensated.

In 1837, President Martin Van Buren instructed the Secretary of the Treasury to make recommendations “for securing the faithful application of public moneys in the hands of public agents”—the very problem exposed by Rudd back in 1818—but it produced only the rather uninspired suggestion that the government retain only men of the highest character as public officials.<sup>50</sup> A little more than a year later, however, in the same month that the Supreme Court handed down its decision in the *Hennen* case, the House of Representatives passed a resolution requiring the clerks to keep a record of all the money they received as fees or “otherwise” and to forward that record to the Secretary of the Treasury. The Secretary, in turn, was “to lay before this house . . . the amount of compensation which has been received during this year.”<sup>51</sup> Aimed at preventing fraud in the administration of the federal courts, the resolution was the first attempt by Congress to subject the clerks' accounts to the scrutiny of an executive branch department.

## The Surplus Income Acts of 1841 and 1842

In 1841, Congress enacted a law that restricted the amount of fees and emoluments that could be retained by the clerks to \$4,500 and re-

49. The government did initiate a civil suit against Rudd to recover the embezzled funds, but the records of the House Judiciary Committee that investigated the matter do not reveal whether that suit was successful. Moreover, despite his participation in the affair, no impeachment charges were brought against Judge Van Ness. A list of nineteen Congressional investigations into the alleged misconduct of various public officials between 1815 and 1826 appears in Leonard D. White, *The Jeffersonians: A Study in Administrative History, 1801–1820* (New York: Macmillan, 1951), 99–100.

50. *Special Report of the Secretary of the Treasury to the House Judiciary Committee*, 30 November 1837, 25th Cong., 2d sess., H. Doc. 1.

51. House Resolution of January 28, 1839.

quired them to submit any surplus to the Treasury Department.<sup>52</sup> This measure represents a watershed in the history of the federal court clerk's office because it transformed the clerks into officers who collected money for the federal government as well as for themselves. It did not impose economic hardships on the clerks, however. In fact, the sum of \$4,500 was more than twice the income of the highest salaried "clerks" in the federal government at the time.<sup>53</sup> Moreover, as most of the district court clerks were also clerks of the circuit courts in their districts, they could still earn up to \$9,000 in fees and emoluments under the new statute—an extraordinary sum when one considers that the judges of the district courts were only earning between \$1,000 and \$3,000, and that the associate justices of the U.S. Supreme Court earned \$4,500.<sup>54</sup>

The following year, Congress reduced the income disparity between the clerks of the federal courts and other public officials by limiting the amount that each district and circuit court clerk was allowed to retain to \$3,500 and \$2,500, respectively. (The lower cap for circuit court clerks probably reflects Congress's realization that those courts had slightly less business than did the district courts, and that the same person was, in most cases, collecting fees for both courts anyway.) More significantly, the 1842 measure contained a reporting requirement that Congress hoped would make it easier for the Treasury Department to monitor the clerks' business. Specifically, the clerks were instructed to submit biannual returns to the Secretary of the Treasury "embracing all of the fees and emoluments of their respective

52. *Statutes at Large* 5 (1841): 427. The law also limited the clerks' reimbursable office expenses (exclusive of authorized deputy-clerk hire) to \$1,000 per year. *Id.*, 428.

53. *Report of the House Committee on Ways and Means, 1841*, "The Number, Classification, and Compensation of Clerks and Other Officers in the Government," in *General Records of the House of Representatives*, RG 233, National Archives, Washington, D.C.

54. Richard A. Posner, *The Federal Courts: Challenge and Reform* (Cambridge, MA: Harvard University Press, 1996), 336.

offices,” and to distinguish the fees earned in bankruptcy from those earned in all other cases.<sup>55</sup>

The statute produced a flurry of correspondence between the Treasury Department and the clerks, as the former sought to enforce the act against dilatory and noncomplying court officers. In 1843, for example, the clerk of the District Court for the Eastern District of Louisiana was instructed to transmit the return required by the Act given the Secretary’s apprehension that “the duty thus imposed had escaped your memory.” Other clerks received less polite correspondence, including A.A. Cowdrey, clerk of the District Court for the Eastern District of Virginia, who was told that “nothing can be lawfully paid you by the marshal” since “[t]here appear to be now *ten* semi-annual returns due from your office . . . .”<sup>56</sup>

In some cases, it was confusion rather than forgetfulness or recalcitrance that accounted for a clerk’s failure to adhere to the new reporting requirement. In 1847, the Secretary of the Treasury scolded the clerk of the Circuit Court for the Eastern District of Pennsylvania for submitting returns in an improper form. Two years later, the Secretary received a letter from one of the clerks of the district courts in Georgia indicating that the latter could not fulfill his obligations under

55. *Statutes at Large* 5 (1842): 483. The special interest expressed by Congress in the clerks’ bankruptcy fees reflects the prevailing concern that the Bankruptcy Act of 1841 was failing to achieve its purposes because a large percentage of the money sought to be distributed between creditors and debtors was winding up in the hands of individuals whose job it was to process the bankruptcy business. In fact, says one student of the history of bankruptcy in the United States in the pre-Civil War period, “court officials earned almost as much as creditors from the funds that bankruptcy courts distributed as a result of the 1841 Act.” Edward J. Balleisen, *Navigating Failure: Bankruptcy and Commercial Society in Antebellum America* (Chapel Hill: University of North Carolina Press, 2001), 138. Congress repealed the act within two years, but the repealing statute permitted all bankruptcy proceedings initiated under the previous law to proceed to termination, meaning that the clerks continued to earn fees from processing bankruptcy cases for several more years. *Statutes at Large* 5 (1843): 643.

56. Secretary of the Treasury to Jennings, February 9, 1843; Secretary of the Treasury to A.A. Cowdrey, (undated), 1849. *General Records of the Department of Treasury*, RG 56, National Archives, College Park, Md.

the Act because he had not been furnished with the proper paperwork.<sup>57</sup>

Most clerks did comply with the reporting requirements, and their reports (along with the correspondence they received from the Secretary of the Treasury regarding those reports) provide a sense of how much money the clerks were able to collect for the federal government and of what kind of expenses they bore. The clerk of the district court for the Southern District of New York reported “surplus emoluments” in the amount of \$3,949.92 for the half-year ending January 1, 1843, while the clerks of the district courts of Massachusetts and Maine for the same half-year period reported surpluses of \$3,155.86 and \$1,972.00, respectively. The latter clerk reported “office expenses” of only \$935.00, while William Brent, who was clerk of the Circuit Court for the District of Columbia, claimed to have expended \$2,161.00 during the first half of 1843 on the salaries of eight deputy clerks and a messenger, as well as “stationery blanks and fuel.”<sup>58</sup>

The collective amount of surplus fees and emoluments obtained by the Treasury Department from the clerks of the district and circuit courts under the terms of the acts passed in 1841 and 1842 may or may not have justified the costs of enacting and attempting to enforce those acts, but there was also a general concern during the 1840s that overreaching officials might compromise the public's respect for the federal government and its institutions. Thus the Treasury Department also conducted investigations to discern whether litigants in the federal courts were being overcharged by unscrupulous clerks. In May 1842, for example, the solicitor of the Treasury sent a set of “interrogatories” to each of the district and circuit court clerks seeking in-

57. Secretary of the Treasury to George Pitt, Esq., July 16, 1847, *ibid.*; W.H. [Hunt?] to the Secretary of the Treasury, June 14, 1849, *id.*

58. Secretary of the Treasury to Charles Betts, Esq., January 30, 1843 (referencing Bett's report), *ibid.*; Secretary of the Treasury to Francis Bassett, Esq., (undated), 1843, and John Mussey, Esq., March 14, 1843 (referencing their reports), *id.*; Draft of Brent's report to the Secretary of the Treasury, July 7, 1843, in the Papers of William Brent (hereinafter “Brent Papers”), Library of Congress, Manuscript Division, Washington, D.C.

formation about the manner in which fees were taxed and collected in the several courts and about whether there were abuses in the process. Among other questions, the clerks were asked about rates charged in their courts for services “actual or fictitious[!],” about fees for services “supposed to be performed, although in fact not so,” and about whether they ever collected “double fees”—those for services rendered once, “but charged for in several writs or process, as if severally performed on each.”<sup>59</sup>

There is no evidence that any clerk responded affirmatively to any of these questions, but Congress was so convinced that there were abuses built into the fee system that in August 1842 it authorized the Supreme Court to prescribe a schedule of fees that would apply to the clerks and to the other fee-earning officers of the federal courts.<sup>60</sup> The Court declined to exercise that authority, however, and the executive branch continued to monitor a system in which clerks around the country charged and collected amounts that were based on state court rates. In 1849, Congress transferred responsibility for monitoring the clerks’ business from the Department of the Treasury to the newly created Department of the Interior, but because the former issued checks to court officers for their expenses and their emoluments, its officers remained in contact with the clerks.<sup>61</sup>

59. *Circular from the Office of the Solicitor of the Treasury, May 11, 1842* (copy on file in the *Brent Papers*, folder marked “Ac 2222, 2268”). For a discussion of the general decline in public service ethics during the Jacksonian era, and the fears that this decline would cause the public to lose confidence in the federal government and its institutions, see Leonard D. White, *The Jacksonians: A Study in Administrative History* (New York: Macmillan, 1954), 411–36.

60. *Statutes at Large* 5 (1842): 518. The act specified that court fees “shall be fixed as low as they reasonably can be with a due regard to the nature of the duties and services which shall be performed by the various officers . . . , and shall in no case exceed the costs and expenses now authorized, where the same are provided for by existing laws.”

61. *Statutes at Large* 9 (1849): 395; *General Records of the Department of Treasury*, RG 56, National Archives, College Park, Md.

## The Fee Bill of 1853

Whether they corresponded with officials at the Department of Treasury or Interior, the clerks and their accounts were increasingly under scrutiny in the early 1850s. In his second annual message to Congress on December 2, 1851, President Millard Fillmore described the operation of the fee system in the federal courts as “the cause of much vexation, injustice and complaint.” Unlike some of the earlier efforts to address the problem, however, Fillmore’s solution did not involve enhanced scrutiny of the conduct of court officials, but rather “a thorough revision of the laws on the whole subject, and the adoption of a tariff of fees which, as far as practicable, should be uniform, and [should] prescribe a specific compensation for every service which the officer may be required to perform.”<sup>62</sup>

Congress had considered enacting a uniform schedule of fees in the early 1830s, but it declined to do so at that time.<sup>63</sup> The large increase in the size and expense of the federal judiciary by the 1850s magnified the problems associated with the fee system and revived the earlier campaign. According to a report of the House Committee on the Judiciary in 1852, “the expenses of [the federal] courts have increased three times as fast since the year 1800 and nearly twice as fast since the year 1830 as the population has increased.” Moreover, the report continued, “the whole tendency of the present analogous, discordant, and deficient system of taxing costs, partly under various state laws . . . is to encourage and increase abuses . . . and to increase expenses . . .” The impetus for reform was not purely a financial one, though. “It is important to the republic,” the committee concluded,

62. *A Compilation of the Messages and Papers of the Presidents*, ed. James D. Richardson (Washington, D.C.: Bureau of National Literature, 1911), 2666.

63. House Committee on the Judiciary, *Letter from the Secretary of the Treasury Transmitting a Report upon the Subject of Fees of District Attorneys and other Officers of the United States Courts*, 22d Cong., 2d sess., 1833, H. Doc. 148.

