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The Integration of Judicial Independence and Judicial Administration

The Role of Collegiality in Court Governance

By R. Dale Lefever

Introduction

As Chief Justice Warren E. Burger stated, “There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function. But it is quite another matter to say that each judge in a complex system shall be the absolute ruler of his manner of conducting judicial business . . . Can each judge be an absolute monarch and yet have a complex judicial system function efficiently?”¹

If we accept the rhetorical nature of the question, then the appropriate answer is “no, they cannot.” Independent of the logic of this conclusion, however, there continues to be a dynamic tension between judicial officers and those responsible for the administration of the court over what judicial independence can and should mean as it relates to the effective and efficient administration of justice. The intent of this article is to examine the impact of judicial independence on court administration and to propose a model of governance, under the label of collegiality, which arguably strengthens both judicial independence and management efficiency.

As a starting point, it is important to recognize every organization has a culture — a set of values and traditions that influences areas such as policy development, decision making, resource allocation, and organizational communications.² In most organizations, this culture is established and reinforced by those in key leadership positions as they convey their vision and goals for what they believe the organization should become and do, and then delegate the responsibility for achieving these goals to their subordinates.

In the classic professions of law, medicine, and religion, however, those in leadership not only define the vision, determine the goals, and set the policies for achieving them, they also are the ones who have the primary responsibility to deliver the core services prescribed. For example, in medicine, physicians not only serve as policy makers and hold formal roles such as department chairs and service chiefs, they also provide the clinical care within the scope of the policies they themselves set for providing such care. In religious organizations, the clergy not only cast the vision for their congregation, they also teach their “flocks” the theology and model the lifestyles required for living out this vision within the church and the various communities served. Similarly, in the judicial system, the judges, through their local governance process, determine the administrative policies and then proceed to deliver the justice services defined in these policies. In essence, judges determine both the ends and the means of their work and expect to have the authority and autonomy to do both along the lines of their personal judicial philosophy and preferences.

It is this exercise of personal autonomy, along with the relative absence of a management hierarchy, that creates a special set of challenges for chief judges and court managers (i.e., generic terms for judges and administrators in formal leadership positions) as they seek to integrate the needs of judges for autonomy with the needs of the court for administrative coherence. In fact, it is not too extreme to suggest that one of the most difficult, and most important, roles of court leaders is to manage these equally important but competing values.

One approach for satisfying the constructive application of each value

is to create an explicit court governance model — one that respects the independence of each judge to render independent case decisions, recognizes the importance of the role of the chief judge, and engages all the judges in the judicial administration process. This model, and the challenges involved in achieving it, will be described below.

Three Models

Basically, there are three forms of “self-governance” active within the typical trial court: (1) a model based on rights, which requires the exercise of personal power; (2) a model based on administrative rules, which requires the exercise of authority; and (3) a model based on relationships, which requires the exercise of collegiality. It is understood these are ideal types and unlikely to be applied in their pure form in any given court or across every issue. For example, judges likely will promote the model based on rights in debates over case management issues but yield to the authority of the chief judge regarding court budget issues.

It also is important to note many judges are not conscious of the actual governance model in place and would be ready to discuss alternatives if the opportunity was available and the desire to change was shared by their colleagues. The following analysis is designed to promote and guide such discussions and to encourage the judiciary to assess their current model, along with alternatives, against the standard of how well it contributes to the effective and efficient administration of justice.

Model Based on Individual Rights

The first option (i.e., a model based on rights) is not unique to the courts. As mentioned above, physicians, clergy, and most academic faculty members have a strong sense of individual discretion and “academic freedom.” There are two special features within the courts, however, which make this model especially relevant to the work of judicial administration. The first is the way each judge comes to hold his or her judicial position, and the second is the way in which the constitutional form of judicial independence is interpreted and applied to administrative affairs.

The way a judge assumes office is a critical factor in any discussion of court governance. Regardless of whether a judge is elected, appointed, or appointed and then retained in an unopposed election, the selection of a new judge most often results from the choice of a person or group external to the court in which they will serve. For example, the chief judge does not, as do senior executives in other organizations, create a position description, note the preferred qualities, interview, along with other judges, the top candidates, and ultimately select the next judge. More accurately, the chief judge wakes up one morning and reads whom the governor appointed, the state legislature selected, or the citizens elected. Each new judge, therefore, initially enters the organization of the court with her or his own sense of legitimacy apart from the court in which they will function and independent of the chief judge and other judges with whom they will associate (i.e., the vast majority of judges don’t recruit their colleagues; they inherit them).

There are several important ramifications of this factor for governance that deserve mention.

The first is the relatively low sense of organizational identity that results from the selection process. The argument, which is not illogical, is that if the court does not select the judge, then it should have little to do with respect to how a judge administers his or her own affairs. Consequently, the initial allegiance of many judges often is stronger toward the electorate or the appointing authority than it is to the court as an organization. This certainly can change over time and be mitigated by the selection process if it is skillfully implemented in appointed and even elective systems. Regardless of the way in which a judge comes to office, this specific aspect of independence explains the low interest many judges exhibit in the administrative affairs of the court and why they believe they have the “right” to operate, administratively, with their own sense of what is best for them and their chambers. In many ways, each judge functions as a private law firm within the context of the larger court. This is why some judges, when confronted with a proposed court reform to which they are opposed, will state, “If the people who elected or appointed me don’t like the way I function, they can end my term. Otherwise, I plan to function as I see fit.”

In addition to a relatively low sense of organizational identity, the selection process also influences the attitude of many judges toward the chief judge or other judges attempting to serve in a governance role. As Doris Provine states, “A tradition of concern for preservation of the sovereignty of judges circumscribes policy initiatives at each level. In our country, judicial independence means not just freedom from control by other branches of government, but freedom from control by other judges. This ideal of autonomous judges, with roots deep

in American legal culture, powerfully influences contemporary debates about efficiency and accountability within the judicial branch.”³ As an example of this phenomenon, a large, general jurisdiction trial court voted overwhelmingly to adopt a court-designed sentencing guideline program for misdemeanor cases. However, several of those who dissented decided not to participate, which indicates that even the consensus of colleagues is not always compelling on any one individual judge.

The second factor, which tends to promote a governance model based on the individual rights of judges, is the interpretation and application of judicial independence in the area of judicial administration. Beyond the separation of powers, as it relates to the third branch of government concept, judicial independence at the individual level refers essentially to the freedom of judges to render impartial rulings based solely on the law and the facts in each case. This decisional autonomy is regarded as sacred, and when efforts to gain administrative efficiencies at the expense of this value collide, the judicial demand for independence most often does and should prevail. As one frustrated judge stated, “If they want me to be more efficient, the next time I conduct an arraignment I will say to the first person, ‘you have the right to remain silent, pass it on.’”

However, while it is recognized that due process is not inherently efficient, this does not mean that decisional autonomy should be regarded as the ultimate goal. As Alexander Hamilton stated, “The Constitutional protections of judicial independence were instrumental and expedient to secure a steady, upright, and impartial administration of the laws. Judges need independence, *not for their own sake* (author’s emphasis), but because an



essential protection of public liberty was having judges decide cases on the basis of legal principles alone.”⁴ The group Justice at Stake echoes this concern as they have placed their focus on the fair and impartial administration of justice (the end) rather than on judicial independence (the means).⁵

The relevance of this point to court governance is that the area of decisional autonomy is best viewed as a means to an end and not as an end in itself. In other words, judges are free from something (i.e., interference in rendering their decisions), in order to be free to do something (i.e., dispense meaningful justice). If individual judges and court leaders can agree to start from this premise, then the test of any proposed court reform can be its

ability to enhance the fair and impartial administration of justice (the end), which requires decisional independence on the part of the judge (the means). This focus on the goal and means as they relate to judicial independence is a more accurate and healthier foundation for court governance than “I am an independent constitutional officer and free to function as I please.”