“that everything connected with the administration of justice, should be pure and honest beyond suspicion.”<sup>64</sup>

The following year Congress enacted a uniform schedule of fees for judicial officers in all cases brought in federal court (thereby doing for civil and criminal cases what it had already done for admiralty suits) and made it a misdemeanor for a clerk to collect fees beyond the value of those specified therein. In the same act, Congress reestablished the \$3,500 limit on the amount the clerks of the district courts were allowed to retain above expenses, and it raised the circuit court clerks' maximum compensation to the same amount. Finally, in recognition of the fact that certain federal courts had a very small volume of business, the fee bill provided that if any clerk should collect less than \$500 in fees during the year the Treasury would make up the difference.<sup>65</sup>

The Fee Bill of 1853 ensured that the rates for most of the services provided by the federal courts across the country were uniform, but it was hardly a panacea for the problems associated with the clerks and the fee system. Because the clerks continued to retain at least a portion of the fees they charged litigants in their courts, there was still an incentive for them to overcharge and to underreport their fees. This meant they were not always “pure and honest beyond suspicion.” Congress was so suspicious of the clerks' behavior under the fee system that in 1875 it required them to swear to the accuracy of their accounts before a judge of a district or circuit court prior to submitting those accounts to the Treasury for payment, and it raised the value of the bond each clerk was required to post before taking office to an amount between \$5,000 and \$20,000 (to be determined by the Attorney General). In the same statute, Congress took the extraordinary step of directing the President of the United States to remove any

64. House Committee on the Judiciary, *Federal Courts Fees & Costs*, 32d Cong., 1st sess., 1852, H. Rept. 50.

65. *Statutes at Large* 10 (1853): 161.

district or circuit court clerk who willfully refused or neglected his duties.<sup>66</sup>

It does not appear that any clerks were actually removed from office by the chief executive officer of the United States, but there were complaints about the degree of executive branch involvement with the administration of the federal courts even before the President was given this authority. In 1860, the district attorney in Massachusetts complained about what he called the “doctrine of Treasury infallibility,” according to which Treasury Department clerks “of the second or third class” were made “the final judge on the legal practise of all the Districts of the Union” by virtue of their authority to disallow the claims submitted by court officers for their emoluments. This particular court officer may have been motivated by a wish for a higher income, but he expressed his concerns in broader terms—as an anxiety about the effect of one branch of government controlling the affairs of another. “If the opinions and practice of the United States Courts in their sphere receive no respect on questions of fees by a coordinate branch of the government,” he asked the congressman to whom he wrote, “how can you expect public opinion to respect decisions which subordinates of the Treasury [Department] are not bound to follow[?]”<sup>67</sup>

In 1870, responsibility for supervising the accounts of federal judicial officers was vested with the newly established Department of Justice, which, under the leadership of a series of attorneys general, took a much more active role than had the Department of Interior or Treasury in monitoring the clerks’ business and in overseeing the day-to-day operations of clerks’ offices. Over the course of the next fifty years the clerks reported to, and were visited by, Justice Department “examiners” who continued to investigate the clerks’ alleged manipulation of the fee system. The clerks faced new challenges during this

66. *Statutes at Large* 18 (1875): 353.

67. Charles Woodbury to Rep. Miles Taylor, May 23, 1860, in the Papers of the House Judiciary Committee, 36th Cong., RG 233, National Archives, Washington, D.C.

period as well. Not only was there an important alteration made to the jurisdiction of the federal courts—an alteration that increased the workload of the clerks—but there was a fundamental restructuring of the federal judicial system that created new clerk positions while eliminating others. In response to these and other developments, the once autonomous clerks began to acquire a collective, and distinctly professional, identity.

## The Clerks and Court Reform, 1870–1919

The federal judicial landscape changed dramatically during the half century after 1870, as both the Justice Department and progressives in and out of Congress worked to enact reforms designed to make the federal courts function more efficiently and uniformly than they had in the past. The clerks, who were responsible for processing much of the federal courts' business, were both the direct objects of certain reforms (e.g., the requirement enacted by Congress in 1898 that the clerks forward all fees collected in naturalization cases to the Treasury Department) and the indirect objects of others (e.g., the expansion of the jurisdiction of the lower federal courts in 1875, the creation of a new tier of federal appellate courts in 1891, and the elimination of the old circuit courts in 1911). This section explores the circumstances giving rise to these reforms as well as the efforts by the clerks to prevent the enactment of the reforms that they perceived as having a detrimental impact on their role within the federal judicial system. This section concludes with a discussion of the clerks' support for one particular reform enacted in 1919—the elimination of the fee-based compensation scheme and its replacement by a government salary for each clerk of court.

### A Burlesque and a Sham: The Clerks and the Processing of the Federal Courts' Naturalization Business

In 1877, Attorney General Charles Devens told Congress that, in his opinion, the clerks of the federal courts were overpaid.<sup>68</sup> Reporting that these officers had received from the government a total of ap-

68. Under the terms of the statute creating the Department of Justice, the Attorney General was required to make an annual report to Congress of all of the business under his purview—business that included the operations of the federal courts in general and the clerks offices in particular. *Statutes at Large* 16 (1870): 164.

proximately \$95,000 for their official fees and per diems during the preceding fiscal year, he gave three reasons why this amount was higher than it needed to be. First, he noted that “[i]n some districts the same person is clerk of the district court and circuit court, and receives a maximum of \$7,000 after all expenses have been paid.” As the government “allows a liberal supply of deputy clerks for the labors of the office,” he maintained, “it is equitable to fix the maximum in such cases at \$5,000.” Second, he complained that in addition to the fees allowed by statute, “the clerk performs other work for which he makes charges and collects sums of which the department [of Justice] has no information,” and that “all earnings of the clerk should be accounted for . . . .” Finally, he protested the fact that “each clerk was permitted to hold a plurality of lucrative offices . . . thus multiplying his gains without official restraint, because his force of competent assistants can attend to the office while he is absent.”<sup>69</sup>

It was the second fact (that the clerks collected fees for items and services that did not appear on the Fee Bill of 1853) that drew the earliest and most sustained attention from the Attorney General’s office and from various members of Congress. Senator George Vest of Missouri was particularly indignant about what he described as the clerks’ practice of charging for the “copying of papers filed [in federal court] in a book styled ‘the final record.’”<sup>70</sup> However, it was the processing of successful naturalization petitions, for which the clerks typically earned up to \$3, that provoked the most ire.

Neither the Department of Treasury nor the Department of Interior had required the clerks to account for their naturalization business. In 1886, however, as the volume of immigration to the United

69. *Annual Report of the Attorney General of the United States for the Year 1877* (Washington, D.C.: Government Printing Office, 1877), 9. The third charge was based on the fact that the clerks were not only permitted to hold simultaneous clerkships, but were appointed, in many cases, to serve as examiners in patent cases, as masters in chancery, and as United States Commissioners. For the latter work, the report alleged, a clerk could earn “from one case as much as sixteen dollars in one day, and if he has more cases he may increase the amount to twenty-five dollars and upwards.” *Id.*

70. George Vest, *Congressional Record*, 47th Cong., 1st sess., 1881, 13, pt. 1:22.

States was increasing dramatically, the Department of Justice brought suit against Clement Hill, the clerk of the District Court for the District of Massachusetts, seeking recovery of his unreported naturalization fees. Such fees, it alleged, amounted to \$22,000. The government's position was that the clerks were required to report these fees under the express terms of Section 833 of the Revised Statutes, which instructed the clerks of the district and circuit courts to submit to the Attorney General biannual reports of the fees and emoluments of their office "of every name and character." The circuit court disagreed, however, and its decision to construe narrowly the terms of Section 833 was affirmed by the Supreme Court of the United States.<sup>71</sup>

In his opinion for the Court, Justice Samuel M. Blatchford praised the role of clerks in naturalization cases, describing their work as "being of great advantage to those seeking to be admitted as citizens," and as "saving the parties the expense of employing an attorney." He then noted that "until this suit was brought, [the non-reporting of naturalization fees] has never been called into question by any accounting officer of the government." Finally, he preserved the clerks' prerogative to not report certain fees, stating that "if a change in the practices should be thought desirable, it is obvious that it should be made by Congress . . ."<sup>72</sup>

The clerks' victory was short-lived, as Congress in 1898 required the clerks to "pay over [to the Treasury] all fees received by them for naturalization . . ."<sup>73</sup> This measure, in turn, was the product of extensive hearings conducted by the House Judiciary Committee earlier in the decade on the subject of the clerks' role in naturalization cases. The hearings were initiated at the prompting of Attorney General William W.H. Miller, whose continued investigation of the clerks of the federal courts of Massachusetts revealed that these officers were not simply administering the declaration of intention to become a citizen to the large number of immigrants streaming into the state, but were

71. *United States v. Hill*, 120 U.S. 169 (1887).

72. *Ibid.*, 180.

73. *Statutes at Large* 30 (1898): 317.

actually conferring citizenship rights on many of these immigrants—without so much as consulting the judges in whom Congress had vested this authority.<sup>74</sup>

Following several days of testimony by the judges, clerks, commissioners, and lawyers of the federal courts in Massachusetts, the committee concluded that the naturalization business conducted in those courts “was a burlesque and a sham.” More specifically, it found the clerks had taken it upon themselves to naturalize aliens “without any action of the court, and generally in the absence of a judge.” What was worse, (at least according to a Republican “Citizens Association” that testified before the committee) was that just before certain state or city elections were held, large numbers of Irish immigrants were brought before the clerks by “naturalization agents,” where, upon the payment of their fees to the clerk, they were quickly naturalized, thereby gaining the right to vote and giving the Democratic party in Boston a decided advantage.<sup>75</sup>

Congress was sufficiently disturbed by these revelations to enact a law requiring the clerks to report their naturalization business, thus eliminating the monetary incentive for a clerk to process that business without consulting the judge or judges of their courts. It did not, however, eliminate the clerks’ de facto authority to determine who became a citizen—an authority that they exercised under the terms of the Naturalization Act of 1790, which made only white persons eligible for naturalization.<sup>76</sup> Because they continued to dispense citizenship applications (if not the actual rights of citizenship) to immigrants seeking to be naturalized by a federal court, it was often the clerks’ judgment as to who was and was not “white” that determined whether a par-

74. There were so many people seeking to be naturalized at the time that the overburdened judges delegated this task to their clerks. But it is also the case that the clerks had an incentive to leave judges out of the process: the \$3 fee that the Supreme Court had said the clerks were not required to report.

75. *Report of the House Committee on the Judiciary on the Alleged Illegal Practices Connected with the United States Courts, and Abuse of Judicial Process* (21 July 1892), 52d Cong., 1st sess., 1892, H. Rept. 1966, 13–17.

76. *Statutes at Large* 1 (1790): 103.

ticular immigrant was even given such an application. Nor was this just an informal practice by the clerks. The Bureau of Naturalization instructed the clerks of the federal courts in the first decade of the twentieth century to inform persons who appeared to be “nonwhite” that their applications for naturalization might be turned down by the courts.<sup>77</sup>

Reflecting progressive-era concerns about professionalizing and rationalizing the administration of the federal courts, Justice Department examiners at the turn of the century reported a host of other problems emanating from the clerks' offices, including the following: excessive drinking; the use of inappropriate language; favoritism in awarding contracts for the printing of court records; improper involvement in various political activities; and even the commission of adultery by a clerk with the wife of one of his deputies. The department dealt with these problems on a case-by-case basis, as when it secured the resignation of the allegedly adulterous clerk, or when it instructed a clerk accused of being “discourteous” to his court's visi-

77. Joan M. Jensen, *Passage From India: Asian Indian Immigrants in North America* (New Haven, CT: Yale University Press 1988), 248. While it is impossible to document the number of potentially eligible immigrants who were turned away by federal court clerks because of clerks' judgments that they were “non-white,” the inherent difficulty of categorizing people by race suggests that the clerks of the federal courts have contributed to our nation's historically ambiguous immigration policy. In 1870, blacks became eligible for citizenship as well as whites, but it was not until 1952 that all official restrictions on immigration on the basis of race were lifted, thereby eliminating the clerks' discretionary function in naturalization cases. Ian F. Haney Lopez, *White By Law: The Legal Construction of Race* (New York: New York University Press, 1996), 46. The clerks' role in naturalization cases was further curtailed in 1991, when the authority to naturalize new citizens was transferred from the federal courts (where it had resided exclusively from 1906), to the Immigration and Naturalization Service. Under the terms of the Judicial Naturalization Ceremonies Amendments of 1991, however, the clerk's office is still responsible for scheduling and organizing naturalization ceremonies for citizenship candidates who have been approved by the INS and who have elected to participate in a court administered oath-taking ceremony. *Clerks Manual, United States District Courts* (Washington, D.C.: Administrative Office of the United States Courts, 1993), 17–6.

tors and a “menace” to its staff to control himself and to “reflect credit upon the court and government service.”<sup>78</sup>

While the Attorney General’s office focused on reforming the behavior of individual clerks and other court officials during this period, Congress made three important changes to the jurisdiction and structure of the federal judiciary, all of which affected the clerks. First, in 1875 it expanded the jurisdiction of the lower federal courts to include general federal questions, a measure that increased the number of writs, motions, orders, and judgments each of the clerks of these courts was required to record, as well as the number of litigants the clerks were required to assist.<sup>79</sup> Second, in 1891 Congress created nine intermediate courts of appeal (the “circuit courts of appeals”) in order to relieve the pressure on the dockets of both the old circuit courts and the Supreme Court of the United States. Finally, in 1911 it abolished the circuit courts altogether, along with the office of circuit court clerk. The clerks did not oppose the jurisdictional change, as it increased their opportunities to collect fees, but they lobbied with some success against the structural changes.

### Reform Delayed: The Clerks and the Restructuring of the Federal Judiciary, 1891–1912

On April 7, 1890, Representative John Rogers of Arkansas introduced a bill (H.R. 9014) that would have eliminated the circuit-riding responsibilities of the justices of the Supreme Court, established nine intermediate federal appellate courts, and fused the district and circuit courts into single courts of original jurisdiction.<sup>80</sup> Rogers’ bill passed

78. *Department of Justice Central Files*, “Card Index to Files on Federal Judges and Clerks of Court, 1889–1912,” RG 60, National Archives, College Park, Md.; Report of Justice Department Examiner C.R. Sherwood to Attorney General William H. Moody, May 8, 1905, *id.* (entry 112); Report of Justice Department Examiner A.P. Kesler to Attorney General George W. Wickersham, May 12, 1912, *id.*

79. *Statutes at Large* 18 (1875): 470.

80. *Congressional Record*, 51st Cong., 1st sess., 1890, 21, pt. 4:3402. By the time Rogers introduced this bill, the justices had been shirking their circuit-riding duties for decades, but the fact that there were sixty-seven judicial districts by 1890, and that

the House by an overwhelming majority (131 to 13), but it was the substitute bill proposed in the Senate that became the vehicle for the first major reorganization of the federal judicial system in almost a century.

Under the terms of this statute, known as the “Evarts Act” (named after its principal sponsor, Senator William Evarts of New York), nine intermediate federal appellate courts were created (one for each of the judicial circuits), along with nine new judgeships and nine new clerkships to administer those courts. Each “circuit court of appeals,” as the new courts were called, consisted of two circuit judges and a district judge.<sup>81</sup> While the appellate jurisdiction of the old circuit courts was transferred to these new tribunals, the circuit courts continued to operate as trial courts alongside the district courts for another twenty years.

The traditional explanation for the substitution of Evarts’ bill for that of Rogers and for the survival of the circuit courts is that there was deep bipartisan sentiment in favor of retaining the practice of circuit riding.<sup>82</sup> In their discussion of the history of the Evarts Act, Frankfurter and Landis describe its leading sponsors in the Senate as “extremists who still thought of the pioneer days when the Justices were active on circuit and thus, supposedly, kept the common touch.”<sup>83</sup> This explanation is insufficient, however, because it overlooks the role played by the clerks of the circuit courts, who perceived

an unprecedented number of new cases (623) were filed with the Supreme Court that year, made it virtually impossible for them to make the rounds that circuit riding required. Thus, the moment for reform had arrived.

81. *Statutes at Large* 26 (1891): 826.

82. There were multiple proposals during the 1860s, 1870s, and 1880s to abolish the circuit courts and establish an intermediate tier of federal appellate courts—so as to reduce or eliminate the circuit-riding responsibilities of the justices of the Supreme Court of the United States. Each of these proposals was defeated, however, by the efforts of traditionalists who viewed circuit riding as an essential aspect of the federal judicial system. For a discussion of these proposals, and of the alliances that formed to prevent them from becoming laws, see Frankfurter and Landis, *The Business of the Supreme Court*, 69–97.

83. Frankfurter and Landis, *The Business of the Supreme Court*, 100.

that the abolition of their courts would cost them their jobs, and the clerks of the district courts, who recognized that fusing the circuit and district courts would either increase their workload (in cases where there had previously been separate clerks for each court), or reduce their potential income from \$7,000 to \$3,500 (in cases where the district court clerk had also been the circuit court clerk).

Several of these clerks articulated their concerns to members of the Senate Judiciary Committee while that committee was considering the Rogers bill. Although they stopped short of pleading for the survival of the circuit courts, they indicated their displeasure with the financial repercussions of the bill. In so doing, they may well have convinced the committee members that the need to accommodate them on this score would reduce the savings presumed to result from the merging of those courts with the district courts. Noble G. Butler, who was clerk of both the district and circuit courts of Indiana, wrote to committee chairman George Edmunds of Vermont to express his discontent with Rogers' scheme: "The clerkship of the Circuit Court as it now exists, is abolished, and the whole clerical business of two courts is devolved on the clerk of the District Court, while he is left with the maximum compensation of a clerk of only one of them, which is \$3,500 per annum." This amount, he complained, "is not only the utmost that he can receive in nearly all districts, but he is prohibited by express statute, as well as by the character of his duties, from adding to his income by practicing law." In light of these factors, Butler urged the Senate to adopt an amendment (proposed by Senator David Turpie of Indiana) to the Rogers bill that would have allowed clerks in Butler's position to continue earning the \$7,000 in fees to which they had been entitled under the present system.<sup>84</sup>

84. Butler to Edmunds, April 29, 1890, *Records of the United States Senate*, RG 46, folder marked "H.R. 9014," National Archives, Washington, D.C. The letter was actually forwarded to Senator Edmunds by Senator Turpie himself, along with a note urging "favorable consideration of his views." Turpie to Edmunds (with enclosures), May 12, 1890, *id.*

Butler must have discussed the ramifications of the proposed judicial reorganization with some of his fellow clerks, because several of them wrote their own letters, to either Edmunds or one of his colleagues, in which the clerks referenced Butler's correspondence and urged the adoption of Senator Turpie's amendment.<sup>85</sup> Moreover, the clerks had powerful allies in their efforts to protect their access to the emoluments and fees of the imperiled circuit courts. The district and circuit judges of the Northern District of Ohio penned a joint letter to Edmunds in which they warned the senator that the abolition of the circuit court in their district (and its clerk's office) would "impose upon the District Court Clerk all the duties and responsibilities heretofore resting upon both clerks . . . If he is required to do double the work, and meet double the responsibilities heretofore resting upon him, he should have a corresponding compensation."<sup>86</sup>

Not surprisingly, as the Rogers bill was being discussed in the Senate, the reactions of clerks of merely one court were slightly different from those of clerks who held multiple posts. Walter Harsha, the clerk since 1882 of the Circuit Court for the Eastern District of Michigan, told Edmunds that in his view "the [Rogers] bill is a good one, [though] I confess . . . it will legislate me out of office." Harsha, as it turns out, was expecting to be named clerk of one of the new circuit courts of appeals, and he was therefore not interested in the fees to which the district court clerks would be entitled once the circuit courts were abolished. Instead, he lobbied Edmunds to raise the maximum compensation of the appellate court clerks to \$5,000.<sup>87</sup> Harsha lost this particular battle, as the clerks of the circuit courts of appeal were given a straight salary of \$3,000, but since the circuit courts were not abolished for another twenty years, he was not "legislated out of office" as he had predicted—at least not right away. In fact, he

85. See, e.g., letter from Clerk of the United States District and Circuit Courts for the District of Delaware, to George Edmunds, May 10, 1890, *id.*

86. Letter from Augustus J. Ricks (district court judge) and Howell E. Jackson (circuit court judge) to George F. Edmunds, April 30, 1890, *id.*

87. Harsha to Edmunds, April 19, 1890, *id.*

served simultaneously as the fee-earning clerk of the circuit court and the salary-earning clerk of the Court of Appeals for the Sixth Circuit from July 1891 until October 1894, when he resigned the salaried post.<sup>88</sup>

Congress, whether or not influenced by the clerks and the judges, retained the old circuit courts along with their fee-earning clerks when it established the circuit courts of appeals. Moreover, when Congress assigned the clerks of the new courts a salary of \$3,000, it did not seize this opportunity to transform the lower federal court clerks into salaried officers as well—a fact that probably reflects an unwillingness on the part of the legislature to disappoint or alienate these officials, or, for that matter, the judges who appointed them and defended their interests. The clerks were also exempted from an 1896 statute that placed the United States marshals and district attorneys on salary, but this exemption was not a function of the clerks' political influence. It appears, rather, that Congress was motivated by the assertions of the Attorney General that the fee-based compensation scheme for court officers was fostering the overzealous prosecution of criminal defendants—a problem that was more directly related to marshals and district attorneys than to clerks.<sup>89</sup>

The clerks were unsuccessful in their efforts to prevent enactment of the Judicial Code of 1911, which abolished the circuit courts and transferred their jurisdiction and pending business to the district

88. His resignation came three months after Congress had inserted a provision into the general appropriation act prohibiting any person who held a federal office for which the annual salary was over \$2,500 from holding any other income-producing federal office. *Statutes at Large* 28 (1894): 205. The details of this story were obtained from the text of a Supreme Court opinion holding that Harsha was entitled to the fees for services he had rendered in his capacity as circuit court clerk during the three-month period preceding his resignation from the higher court. (The government had taken the position that Harsha had vacated the fee-earning post during this period, but the Court disagreed.) *United States v. Harsha*, 172 U.S. 567 (1899).

89. *Statutes at Large* 29 (1896): 180; *Annual Report of the Attorney General of the United States for the Year 1895* (Washington, D.C.: Government Printing Office, 1895), 5–6.

courts.<sup>90</sup> The purpose of the measure was to eliminate the inefficiencies associated with administering two trial courts that were often presided over by the same judge, but as did all of the proposals to consolidate the circuit and district courts over the course of the previous half-century, the plan met with resistance from groups and individuals who venerated the old circuit courts and feared the impact of their disappearance from the federal judicial scene.<sup>91</sup>

Among these parties were the American Bar Association (which initially had supported the fusing of the two types of lower federal trial courts) and Representative W.G. Brantley of Georgia (who asked his colleagues to defer action on the measure in December 1910), but the clerks may have been the most vocal critics of the plan. Representative Reuben Moon of Pennsylvania alleged that “there was in existence . . . an organization of the circuit court clerks of this country to defeat this legislation simply because it deprives them of their positions,” while Senator Joseph Sherley of Kentucky claimed that it was “the circuit court clerks who are responsible for most of the antagonism that exists against this proposition.” Frankfurter and Landis were even less generous toward the clerks in their discussion of the debates leading up to the enactment of the Judicial Code of 1911, describing the clerks as “placemen whose clerical jobs were threatened.”<sup>92</sup> Despite the clerks’ antagonisms, the circuit courts were abolished and those “placemen” who were not already serving as district court clerks were left without

90. *Statutes at Large* 36 (1911): 1087.

91. Even some of those who supported consolidation of the lower federal trial courts expressed a preference for transforming the circuit courts into intermediate courts of appeal rather than abolishing them and creating new appellate courts out of whole cloth. See, e.g., the “Resolution of the Association of the Bar of the City of New York, February 5, 1901,” in the *Records of the Joint Committee of Congress*, RG 128, National Archives, Washington, D.C.

92. Brantley, *Congressional Record*, 61st Cong., 3d sess., 14 December 1910, 46, pt 1:298; Moon, *Congressional Record*, 61st Cong., 3d sess., 14 December 1910, 46, pt. 1:301; Sherley, *Congressional Record*, 61st Cong., 3d sess., 23 February 1911, 46, pt. 4:3219; Frankfurter and Landis, *The Business of the Supreme Court*, 133–34.

a post unless they were fortunate enough to be appointed clerk of one of the circuit courts of appeals.<sup>93</sup>

### We Are All American Citizens: The Clerks and the Salary Drive, 1911–1919

By the second decade of the twentieth century, it was no longer possible to justify the district court clerks' status as the only nonsalaried federal court officers. According to the report submitted to Congress by Attorney General George Wickersham in 1912, "serious irregularities" had been found in twenty-eight district court clerks' offices the previous year, almost all of which involved the improper collection of fees. Ten clerks had resigned after such irregularities had come to light; six had been indicted; and three were convicted and removed from office. Noting "the wisdom of putting [the clerks] on a salary basis," Wickersham concluded his report with a plea for "the passage of the bill to accomplish this purpose now pending before Congress."<sup>94</sup>

The bill to which the report referred was introduced in the House of Representatives on March 2, 1912, by Henry D. Clayton, chairman of the House Judiciary Committee. Under its terms as amended by a bill introduced during the first session of the succeeding Congress, the clerks were to turn over all of the fees of their office to the Department of the Treasury in exchange for a salary of somewhere between \$3,000 and \$4,500—depending on the volume of business in a particular court.<sup>95</sup> In August 1913, Senator George Chamberlain of Oregon underscored the need for such a measure, proclaiming that "the amount of fees and compensation allowed to the clerks of [the federal] courts

93. *Statutes at Large* 36 (1911): 1167.