Clearly, there are legitimate elements to a model based on individual rights, especially as they relate to decisional autonomy, which must be protected even when some administrative inefficiencies result. However, individual judges need to understand while they can hold the court hostage through non-cooperation in the areas of judicial administration,

this only weakens the court as the third branch of government, creates a governance model best described as an adhocracy, and even can undercut the prime value of equal protection. As John Gardner stated, “Our pluralistic philosophy invites each organization, institution, or special group to develop and enhance its own potentialities. But the price of that treasured autonomy and self-preoccupation is that each institution concern itself with the common good. That is not idealism, it is self-preservation. The argument is not moralistic. If the larger system fails, the subsystems fail. That should not be such a difficult concept for the contending groups to understand.”⁶

Model Based on Rules

The second option for judicial self-governance is a model based on administrative rules — which requires the exercise of some form of organizational authority to enforce. One of the most common approaches for integrating the needs of judges for autonomy with the needs of the court to operate with administrative coherence is to elevate a member of the bench to the position of chief judge and to appoint a court manager with whom s/he can partner in the management of the administrative work of the court (e.g., budget, technology, space). And, independent of the process by which a judge comes to this leadership position (e.g., election, seniority, rotation, appointment by the state supreme court) and the preparation and interest they might have for and in the position (including “my turn in the barrel”), the important factors are this person is a judge and not a “non-judicial officer” and is a member of her or his respective court (i.e., a colleague).

While this governance structure is common in both state and federal courts, and at most levels of jurisdiction, this form of governance often operates with limited effectiveness. In fact, even though many states have worked to strengthen the role of the chief judge by crafting new documents outlining their authority (i.e., a new chief judge rule), most chief judges still are reluctant to exercise the authority behind the stronger words (e.g., “all judges *should* to all judges *will*”). There are several possible explanations for this.

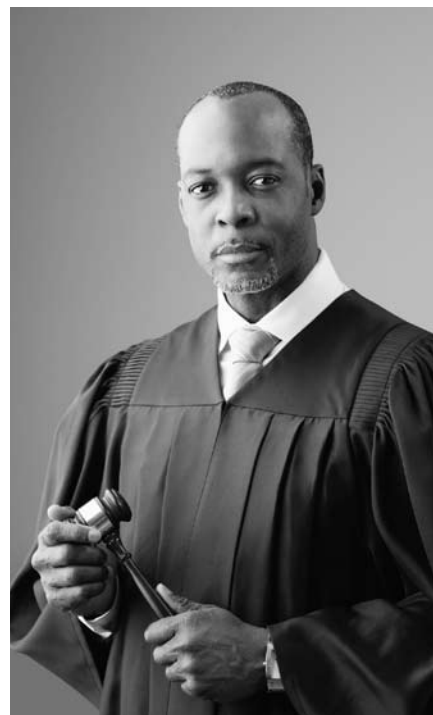
First, the exercise of authority among colleagues is understandably awkward and potentially damaging to a relationship between peers. What most chief judges understand is they are “a first among equals” (state courts)

or “an equal among firsts” (federal courts). They might try to cajole or persuade, but the idea of exercising direct authority over a colleague usually is viewed as the last resort, unless the issue rises to the level of referral to a board of judicial qualifications. While the bench often will view the chief judge as someone who needs to protect them from outside interference and the one responsible for garnishing important resources, they rarely view the chief judge as their “boss.”

Second, many chief judges often continue to carry a relatively full caseload and simply don’t have the time and emotional energy to expend on administrative affairs and the related conflicts that often emerge with their colleagues over these issues. Even when chief judges, usually in a larger court, are granted the option of a reduced caseload, many refuse to accept this for fear of appearing not to be “pulling their own weight” in the case management system. Therefore, it is much easier, and more comfortable, for chief judges to focus on their individual calendars and reserve administrative matters to the 30 minutes routinely scheduled for these issues at the quarterly judges’ meetings.

Third, in many courts, the term for the chief judge is relatively brief in comparison to the time required to learn the position and exercise the leadership required in relationship to the growing complexity of issues that now confront the court (e.g., the economic crisis; the increase in attacks on judges for making unpopular decisions). In fact, the stress of the position and the fact there most often are no monetary incentives attached to it combine to make a limited term a condition for some judges to even accept this leadership role.

Fourth, and related to the issue of term length, is the concern of other



judges that if any one individual serves in this role “too long” they will develop a power base that might threaten the autonomy of the other judges. The incumbent chief judge, therefore, is reluctant to challenge a colleague who could be the future chief judge — an informal *détente* where the understanding is “If I don’t mess with you, you won’t mess with me.”