94. *Annual Report of the Attorney General for the Year 1912* (Washington, D.C.: Government Printing Office, 1912), 52–53.

95. *Congressional Record*, 62d Cong., 2d sess., 1912, H.R. 21226, 48, pt. 3:2749; *Congressional Record*, 63d Cong., 1st sess., H.R. 8673, 50, pt. 6:5291 (also introduced by Representative Clayton).

is now so exorbitant that they are practically prohibitive and prevent a man of moderate means from litigating his cases in said courts . . . ”<sup>96</sup>

The Judiciary Committee reported favorably on the bill in December 1913, though it was more concerned, apparently, about the potential savings accruing to the Treasury than about reducing the costs of litigation. “The Government would be benefited by saving annually of many thousands of dollars,” the committee concluded, noting that “the fees collected from firms, individuals, and corporations will pay all the expenses of the clerks’ offices, including the salaries of deputy clerks, and still leave a substantial balance to be turned into the Treasury.”<sup>97</sup>

One would think that the clerks, from whose pockets those “many thousands of dollars” would come, would have been opposed to the measure. But E.M. Keatley, clerk of the District Court for the Southern District of West Virginia, testified in favor of the bill almost two years earlier while it was being considered by the House Judiciary Committee. Keatley, who had been designated the clerks’ representative by a group that convened in St. Louis after the passage of the Judicial Code in 1911, told the committee that he had “received letters from every clerk in the United States, and there are only a few who think we ought to remain on fees.” When reminded that the measure would “reduce the salaries of a great many of them,” he admitted that “after the passage of the judicial code the sentiment among the clerks was in favor of an increase in our emoluments, but it is legislation which to my mind, unquestionably ought to be passed.” Lest the clerks be left out of the great reforms sweeping over the country, or even worse, be viewed as opposing them, Keatley invoked the patriotism of the clerks he represented, telling the committee that they were willing to make the sacrifices that the salary system would entail because “we are all American citizens.” “There is a great reform being made in the courts,”

96. Resolution of Senator Chamberlain, *Congressional Record*, 63d Cong., 1st sess., 7 August 1913, 50, pt. 4:3170.

97. *Report of the House Committee on the Judiciary*, “Salaries of Clerks of United States District Courts,” 63d Cong., 2d sess., 11 December 1913, H. Rept. 131, 3.

he continued, “and all the clerks wanted [were] . . . salaries commensurate with the work and responsibilities of the position.”<sup>98</sup>

Despite the apparent willingness of the clerks to submit to the terms of the proposed salary bill in 1913, the Senate postponed further consideration of the measure until December 1917, when Senator Duncan Fletcher of Florida introduced a new bill to fix the clerks' compensation.<sup>99</sup> Once again the clerks sent representatives to testify, but this time it was Edwin Williams, clerk of the District Court for the Southern District of Florida, and William Tallman, first deputy clerk of the District Court for the Southern District of New York. Prior to his testimony before the Senate Judiciary Committee, Williams sent a letter to each of the district court clerks requesting them to “exhibit an interest in the bill by writing to each of the Congressmen and Senators from their respective states asking and urging their support.” Demonstrating his political savvy, Williams added a suggestion “that you impress upon your Representatives that the bill is not a salary grab, but is a measure to correct gross injustice done the clerks by the present system.”<sup>100</sup>

Apparently a few of the clerks wrote to their elected representatives to protest the measure because they felt “there is some discrimination in the salaries provided.”<sup>101</sup> Williams testified, nevertheless, that “I have had correspondence with almost every clerk in the United States on this Bill, and I have had I think, [only] two who objected to [it] . . . .” “The fee system is now almost universally regarded as ob-

98. *Hearings Before Special Subcommittee No. 5 of the House Committee on the Judiciary* (12 March 1912), 62d Cong., 2d sess..

99. *Congressional Record*, 65th Cong., 2d sess., 17 December 1917, 56, pt. 1:61. This bill (S. 3079) contained a broader range of salaries than Representative Clayton's bill, in recognition of the fact that some courts were much busier than others.

100. Williams to the Clerks, circular dated April 9, 1918. A copy of the letter received by Walter B. Maling, clerk of the District Court for the Northern District of California, was obtained from Michael Griffith, the archivist/historian of that court.

101. This, at least, was the recollection of Senator Wesley Jones of Washington, who told his fellow Senators that the clerks in his state felt that they would earn much less under the bill than the clerks in some other districts. *Congressional Record*, 65th Cong., 2d sess., 1918, 56, pt. 9:8616.

noxious and conducive to petty graft," he submitted, "and it is difficult to see why the clerks office, which is just as important a part of the judicial machinery, [as the marshals' and district attorneys' offices], should be continued on the pernicious fee basis." In a statement that indicates how the clerks' economic concerns were connected to their efforts to enhance their professional status, Williams said "[c]ourt officials more than any others should be relieved of having to depend for their compensation on the fees earned . . . The very word 'fee' is suggestive of petty graft, and certainly such a taint should not connect itself with an official of the court of justice."<sup>102</sup>

In his testimony, William Tallman emphasized just how unfair the present system was to the many clerks who either could not meet the expenses of their office or whose fees were "so irregular that [they] have had to wait long periods of time before they could get their own compensation." Lamenting that "the fee schedule which was adopted back in 1853 is practically the same [in 1918] as it was then," Tallman asked the committee to consider whether "the clerk and deputy clerks . . . of any federal court [should] not have fixed and determined salaries, upon which they can, with safety, depend for their compensation, instead of having that compensation be dependant upon the amount of business done by their offices, which fluctuates from year to year." Like Williams, however, Tallman did not limit his testimony to a statement of what economic relief the clerks were seeking. He wanted the committee to understand the importance of the clerks and their deputies to the federal judicial process, and he proclaimed that "their services are just as necessary as those of the judges in maintaining the courts."<sup>103</sup>

It is questionable whether many clerks would have favored a salary bill had the status quo before 1911 not been disturbed, but the fact is that their support for the measure was crucial to its passage by the

102. *Hearings Before the House Judiciary Committee on House Bill 8426*, "Fixing the Salary of the of the United States District Courts, etc.," 65th Cong., 2d sess., 10 April 1918; *id.*

103. *Ibid.*

House on February 17, 1919. The Salary Act of 1919 became a law a week later, and it vested the Attorney General with the authority to fix the clerks' salaries at an amount between \$2,500 and \$5,000.<sup>104</sup> Ironically, what was conceived by members of Congress and Justice Department officials as a measure to control the clerks was ultimately embraced by those court officers, as they eagerly exchanged their autonomy for a measure of security and a chance to rid themselves of the negative image they had acquired under the fee system. By the end of the second decade of the twentieth century, the clerks of the federal courts were forging a group identity and learning to advance their own interests by connecting those interests to the public good. During the 1920s, in fact, the leaders of the salary drive would work to forge even closer ties between the clerks' offices scattered throughout the country and to make the cause of more efficient judicial administration their own.

104. *Statutes at Large* 40 (1919): 1182. The act also permitted the clerks to be reimbursed up to \$4 per day for traveling expenses and for all necessary office expenses including the cost of hiring deputies.

## Toward a More Efficient and Independent Judiciary: The Federal Court Clerks Association, The Judicial Conference, and the Administrative Office of the U.S. Courts, 1919–1969

The passage of the Salary Act of 1919 coincided with the emergence of a new era in federal judicial administration—an era in which control over many aspects of the business of the district courts shifted from executive branch departments to the judges of the circuit courts of appeals and to newly created agencies and organizations within the judicial branch. The act itself subjected the appointment of district court clerks to the approval of the senior circuit judge for the circuit in which the district was situated.<sup>105</sup> This provision was repealed two years later, but the clerks and their offices were greatly affected by the new institutions of federal judicial administration that emerged over the course of the next fifty years. This section integrates the history of the federal court clerks office with the more well-known story of the emergence of the Conference of Senior Circuit Judges (known eventually as the Judicial Conference) and the Administrative Office of the U.S. Courts.<sup>106</sup> This section also emphasizes the degree to which these entities increased the administrative burdens placed on the clerks while assisting them with their efforts to improve the judicial process and to achieve better working conditions.

105. *Statutes at Large* 40 (1919): 1182. The clerks were to be appointed by the district judge for each district, however, or by the senior district judge if there were more than one district judge.

106. Peter Graham Fish, *The Politics of Federal Judicial Administration* (Princeton, NJ: Princeton University Press, 1973); Henry P. Chandler, “Some Major Advances in the Federal Judicial System, 1922–1947,” *Federal Rules Decisions* 31 (1963).

## The Federal Court Clerks Association

The annual Conference of Senior Circuit Judges met for the first time in December 1922, but a less heralded milestone in the history of court administration occurred earlier that same year, when a group of fifteen federal court clerks and deputy clerks assembled in Washington, D.C., to form the Federal Court Clerks Association (FCCA).<sup>107</sup> It may well have been the economic implications of the Judicial Code of 1911 and the salary act of 1919 that first impressed upon the clerks the need for some kind of national organization to pursue their common interests, but the founders of the FCCA were determined to put the clerks' offices at the forefront of the campaign to promote the more efficient administration of the federal courts. According to its Articles of Association, the FCCA had six "objects": 1) "to assist its members in rendering the best service as clerks in the administration of justice in the United States Courts"; 2) "to foster harmonious relations and to promote helpful co-operation between the offices of clerks of the United States Courts and the Government Departments"; 3) "to establish uniformity of practice and procedure in the Courts of the several Circuits and Districts"; 4) "to encourage the adoption of standard and simplified systems of accounting and office methods"; 5) "to maintain a high standard of integrity, honor, and courtesy in all their relations"; and 6) "to cherish the spirit of brotherhood among members of the Association."<sup>108</sup>

After electing George Brodbeck, clerk of the District Court for the Eastern District of Pennsylvania, to be president of their group, the members of the FCCA resolved unanimously to use "all proper and necessary means" to recommend some very specific "changes in existing practice and procedure" in the federal courts. These recommendations included amending the Supreme Court's rules to provide for the recording of minutes and orders in equity in a single volume in-

107. The group included E.M. Keatley, William Tallman, and Edwin Williams, all of whom had mobilized in 1919 to rid the clerks' offices of the stain associated with the fee-based compensation system.

108. *Articles of Association of the Federal Court Clerks Association*, July 8, 1922.

stead of in separate equity journals and order books, and eliminating the need for district court judges to physically sign orders admitting or denying admission to citizenship. There were a few more ambitious proposals, however, including the clerks' call for the "[f]ixing [of] a flat filing fee in all law, equity, admiralty, and criminal cases."<sup>109</sup>

At the time, litigants who brought suit in federal court were required to deposit between \$15 and \$25 with the court (depending on the jurisdiction), and as the case progressed the clerk would deduct various amounts from this deposit based on the schedule of fees contained in section 28 of the Judicial Code (which was an updated version of the old Fee Bill of 1853). While not every district required defendants to give a deposit once issue was joined, they too would be taxed for the services they received under section 28. The system created an immense amount of bookkeeping for the clerks, whose job it was to keep track of all deposits and assessments, as well as a good deal of confusion for litigants and lawyers seeking to keep track of their court costs. To rectify these problems, the FCCA recommended legislation in early 1924 to replace this system with one comprised of four basic charges: 1) a \$5 'filing fee' paid by the complainant at the institution of a suit; 2) a \$5 fee when issue was joined (paid by either the plaintiff or the defendant pursuant to local rules adopted by each district court); 3) another \$5 fee when a judgment was entered; and 4) a \$5 fee if, and when, an appeal was taken.<sup>110</sup>

George Brodbeck testified before the Senate Judiciary Committee in March 1924, and he was quick to emphasize that the clerks' bill was not intended to increase or decrease the total amount of fees collected from litigants in the courts of the United States, but to "simplify the work in the clerk's offices" and to make court costs more "understandable to members of the bar who practice in the federal courts." "Under the present system," he said, "it was impossible for attorneys, unless they go to a clerks office, to find out what has been charged

109. *Ibid.*

110. *A Bill to Provide Fees to be Charged by the Clerks of the District Court of the United States*, 68th Cong., 1st sess., 1924, S. 2173.

...” He reiterated these points before the House Judiciary Committee two weeks later, and he submitted for inclusion in the record a copy of a letter he had received from Attorney General Harry Daugherty in October 1922 in which Daugherty praised the FCCA for its “unselfish desire to promote the administration of justice in the United States . . . .”<sup>111</sup> Congress enacted the substance of the clerks’ proposal on February 11, 1925.<sup>112</sup>

The flat fee bill was neither the first nor the last measure that the clerks championed successfully through their national organization. Four days earlier, in fact, Congress eliminated the requirement that the federal courts maintain records of judgment creditors after hearing testimony from Brodbeck that there was no substantial demand for such information. In 1926, the FCCA secured passage of a measure designed to reduce the administrative burdens on federal court judges in naturalization cases,<sup>113</sup> and in 1942 it lobbied successfully for a revision of the flat fee bill that it had worked to enact back in 1925.<sup>114</sup>

111. *Hearings Before the Senate Judiciary Committee*, “Statement of Mr. George Brodbeck, clerk of the United States District Court for the Eastern District of Pennsylvania,” 68th Cong., 1st sess. 25 March 1924, 3; *Hearings Before the House Judiciary Committee*, “Statement of Mr. George Brodbeck, Clerk, United States District Court, Philadelphia, Pa.,” 68th Cong., 1st sess., 10 April 1924, 1–5.

112. *Statutes at Large* 43 (1925): 857.

113. *Statutes at Large* 43 (1925): 813; “Statement of George Brodbeck Before the Senate Subcommittee on the Judiciary on S. 2176” (25 March 1924), 68th Cong., 1st sess.; *Statutes at Large* 44 (1926): 709.

114. Under the revised system, instead of a series of \$5 charges being levied at various moments as a case progressed, the only filing fees were \$15 charged to the plaintiff at the outset of a case and \$5 charged to any party taking an appeal. A Judicial Conference committee recommended the measure at the behest of the clerks, and Congress enacted it a short time thereafter. *Reports to the Judicial Conference, 1942*, Agenda Item #19: “Report of the Committee . . . on Flat Fee Systems for the Clerks of the Circuit Courts of Appeals and the District Courts”; *Statutes at Large* 58 (1942): 743. The organization was not always successful in its lobbying efforts. In 1956, for example, it attempted but failed to effect a transfer of the responsibility for disbursing funds appropriated for the operation of the federal courts from the marshals’ offices (where that responsibility had resided traditionally) to the clerks’. *Reports to the Judi-*

## The Conference of Senior Circuit Judges and the Emergence of the Clerk-Statistician

The act establishing the Conference of Senior Circuit Judges increased the clerks' responsibilities for judicial administration. In an effort to assure that the conference had the statistical information it needed to formulate recommendations for the temporary assignment of federal judges, Congress required the senior judge of each district court to submit an annual report of the judicial business in his district to each senior circuit judge. The report was to include "the number and character of cases on the docket, the business in arrears, and cases disposed of, . . . together with recommendations as to the need of additional judicial assistance for the disposal of business for the year ensuing."<sup>115</sup> This provision did not mention the word "clerks," but it was obvious that the task of actually assembling the data that Congress required to be placed before the conference each year would devolve upon the administrative officers of the district courts—those individuals who had the responsibility for maintaining the docket books.

Clerks such as O.C. Fuller of the District Court for the Northern District of Georgia used their statistical reports as an opportunity to lobby judges for better-compensated deputy clerks, while others made specific suggestions as to how the conduct of the judicial business could be improved. G.H. Marsh, the clerk of the District Court for the District of Oregon, wrote to the judge of that court to recommend that changes be made to the form adopted by the Supreme Court as the required notice to creditors under the terms of Bankruptcy Act of 1898. His suggestions, he claimed, would enable the clerks' offices to

*cial Conference, March 1956, Agenda Item #1: "Report of the Committee on Supporting Personnel and the Committee on Court Administration."*

115. *Statutes at Large* 42 (1922): 838. Each of the annual reports of the Attorney General after 1875 provided some information about the federal judicial business, but Frankfurter and Landis complained as late as 1925 that the information in these reports was "not enough," and that "we [will not] be able to know how our courts function until an effective system of judicial statistics becomes part of our tradition." *The Business of the Supreme Court*, 52, n. 174.

more easily process these forms and would make it easier for the creditors themselves to understand the notices. Two months earlier, I. Wade Coffman, clerk of the District Court for the Northern District of West Virginia, complained to the senior judge of the Fourth Circuit that the district attorney in Coffman's court was disfavored by the judge and by members of the bar and the public, and that unless the district attorney was removed "there would be no improvement in the condition of the judicial business, nor of the unsavory reputation of the department of justice in this district . . . ." Coffman then suggested a list of qualifications to be met by a replacement.<sup>116</sup>

It does not appear that any of these specific proposals were adopted, but the mere fact that the clerks of the district courts were keeping track of the speed with which federal trial court judges were handling their caseloads, and that those findings were presented to the Conference of Senior Circuit Judges and to the Attorney General (who attended but was not a member of the conference), was an incentive for those judges to pick up the pace of their work. The senior judge for the Third Circuit, for example, who had sent a notice to each of the clerks of the district courts in his circuit stating that he wanted a report on the volume of undecided cases in those courts, reported to Chief Justice Hughes that "I have found that this delicate matter of keeping the work of the District Judges promptly disposed of has been very successfully met by this plan, and I believe without any offence to the several Judges of the court."<sup>117</sup>

Other judges were less pleased about having their performance monitored by the conference. One complained that the "obsession of ultra regulation that afflicts Washington has at last invaded the Supreme Court," while another confessed that "I am at a loss to under-

116. Fuller to Hon. Samuel H. Sibley, May 1, 1925; G.H. Marsh to Hon. Charles E. Wolverson, May 26, 1925; Coffman to Hon. Charles A. Woods, March 27, 1925. "Records Relating to Judicial Conference Meetings from 1922-1958," *Records of the Administrative Office of the United States Courts*, RG 116, National Archives, Washington, D.C.

117. Hon. Joseph Buffington to Charles Evans Hughes, September 20, 1932, *ibid.*

stand why this [reporting] should be required . . . .”<sup>118</sup> Overall, however, any dissatisfaction on the part of federal district court judges with their clerks’ new role as data collectors for the senior circuit judges was outweighed by their loyalty to those clerks—a loyalty that revealed itself in efforts to praise their performance to the jurists attending the conference and in efforts to secure for them larger salaries and better working conditions.<sup>119</sup>

### Cogs in the Machine: The Clerks and the Administrative Office of the United States Courts

In an unsigned memorandum to the Judicial Conference written by one of the judges of the Court of Appeals for the Fourth Circuit in 1932, the author urged the conferees to take action to wrest authority over court personnel away from the Attorney General:

The situation is as follows: the court both historically and by reason of its power to appoint and remove has power to direct the clerk what to do and how, when, and where it should be done. The Department of Justice has or claims to have some general but undefined power of control over the clerk by reason of the authority given to fix salaries. This situation should not exist. There should not be di-

118. These judges are quoted, anonymously, in Henry P. Chandler, “Some Major Advances in the Federal Judicial System 1922–1947,” *Federal Rules Decisions* 31 (1963), 335.

119. In 1922, for example, judge Samuel Sibley of the Northern District of Georgia wrote to Richard W. Walker, the senior judge for the Fifth Circuit, to inform him that in his court “the clerks frequently work overtime, take very little holiday during the year . . . and often have to work on Sundays.” “Such a situation is wrong,” he continued, “and really cannot be prolonged indefinitely.” Judge Walker then reported to the conference that a recent statute authorizing the Department of Justice to fix the salaries of federal court clerks at amounts between \$2,500 and \$5,000 “had resulted in a cheese-paring policy which had cut down on the already too low salaries.” Sibley to Walker, January 16, 1922, in *Records of the Administrative Office of the United States Courts*, RG 116, National Archives, Washington, D.C.; Notes of December 28, 1922, meeting of the Conference of Senior Circuit Judges, *ibid.*

vided authority—the clerks should not be subject to the order of two masters.<sup>120</sup>

Some federal judges resisted all forms of centralized oversight of the personnel or operations of their courts, but most just wanted their own administrative agency, one that was knowledgeable about and attentive to the particular concerns of the federal judiciary. Throughout the 1930s, the establishment of such an agency was on the agenda of the Conference of Senior Circuit Judges. In 1939, Congress finally adopted its recommendation, establishing the Administrative Office of the United States Courts and giving it responsibility for supervising most of the nonjudicial operations of the federal courts.<sup>121</sup> The Administrative Office Act also established “circuit councils” composed of the judges of the courts of appeals in each circuit, and vested those councils with the authority to ensure the effective and expeditious transaction of the business of the district courts.<sup>122</sup>

The law creating the Administrative Office enjoyed virtually unanimous support from members of Congress, state and national bar associations, the legal-academic community, and the Attorney General himself, but the transfer of supervisory powers to the Administrative Office from the Department of Justice was a slow and uneven process. The Department of Justice continued to play a role in the collection of judicial statistics until July 1941, and it was not until the mid-1970s that the Judicial Conference requested its Committee on the Budget to secure appropriations to enable the Administrative Office to commence and discharge the periodic field examinations of the clerks' offices.<sup>123</sup> Nevertheless, with the establishment of the Administrative Office the clerks were made cogs in what one knowledgeable com-

120. “Memorandum as to Clerk's Office and His Salary and Expenses,” *ibid.*

121. *Statutes at Large* 53 (1939): 1223. For an account of the hostility of federal judges towards the administrative intrusions of the Department of Justice in the 1920s and 1930s, see Fish, *The Politics of Judicial Administration*, 91–98.

122. *Statutes at Large* 53 (1939): 1224.

123. *Annual Report of the Proceedings of the Judicial Conference of the United States*, held at Washington, D.C., April 5–6, 1973 (Washington, D.C.: Government Printing Office, 1973), 50.

mentator called the “New Machinery for Effective Administration of the Federal Courts.”<sup>124</sup>

To operate and service that machinery, the Administrative Office was organized into two divisions: the Division of Business Administration and the Division of Procedural Studies and Statistics. While the clerks were to assist the latter division with obtaining information requested by the Judicial Conference (such as statistics about the pendency of cases on the dockets of the federal courts), they had more day-to-day contact with the former, which was responsible for auditing the clerks' accounts and assisting them with personnel issues. The clerks' interactions with both divisions, however, were shaped by the federal judicial docket.

Between 1934 and 1939, the number of new civil and criminal case filings in the federal district courts remained relatively constant, but the backlog of cases on the dockets of those courts was actually decreasing because of an increase of more than 22% in the number of federal judges.<sup>125</sup> Nevertheless, it was becoming difficult for a clerk and a single deputy to handle all of the administrative work of a federal court because the larger number of judges augmented clerks' procurement and calendaring responsibilities. At the same time, the increasing complexity of some of the civil cases being filed in the federal courts raised the number of pleadings, motions, notices, and other paperwork for which the clerks were responsible, placing additional strains on them. These developments led to an increase in the number of personnel in the clerks' offices during the late 1930s and to a division of labor within each of those offices.

124. Will Shaffroth, *American Bar Association Journal* (September 1939), 738–41. Shaffroth was the chief of the Administrative Office's Division of Procedural Studies and Statistics at the time he wrote the article.

125. *Annual Report of the Director of the Administrative Office of the United States Courts, 1940* (Washington, D.C.: Government Printing Office, 1940), 41. In 1935 there were 134 sitting district court judges; by 1940 that number had risen to 164. Richard A. Posner, *The Federal Courts: Challenge and Reform* (Cambridge, Mass.: Harvard University Press, 1996), 397.

In 1940, Congress passed the Ramspeck Act, authorizing the President to extend the classified civil service system to a number of previously unprotected government employees, including deputy marshals.<sup>126</sup> The act did not apply, however, to the more than 1,000 federal court employees working in the clerks' offices, most of whom were deputies hired to perform discrete functions such as sending notices to creditors in bankruptcy, processing naturalization applications, assembling juries, or attending the judge during court.<sup>127</sup> The exclusion of these personnel from the Ramspeck Act reflected the determination of those who supported the creation of the Administrative Office a year earlier to keep the administration of the judicial branch separate from that of the executive branch. It also left federal court clerks and their deputies without the kind of job security afforded by a merit-based job classification system.

In September 1941, Henry P. Chandler, the first director of the Administrative Office, acknowledged that "the establishment of standards [for judicial branch employees] like the civil-service standards applicable to the executive offices would be conducive to a more efficient personnel" and would allay concerns expressed by both clerks and their deputies that they might lose their jobs "without fault on their part . . . ." He wondered, however, whether there was "a practicable means of establishing [such a system] without any infringement on the judicial independence and control by the courts of their own officers and employees."<sup>128</sup> The following year, the Committee to Consider [the] Desirability of Extending the Merit System to Cover Personnel of Clerks' Offices, chaired by Judge Calvert Magruder of the First Judicial Circuit, reported that there "is no reason why the subordinate personnel of the clerks' offices should be denied [civil service]

126. *Statutes at Large* 54 (1940): 1211.

127. *Annual Report of the Proceedings of the Judicial Conference of Senior Circuit Judges, held at Washington, DC, October 1-4, 1940* (Government Printing Office, 1940), 26.

128. *Reports to the Judicial Conference, September, 1941*, Agenda Item #23: "The Question of Bringing the Personnel of the Clerks' Offices, Except the Clerks, Under a Civil Service System."

security.” In recognition of the “confidential relationship” that clerks and chief deputies maintained with their judges, however, it recommended excluding them from civil service classification.<sup>129</sup>

Neither the clerks nor their chief deputies were accorded any kind of civil service protections, nor would it have been possible for Congress to have done so without first revoking a provision of the Administrative Office Act that reserved to federal judges the right to appoint their own administrative or clerical personnel.<sup>130</sup> The Administrative Office did, however, issue minimum qualification standards for clerks and chief deputy clerks. In his report to the Judicial Conference in 1965, Warren Olney III (who succeeded Henry Chandler as director of the Administrative Office in 1958) suggested that a minimum of ten years of administrative or professional experience in public service or business would be an appropriate amount of preparation for the job of court clerk. He added that a college or university education could be substituted for a maximum of three years of such experience. He also listed fourteen recommended “personal characteristics,” including “an understanding of, and allegiance to, the judicial process,” “an understanding of the principles of organization and management,” and “the capacity for assuming responsibility for work performed by others.”<sup>131</sup>

The Administrative Office did not possess the authority to impose these suggestions on the judges of the federal courts, but it was able to persuade the Judicial Conference to grant periodic salary increases for the clerks and to adopt a three-tiered salary structure that made each

129. *Reports to the Judicial Conference, September, 1942*. In their minority report to the committee, several judges took an even stronger stance against the proposal to dilute their autonomy in selecting their chief administrators: “The safest method is to trust the self-interest of the judges and the clerks to make the selections best suited to their situation,” they claimed, noting that “some of the important duties of the clerk’s office call for qualities entirely dependent upon personality.” “Minority Report by Judge Stone, in which Judges Sibley and St. Sure Concur,” *Reports to the Judicial Conference, September, 1942*.

130. *Statutes at Large* 53 (1939): 1223, § 304(1).

131. *Reports to the Judicial Conference, March 1965*, Agenda Item #11: “Qualification Standards for Clerks of Court.”

district court clerk's income dependent on whether his or her district was classified as "large," "medium," or "small."<sup>132</sup> The Administrative Office also devised the Judicial Salary Plan in 1961, which established grade levels and compensation categories, education and qualification standards, and duty and responsibility statements for the subordinate personnel of the clerks offices and for probation officers and district court referees.<sup>133</sup> In the view of the judges who adopted the plan, "it provid[ed] for increases in compensation for increased efficiency on the job," but did "not violate the principle of judicial autonomy."<sup>134</sup>

While the clerks certainly benefited as a group from having an institutional advocate within the judicial branch, the Administrative Office also provided individual clerks with the resources to test and implement new methods for processing the business of the federal courts. In 1948, for example, Harry M. Hull, clerk of the District Court for the District of Columbia, experimented with microfilm—a new method of preserving the judgments and orders issuing from his court. In December of that year, Hull reported to the judge of his court that the microfilming system was "effectuat[ing] almost unbelievable economy," estimating that the cost of using the new system would be "less than one dollar for every twenty five dollars now spent in providing the civil order and minute records," and speculating that the switch to microfilm would release at least three deputy clerks engaged in record keeping for other duties.<sup>135</sup> He then wrote to Elmore Whitehurst, assistant director of the Administrative Office, to say that "I am thoroughly converted to the use of microfilming in the place of civil

132. The first mention of such a scheme appears in the "Report of the Committee on Supporting Personnel," *Reports to the Judicial Conference, March 1956*.

133. Peter Graham Fish, *The Politics of Federal Judicial Administration*, 221–22. The Judicial Salary Plan was implemented in 1964.

134. *Report of the Proceedings of the Judicial Conference of the United States, 1961* (Washington, D.C.: Government Printing Office, 1962), 127.

135. A copy of the letter from Hull to Judge Letts, dated December 6, 1948, appears in *Reports to the Judicial Conference, March 1949*, as part of Agenda Item #6: "The Microfilm Method of Preserving Records in the Office of the Clerk of the District Court for the District of Columbia."

order books and minutes, and feel that its adoption should be provided at the earliest possible date.”<sup>136</sup>

In 1949, at the behest of the Administrative Office, the Judicial Conference began authorizing other clerks to adopt Hull's system. Within a few years, eighteen district court clerks were microfilming current records. This was only one aspect of the clerks' efforts to improve record-keeping practices. By 1954, eighty-five clerks had replaced their bound docket books with a loose-leaf docketing system that enabled old material to be discarded; fifty-six were employing a card-indexing system (thereby making it easier to find and retrieve various records); and most had availed themselves of the authority under the Federal Records Act of 1950 to transfer the custody of substantial quantities of old records to federal records centers (thus saving valuable space in federal courthouses across the country).<sup>137</sup>

Despite these new efficiencies in performing one of their primary tasks, the clerks and their staffs were overburdened by the mid-1950s. Civil and criminal case filings in the district courts increased by 71% and 25%, respectively, between 1940 and 1954, while the total number of personnel in the clerks' offices increased only 11% during that period, from 1,029 to 1,145. “Too many . . . members of the clerks office staffs are habitually working overtime and on holidays in order to keep up with the business,” the Judicial Conference reported, “[and] the strain is excessive.”<sup>138</sup> In its effort to reduce this strain, the Administrative Office requested and received authorization from Congress for several increases in personnel in the clerks' offices over the next few years. Between 1959 and 1962, moreover, it commissioned and/or conducted surveys of several clerks' offices in order to “review and analyze methods, systems, procedures, and paper flow . . . to determine possible areas for management improvement [and to] provide

136. Hull to Whitehurst, December 7, 1948, *ibid.*

137. *Annual Report of the Proceedings of the Judicial Conference of the United States, September 22–24, 1954* (Washington, D.C.: Government Printing Office, 1955), 61.

138. *Ibid.*, 63

a prototype against which other clerks could compare their own organization and methods.”<sup>139</sup>

In 1960, the survey of the office of the clerk of the District Court for the District of New Jersey disclosed twenty-nine core clerk functions. A few of these functions, such as “preparing payrolls for judges, referees, jurors, and supporting personnel of the courts,” “preparing and maintaining statistical information . . . ,” and “processing applications for passports” would have been beyond the scope of the work performed by earlier generations of court clerks. But most clerks, even in the late-eighteenth century, would have been quite familiar with tasks such as “advising and assisting attorneys,” “drafting judgments and orders,” “collecting required fees and maintaining appropriate accounts and records,” and “administering the selection of grand and petit jurors.”<sup>140</sup>

Despite these fundamental similarities in the nature of the clerks’ tasks, a clerk’s office in the mid-twentieth century was a much different place than its eighteenth, nineteenth, and early-twentieth century analogues. Not only was it assisted by a central agency created to deal specifically with the administration of the federal courts, but it was populated by an increasingly large number of employees who were needed to handle the huge volume of cases the federal courts processed. The clerks themselves, moreover, were expected to perform a variety of nonjudicial functions, such as preparing budgets, maintaining modern accounting systems, and providing for the storage of an expanding volume of court records.

There was some concern expressed by and to members of the Judicial Conference in the late 1960s that a clerk-centered administrative apparatus inherited from the late-eighteenth century was insufficient to meet the administrative needs of the twentieth century federal judi-

139. Peter Graham Fish, *The Politics of Federal Judicial Administration*, 220 (quoting *The Annual Report of the Judicial Conference 1961*, 129).

140. *A Factual Study of the Office of the Clerk of the United States District Court for the District of New Jersey, 1960* (on file with the Federal Judicial History Office, Federal Judicial Center).

ciary. At the fall 1966 meeting of the Conference, Judge David L. Bazelon of the U.S. Court of Appeals for the District of Columbia emphasized the need to establish review and inspection units within the Administrative Office, “because of the increased volume and complexity of the work of the clerks of the U.S. Courts.” Two years later, the comptroller general of the United States (who was responsible for auditing the accounts of clerks) issued a statement to the Judicial Conference Committee on Court Administration in which he described the need to review the operations of the clerks’ offices as “particularly pressing” because, he claimed, “in many courts, a single clerk acts as certifying, disbursing and collection officer.”<sup>141</sup>

These concerns coincided with the emergence of two new players on the scene of federal judicial administration: The Federal Judicial Center, an organization established by Congress in 1967 to be the research and education agency for the federal courts, and a group of regionally based court managers known as “circuit executives.” The clerks certainly benefited from the training and educational tools the Center provided the clerks’ offices over the next three-and-a-half decades.<sup>142</sup> The clerks were opposed, however, to the act creating the new court managers and to efforts by members of Congress and individuals

141. *Report of the Proceedings of the Judicial Conference of the United States, September 22–23, 1966*, 37; *Reports to the Judicial Conference, September 1968*, “Exhibit C.”

142. A detailed description of the Federal Judicial Center’s clerk and deputy-clerk programs is beyond the scope of this study, but it is clear that the focus of those programs has changed over time. When the Center hosted its first conference for district court clerks in 1969, for example, it provided training and instruction on a variety of topics, including office organization, docket control, the uniform application of rules, the efficient selection and use of jurors, automation, and the administration of multidistrict litigation. *Second Annual Report of the Federal Judicial Center to the Judicial Conference of the United States, October 1, 1969*, 12–13. Not only has the Center eschewed such conferences in favor of on-site programs delivered to clerks office personnel via closed circuit television (the Federal Judicial Television Network), but since the mid-1970s the Center has fostered the decentralization of federal judicial administration by offering management training seminars to the clerks and by providing them with a selection of educational tools to enable them to develop and implement their own training programs.

within the judicial branch to install separate administrators at the district court level.

## The Emergence of the Court Executive, 1970–1981

An upsurge in appellate filings in the mid-1960s caused delays in the processing of civil and criminal cases in the courts of appeals and led to calls for a new administrative apparatus to reduce such delays. Speaking at the Harvard Law School a few months after the creation of the Federal Judicial Center in 1967, Chief Justice Earl Warren questioned whether clerks of court (who, he claimed, “still operate as they have throughout our history”) were equipped to manage the besieged courts, and he queried whether “some other system is best geared to serve the needs of the bench and bar and thus assure better administration of justice.”<sup>143</sup>

One solution, recommended by the Judicial Conference in February 1968, was to provide the chief judge of each judicial circuit with an administrative assistant.<sup>144</sup> In a speech before the American Law Institute in May, however, Warren called for the appointment of a different kind of administrator, one that had more comprehensive duties and, as a result, one that many clerks of court would come to perceive as a threat to their role in federal judicial administration. Proclaiming that the “need for administrative assistance goes far beyond the needs of the chief judge of the courts of appeals to the need of the circuit councils,” Warren advocated the appointment of administrators who, under the direction of those councils, would provide assistance to all of the federal courts within each judicial circuit. Such administrators should be trained in the science of business management, Warren argued, and they should be given responsibility for calendar control, the administration of court reporters, the discipline and

143. Earl Warren, “The Administration of the Courts,” Address at the Sesquicentennial Banquet of the Harvard Law School (September 23, 1967), *Judicature* 51 (1968): 196.

144. *Annual Report of the Proceedings of the Judicial Conference of the United States* (February 1968), 31.

supervision of court personnel, the operation of the jury system, and the payment of court-appointed counsel. In addition to performing these functions more efficiently than did the clerks, Warren maintained, the new administrators would free the clerks to focus on the traditional functions of their office—record keeping and the screening of pleadings and other filings.<sup>145</sup>

In July 1968, a subcommittee of the Senate Judiciary Committee conducted hearings on “A Bill to Provide for the Appointment of an Administrator of the Courts for Each Judicial Circuit.”<sup>146</sup> Ernest Friesen Jr., the third director of the Administrative Office, testified in support of the bill. After urging that the proposed administrators be referred to as “court executives,” Friesen described the administrators’ role as “advis[ing] the clerks of the courts, as a management consultant, on matters regarding office management, records management, calendar practices and jury selection.”<sup>147</sup> Joseph Tydings, the chairman of the Senate Judiciary Committee, expressed two related concerns about the bill: 1) that the clerks of the courts of appeals and the district courts in each circuit would resent the presence of the proposed administrators; and 2) that its purpose (improved efficiency in judicial administration) might be achieved more economically by “upgrading the clerks office” rather than by creating new positions.<sup>148</sup>

Friesen sought to allay these concerns by emphasizing that “court management is a separate function” from the fundamental task of a court clerk, one requiring “special qualifications and ability.” He emphasized that the court executive would be “a counselor to [the] clerk,” and that the court executive’s presence would “not diminish the importance of the clerks of the courts and their very important task in managing the procedures of the court.” Friesen also informed Tydings and the other subcommittee members that he did not favor

145. The text of Warren’s speech is reprinted in *Hearings Before the Subcommittee on Improvements in Judicial Machinery*, Senate Committee on the Judiciary, 90th Cong., 2d sess., 292–99 (25 July 1968).

146. Hearings on S. 3062, July 1968, 90th Cong., 2d sess.

147. Statement of Friesen, *ibid.*

148. Statement of Tydings, *ibid.*

giving enhanced authority over court administration to his own agency rather than to court executives, because “the need is not for a centralized expertise acting as a critical force from far off Washington but for a manager close to the operations and thoroughly familiar with the tasks of all the participants in the judicial process.”<sup>149</sup>

Convinced of the need for more decentralized administrative oversight of the operations of the federal courts, but still concerned about potential conflicts between the clerks and the proposed new instruments of that oversight, Tydings introduced another bill during the next session of Congress. The bill directed each of the eleven circuit councils to appoint a “circuit executive” and to supervise each executive’s performance of the following duties: exercising administrative control over all of the nonjudicial activities of the court of appeals for the circuit; formulating and administering a system of personnel administration for all of the federal courts in that circuit; preparing the budget and maintaining a modern accounting system; devising and executing a space-management program; compiling statistical data relating to the business and administration of the courts within the circuit; preparing appropriate recommendations and reports to the circuit council and the Judicial Conference based on those data; establishing procedures for calling jurors; and representing the circuit in its dealings with government agencies and with the Administrative Office.<sup>150</sup>

Despite this attempt to delineate and thereby circumscribe the circuit executives’ responsibilities, the clerks and their representatives opposed Tydings’ bill. Richard Peck and Lewis Orgel, the president and vice president of the FCCA, respectively, appeared before a House subcommittee on November 5, 1969, and urged the subcommittee members to issue a report recommending that Congress decline to establish the position of circuit executive and that it confine the search for better court administration “to the reservoir of [clerks] already laboring in the vineyards, and possessed of a wealth of knowledge of

149. *Ibid.*

150. S. 1509, 91st Cong., 1st sess.

what actually makes the system run well or very poorly.” They also recommended that the clerk’s office be renamed the “court executive’s office,” that the clerks be made “directors” thereof, and that their compensation be increased to the amount proposed for each of the court executives under the Tydings bill.<sup>151</sup>

Notwithstanding its efforts, the FCCA’s leadership was unable to effect an upgrading of the clerk’s office or to prevent passage of the Circuit Executive Act in 1971, as the legislation received important support from Warren Burger, Earl Warren’s successor as Chief Justice.<sup>152</sup> Nor was it likely that the judges of the courts of appeals would be able to appoint their own clerks to the new positions. The act established a five-member Board of Certification to develop qualification standards for circuit executives, and it required each candidate to be screened and certified by the board prior to becoming eligible for appointment.<sup>153</sup>

By the close of fiscal year 1972, circuit executives had been either installed or selected in all but three of the judicial circuits, but the Circuit Executive Act did not have the effect on judicial administration that some of its sponsors had hoped. Despite considerable evidence in the legislative history that the proponents of the act intended

151. *Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary* (November 5, 1969), “Statement of Richard C. Peck, President, Federal Court Clerk’s Association; Accompanied by Lewis Orgel, Vice President.” To buttress their position, Peck and Orgel dwelled on some of the recent accomplishments of the clerks acting in an administrative capacity, such as their role in implementing computers into the process of selecting and compensating jurors, *id.*

152. *Statutes at Large* 84 (1971): 1907. An excellent account of the events leading to the passage of the act, including Burger’s lobbying efforts, appears in John T. McDermott and Steven Flanders, *The Impact of the Circuit Executive Act* (Federal Judicial Center, 1979), vii–31. Not only did Burger call for a corps of trained administrators to relieve federal judges of their extrajudicial burdens, but his efforts, along with those of the American Bar Association, led to the establishment in 1970 of a place where such court administrators could be trained: the Institute for Court Management. Philip L. Dubois, “Court Executives for the Federal Trial Courts: Learning From the Circuit Executive Experience,” *The Justice System Journal* 7 (1982): 182.

153. *Statutes at Large* 84 (1971): 1908.

the circuit executives to assist with the administration of all of the courts within a judicial circuit (including the district courts), in most circuits these administrators became what one district judge called “circuit court of appeals executives,” or what another referred to as “super law clerks to the chief judge of the court of appeals.”<sup>154</sup> One explanation for the limited role played by circuit executives in the administration of the district courts is the hostility of many district court judges towards the incursion of the councils and the circuit executives into the affairs of their courts, and their perception that their clerks could handle those affairs.<sup>155</sup>

By the mid-1970s, district court clerks were, in fact, spending more and more time managing personnel and attending to other business that did not relate to their traditional document-screening and record-keeping functions. Despite the absence of other administrators at the local level, however, these clerks did not go unsupervised or unassisted. In fact, the Administrative Office and the Judicial Conference were devoting more time and resources to making sure that the clerks’ offices were run according to the latest management techniques. In 1975, the Administrative Office’s Division of Administrative Services established “manpower standards” for the office of the clerk of court based on the volume of filings and “filing equivalents” (work that was not common to all courts), and it completed a work-measurement survey of twenty-eight clerks offices that it used to de-

154. McDermott and Flanders, *The Impact of the Circuit Executive Act*, 152 (citing the opinions of two district court judges on the subject).

155. According to a survey conducted in 1992, over 60% of federal district court judges supported eliminating appellate court supervision of the district courts and increasing the administrative responsibilities of the clerks of those courts. *Planning for the Future: Results of a 1992 Federal Judicial Center Survey of United States Judges* (Federal Judicial Center, 1994), 34. One study of the Circuit Executive Act offers a different explanation for the relative lack of involvement by circuit executives in the affairs of the district courts: under the terms of the act, the executives’ authority was largely derivative of the circuit councils’, which that study says was only indirectly related to the affairs of the district courts. McDermott and Flanders, *The Impact of the Circuit Executive Act*, 17.

velop performance standards for the clerks and their deputies.<sup>156</sup> Later that year, the Administrative Office established a “Clerk’s Division” to, among other things, “provide technical assistance on design, testing, and implementation of systems used to accomplish the work of the clerks and to measure the effectiveness of these systems”; “review proposals of Congress and the Judicial Conference with potential impact on the clerks offices [and] make recommendations thereon”; and “serve as a clearinghouse for information concerning services available to clerks of court from units of the Administrative Office and other sources.”<sup>157</sup>

In September 1977, the Judicial Conference adopted a “Mission Statement for the Office of the Clerk” that contained a detailed list of the management functions of the modern clerk. The statement had grown out of a report submitted by a group of clerks at the annual meeting of the Conference of Metropolitan District Court Judges in 1974. By drawing attention to the fact that the job of the court clerk required much more than an understanding of the federal judicial process and local rules of court, the statement represented an effort on the clerks’ part to raise their status and, presumably, their salaries. Ironically, though, insofar as it depicted the clerks as having little time for such traditional functions as record keeping and the screening of pleadings and other motions, the statement helped to revitalize the campaign of the previous decade to transfer certain responsibilities from clerks to administrators who were trained in the science of business management.

Once again, Warren Burger assumed a leading part in the effort to diminish the role of the clerks in judicial administration.<sup>158</sup> Unlike his

156. *Annual Report of the Director of the Administrative Office of the United States Courts for the Fiscal Year Ended June 30, 1975*, 107, 128.

157. *Ibid.*, 108.

158. Burger had, in fact, called for the circuit councils to take a more active role in the affairs of the district courts as early as 1957 while he was a judge of the U.S. Court of Appeals for the District of Columbia Circuit. Burger, “Courts on Trial” (speech delivered at N.Y.U. School of Law, December 6, 1957), reprinted in *Federal Rules Decisions* 22 (1958), 71–93.

earlier campaign to secure passage of the Circuit Executive Act, this one involved an attempt to install district court executives in selected judicial districts—an even greater threat to the status and autonomy of district court clerks than were the circuit executives.<sup>159</sup> Receiving an endorsement of his initiative from the Judicial Conference of the United States, the Chief Justice instructed the director of the Administrative Office to amend the appropriation request of the federal judiciary for the fiscal year 1981 to provide for the appointment of a district court executive to each of the fifteen metropolitan district courts containing ten or more judges.<sup>160</sup>

The plan to establish district executives offices was opposed by both judges and clerks of the district courts. The judges objected to the requirement that each district executive be selected from a list of candidates published by the Board of Certification established under the Circuit Executive Act on the grounds that such a requirement would deprive judges of their traditional authority to determine who administered the business of their courts. The clerks, meanwhile, were concerned about the possibility that their salary grade (which had been set at the highest level by the Judicial Conference in September 1978) would be lowered to reflect the transfer of certain responsibilities to the district executives.<sup>161</sup>

The clerks had less selfish reasons for opposing the establishment of district court executives offices as well. These reasons were presented to the congressional appropriations subcommittees, not by the FCCA but by Angelo Locascio, the clerk of the District Court for the District of New Jersey (because the FCCA had recently acquired tax-exempt status—necessitating its transformation from a lobbying organization into one focused primarily on providing education to its

159. Dubois, "Court Executives for the Federal Trial Courts," 182–83. In October 1979, in a speech at the semiannual meeting of the Conference of Metropolitan District Chief Judges, Burger urged the appointment of district court executives as a partial solution to the problem of delays in the district courts. Burger, *The Third Branch* (November 1979): 8.

160. Dubois, "Court Executives for the Federal Trial Courts," 182–83.

161. *Ibid.*, 186.

members).<sup>162</sup> District court executives would become an “unnecessary, costly, additional layer of authority,” Locascio argued, telling the subcommittees that he was already responsible for all of the duties and functions proposed for the court executive and that “most of these same duties are delegated and are being performed by incumbent clerks of court in other Metropolitan [sic] courts.” To the degree that some clerks were not carrying out all of the functions listed on the clerks’ mission statement, he added, the fault lay with the lack of hiring standards, a shortage of staff in certain clerks’ offices, and the unwillingness of some judges to delegate certain administrative tasks to anyone at all.<sup>163</sup>

The House Committee on Appropriations declined, at first, to approve the request for district court executives, noting in its report that there was “a possible conflict of duties with the respective clerks of court.”<sup>164</sup> After a committee appointed by Justice Burger defined more specifically the duties and responsibilities of the district executives in an effort to prevent such a conflict, the Senate Appropriations Committee restored the cuts made in the House. In the spring of 1981, Congress finally approved a budget that included money for district court executives offices in the following districts: the Eastern and Southern Districts of New York, the Eastern District of Michigan, the Central District of California, and the Southern District of Florida. Not only was this a smaller appropriation than Burger sought, but there was no authorizing legislation accompanying the funding, which

162. More recently, as the Federal Judicial Center has assumed the task of training clerks and deputy clerks, the FCCA has become primarily a social organization, fostering the “spirit of brotherhood” through its annual conferences.

163. Statement by Angelo Locascio, Senate Appropriations Subcommittee Hearings, 1980: 424–39 (quoted in Dubois, 185). Six years earlier, Locascio spoke to a group of newly appointed federal judges, and he urged them to rely on their clerks for a broad range of administrative services. Locascio, “The Judge and Clerk of Court,” *Seminars for Newly Appointed United States District Judges* (West Publishing Co., 1974), 179–241.

164. *House Appropriations Committee Report 96-1091*, 1980, 38 (quoted in Dubois, 186).

meant that the five offices were established as mere pilot programs in the district courts that hosted them.<sup>165</sup>

A sixth district court executive's office was established in the Northern District of Georgia in 1983, but less than a decade later only it and the offices in the Eastern and Southern Districts of New York remained in operation. No attempt has been made, as yet, to study the reasons why the district court executive concept has never progressed from a pilot program to a fully entrenched institution of judicial administration, or why the scope of that program has actually been narrowed, rather than expanded, but it is likely that the clerks' determination to maintain their traditional role as the chief regional administrators of the federal judicial system has been a contributing factor.

165. Dubois, 187.

## Court Administration in the Information Age: The Automated Clerk's Office

The fact that the vast majority of district court clerks in the early 1990s were not sharing their responsibilities for judicial administration with court executives did not mean that those clerks were handling the tasks of court management on their own. They were assisted, rather, by computers and other technological innovations that were helping them to meet the demands of the late-twentieth century litigation explosion.

The computerization of the clerks' offices began in the late 1960s and early 1970s with the introduction of a local court-management information system known as "COURTRAN." The system featured centralized hardware facilities and standardized software applications that were designed to assist the clerks with caseflow management, data management, and even opinion transmission, and it marked a dramatic change in the nature of the clerks' record keeping, jury selection, calendaring, and docketing practices. COURTRAN was eventually phased out of the federal judicial system in favor of more decentralized computing systems, but this development only enhanced the clerks' role in administering court business, as they became responsible for choosing and implementing those systems.

The introduction of new technologies continued in the 1990s with the development of an electronic public access server known as PACER that changed the way the clerks' offices interacted with the public. Introduced as a pilot program in selected courts in 1989, PACER allowed users to obtain case and docket information from federal appellate, district, and bankruptcy courts without visiting the clerks' offices of those courts. By 1994, it was available in forty-two of the ninety-four district courts and seventy-one of the ninety-four bankruptcy courts. Coupled with the emergence of an electronic case filing system developed by the Administrative Office in the late 1990s that enabled litigants and their lawyers to file and respond to pleadings

via the Internet, PACER not only made the federal courts and their records more accessible to the public, but it reduced the clerks' historic role as liaison between the public and the judiciary.

This is not to say that the federal court clerks are in danger of being replaced by machines. If anything, the turn to automated filing, record-keeping, and information-retrieval systems in the federal courts requires a staff of computer-savvy administrators, and the clerks have had to hire and supervise that staff while mastering new technologies as they become available. According to a recent report on the administrative structures of the lower federal courts conducted by the National Academy of Public Administration ("NAPA") at the behest of the Administrative Office, "automation was by far the area with the most staff devoted to it" in those courts. The same report classified the district court clerk's office as one among five principle "court units" within the lower federal judicial system (the others are the bankruptcy clerk's office, the probation office, the pretrial services office, and, where applicable, the district court executive's office). The report also attributed to the court clerk a vital role in assisting the other "unit heads" with their administrative responsibilities. In fact, after documenting the emergence of a new model of administration characterized by the sharing of administrative services among these five court units, the report concluded that among these unit heads the "district clerks were most likely to be service providers [rather than recipients]."166

While it is perhaps too early to tell whether the clerks of the federal district courts will continue to function as the major providers of services and support to the other units of court administration, or whether those units will seek and obtain some form of administrative independence from those clerks, it is clear that from a historical perspective the clerks have provided an invaluable service to both the federal judiciary as an institution and to the litigants, lawyers, and judges who have relied on them for a broad range of services. During the course of over two centuries, the profile of the district court clerks

166. NAPA Report, Executive Summary, November 17, 2000.

may have changed dramatically, as have the terms and conditions of their employment, but the essential role of those clerks as the processors of the courts' business, as the fee-collectors for the U.S. Treasury with respect to that business, and as the institutional memory of our common-law-based judicial system has remained constant. Moreover, while the clerks are now assisted by a host of specialized deputies, it is the clerks themselves who remain responsible for ensuring that the pleadings, motions, and other documents submitted to the federal courts are in the proper form for consideration by the judges of those courts, and that those documents, along with the courts' orders and judgments, are stored so that they can become part of the nation's official public record.

## Chronology

1789: In the Judiciary Act of September 24, Congress authorized the Supreme Court and each of the district courts to appoint a clerk to “enter and record the orders, decrees, judgments and proceedings of the said court(s) . . . .” Each district court clerk was to serve also as the clerk of the corresponding circuit court and was required to post a bond in anticipation of the collection of fees, which would be the source of the clerks’ compensation.

1839: The Supreme Court declared in *Ex Parte Hennen* (13 Pet. 225) that the clerks of the federal courts served at the pleasure of the judges of those courts and that a district court judge did not need to obtain the approval of the circuit court justice when appointing or removing the clerk. The following month Congress authorized separate clerks for each of the circuit courts, and each clerk was to be appointed jointly by the district court judge and the corresponding circuit justice.

1841: Congress required the clerks to submit fees collected in excess of \$4,500 to the Treasury Department.

1842: Congress required the clerks to submit biannual reports of their fees to the Secretary of the Treasury.

1849: Authority for supervising the accounts of clerks and other court officers was transferred from the Department of the Treasury to the Department of the Interior.

1853: Congress enacted a uniform schedule of fees for the services of all federal judicial officers.

**1869:** Congress authorized the appointment of a circuit judge for each of the nine judicial circuits and granted each of those judges the authority to appoint a clerk.

**1870:** Authority for supervising the accounts of clerks and other court officers was transferred from the Department of the Interior to the Attorney General.

**1891:** Congress established courts of appeals within each of the nine judicial circuits and authorized each of the new courts to appoint a clerk, who would receive a fixed salary.

**1911:** Congress abolished the circuit courts (along with the position of circuit court clerk) and directed that all the records of those courts be transferred to the clerks of the district courts.

**1919:** Congress placed the clerks on salary, ending their reliance on fees for compensation.

**1922:** Fifteen clerks and deputy clerks met in Washington, D.C., to establish the Federal Court Clerks Association.

**1939:** The Administrative Office of the United States Courts was established. The agency assumed primary responsibility for supervising and assisting the clerks.

**1969:** The Federal Judicial Center sponsored its first district court clerks conference.

**1971:** Congress authorized the appointment of a “circuit executive” in each judicial circuit.

**1981:** Inauguration of District Court Executive Pilot Program. District court executives are installed in five metropolitan judicial districts.

## A Note on Sources for Additional Research at the National Archives

It is hoped that this history of the federal court clerk's office as a national institution will both stimulate and support studies of individual clerks and the role of clerks in individual courts. These closer studies will rely on information obtained from courthouses, historical societies, and other depositories of local history, as well as the abundance of material in both the regional and main branches of the National Archives and Records Administration. The regional branches contain the *Records of District Courts of the United States* (Record Group 21), and each subgroup therein contains, among other things, the minute books, case files, docket books, and other documents maintained by the clerks of those courts and the corresponding circuit courts. Those materials were not consulted in the preparation of this report, but a list of the regional branches and their holdings, as well as a summary of each subgroup within Record Group 21, is available in the *Guide to Federal Records in the National Archives of the United States*, which can be viewed on-line at [www.nara.gov](http://www.nara.gov).

Extensive research for this study was conducted at the main branches of the National Archives, which are in Washington, D.C. (NARA I), and College Park, Maryland (NARA II), so a more particular description of materials at those locations bearing on the subject of court administration at the local level is provided below. The following is a list of relevant record groups, entry numbers, and microfilm rolls (where applicable), along with a brief description of their contents. NARA II contains the records of the Departments of State, Treasury, Interior, and Justice, all of which had, at some point, responsibilities for supervising the conduct and accounts of federal court clerks across the country, while NARA I houses the records of the Supreme Court of the United States (for those interested in the clerk's office of that particular tribunal), as well as the records of the Administrative Office, in which can be found correspondence between the

clerks and various agents of judicial administration within the judicial branch both before and after the creation of the AO in 1939.

*Records of the Office of the Clerk of the Supreme Court* (Record Group 267)

General Correspondence, 1791–1941; Letters to and from the Justices, 1791–1940; Subject File, 1800–1910; Correspondence re: the Administrative Office, 1939–1942; Records re: Printing and Binding, 1865–1954; Scrapbooks, 1880–1935; Fee Books, 1818–1934; Fee Bonds, 1832–1889; Day Book, 1898–1926; Correspondence re: Clerks' Accounts.

*Records of the Administrative Office of the United States Courts* (Record Group 116)

*Entry 1*: General Judicial District Administrative Files, 1899–1936 (14 Boxes); *Entry 4*: Records Relating to Judicial Conference Meetings, 1922–1958 (83 Boxes); *Entry 5*: Records Relating to Judicial Conference Committees, 1941–1957 (31 Boxes).

*Records of the Department of State* (Record Group 59)

*Entry 158, Box 1*: Bankruptcy Returns of District Court Clerks, 1845–1846, arranged alphabetically by state; *Entry 160*: Letters Transmitting Copyrights 1831–1834; *National Archives Microcopy Publications, Roll M179*: Calendar of Miscellaneous Letters Received by the Department of State from the Organization of the Government to 1820.

*Records of the Department of Treasury* (Record Group 56)

*Entry 19*: Letters Sent to Members of the Judiciary, 1833–1878 (8 volumes), arranged chronologically, and thereunder by name of addressee and subject; *Entry 87*: Correspondence re: Judges, Marshals, and Clerks, 1829–1833 (1 volume), arranged by judicial district; *Entry 88*: Letters Received from Judges, Marshals, Clerks, etc., 1833–1848 (6 volumes), arranged by judicial district; *Entry 140*: Letters Received

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from Judges, Marshals, Clerks, etc., 1829–1899 (16 boxes), arranged chronologically, and thereunder by state.

*Records of the Solicitor of the Treasury* (Record Group 206)

*Entry 42*: Letters Received from District Attorneys, Marshals, and Clerks of Court, 1821–1929; *Entry 169*: Miscellaneous Records, 1791–1934, Accounts of District Attorneys and Clerks, 1853–1857.

*Records of the Department of the Interior* (Record Group 48)

*Entry 107*: Register of Letters Received re: Judiciary; *Entry 190*: Letters Sent Concerning Judiciary, 1854–1869 (42 volumes), arranged chronologically, and thereunder by state and addressee.

*Records of the Department of Justice* (Record Group 60)

*Entry 87*: Letters Sent to Judges and Clerks 1874–1904 (34 volumes), arranged chronologically, and thereunder by name of state or territory (also available on microfilm as part of the *National Archives Microfilm Publications, Roll 703*); *Entry 58*: Letters Received re: Judiciary Accounts, 1849–1889, arranged alphabetically by state, thereunder by judicial district, and thereunder chronologically; *Entry 69*: Card Index to Files on Federal Judges and Clerks of Court, 1889–1912 (these cards refer researchers to the actual files on the judges and clerks for this period, which are contained in entries 72 and 112).

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## **About the Federal Judicial Center**

The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

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The Director's Office is responsible for the Center's overall management and its relations with other organizations. Its Systems Innovation & Development Office provides technical support for Center education and research. Communications Policy & Design edits, produces, and distributes all Center print and electronic publications, operates the Federal Judicial Television Network, and through the Information Services Office maintains a specialized library collection of materials on judicial administration.

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