And, lastly, many chief judges do not believe their respective supreme court “has their back,” if they should choose to challenge a colleague on an administrative issue. Waving the new chief judge rule in front of a colleague simply is unlikely to be compelling unless there is strong support for the chief judge who has the courage to challenge another judge on her or his manner of doing their judicial business.

Again, while a model based on rules — which requires the exercise of authority — is a common structure in court governance, its successful application among the judiciary is

random at best unless codified into a more formal governance structure, including written bylaws, and supported by a judicial consensus regarding the court's direction in the areas of court reform (discussed further below).

Model Based on Collegiality

The third option for court governance, and the one which has the greatest potential for integrating judicial independence and judicial administration, is a model based on relationships — which requires the exercise of collegiality. In order to evaluate this option, however, it is important to understand what collegiality means in the context of governance as used in this article. Quite often, the word collegiality is viewed as synonymous with civility — demonstrating a professional courtesy to other judges or refraining from public criticism of other judges. While this definition and application certainly are worthy ones, they don't carry the full measure of what is intended. Collegiality is a governance concept that refers to the (willful) sharing of power and authority among colleagues. It is an approach that recognizes the

importance and reality of individual rights as well as the need for a modicum of administrative authority. It also conveys the sense that neither of these is sufficient in itself nor should they be imposed on others (i.e., neither an adhococracy nor a bureaucracy is a viable model for sustainable governance).

Collegiality, however, should not be viewed as a soft compromise between adhococracy and bureaucracy that is designed to appease any one person or group. As Jim Collins explains in *Built to Last*, the goal in structuring an effective organization, in any sector of our society, is to replace the tyranny of the “or” with the genius of the “and.” In other words, it is not meaningful judicial independence “or” effective judicial administration, but meaningful judicial independence “and” effective judicial administration that should be the goal of court governance. As Collins states, “We’re not talking about mere balance here. ‘Balance’ implies going to the midpoint, fifty-fifty; half and half. A visionary organization doesn’t simply balance between preserving a tightly held core ideology and stimulating vigorous change and movement; it does each to an extreme.”⁷ Therefore, collegiality is recommended as the most robust form of court governance; it is the model that can go beyond balance and compromise and actually integrate

the needs and rights of individual judges with the needs and rights of the court for effective and efficient judicial administration.

The application of collegial governance should be viewed as a comprehensive model that cuts across such issues as case disposition decisions; trial/courtroom practices; administrative activities and personal/off-the-bench conduct. And, in each of these areas, it is critical for the judges to discuss and decide the degree to which individual rights, the authority of the chief judge, and the consensus of the bench should prevail. In this regard, it is important these decisions be codified so they transcend the individual term of any one chief judge and become the “best practices” for governance of the court. In one sense, these governance principles should serve as a set of bylaws for the court with respect to judicial administration.

Steps to Achieve Collegial Governance

There are several steps that would assist in this process. First, a shared set of institutional standards should be developed with full participation by the bench in each of the four areas mentioned above: *case disposition*

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decisions; trial/courtroom practices; administrative activities; and personal/off-the-bench conduct.

In the area of *case disposition decisions*, where the sensitivity to violations of judicial independence is understandably the greatest, uniform practices likely will be minimal. This area, however, should not be ignored, since the criterion for the value of any proposed court reform or claims of judicial independence should be its contributions to the impartial administration of justice and not the individual rights of judges or the arbitrary exercise of authority. For example, in one three-judge court, one judge sentenced every first-time DUI offender to a weekend in jail. The result was that the other two judges ended up with a calendar packed with DUI cases. In another instance, one judge allowed a partial payment of fees, but the others did not, which brought claims of unfair treatment by attorneys on behalf of their clients. The point behind both of these examples is not the rightness of either practice, but that the action of any one judge has implications for other judges, for the court as an organization, and for the need to guarantee equal protection. This factor, in itself, should be sufficient to warrant an open and civil discussion on the absolute power of a judge in the area of case disposition decisions.

The same case could be made in the other three areas as well. For example, in the area of *trial/courtroom practices*, issues regarding voir dire and the number of jurors that need to be called might be worth discussion, since this has a direct impact on the court's budget. Is it really the appropriate application of judicial independence, for example, to have the court policy be 40 jurors with one or more judges insisting on 100? There already are national efforts on preparing judges in trial court management and groups

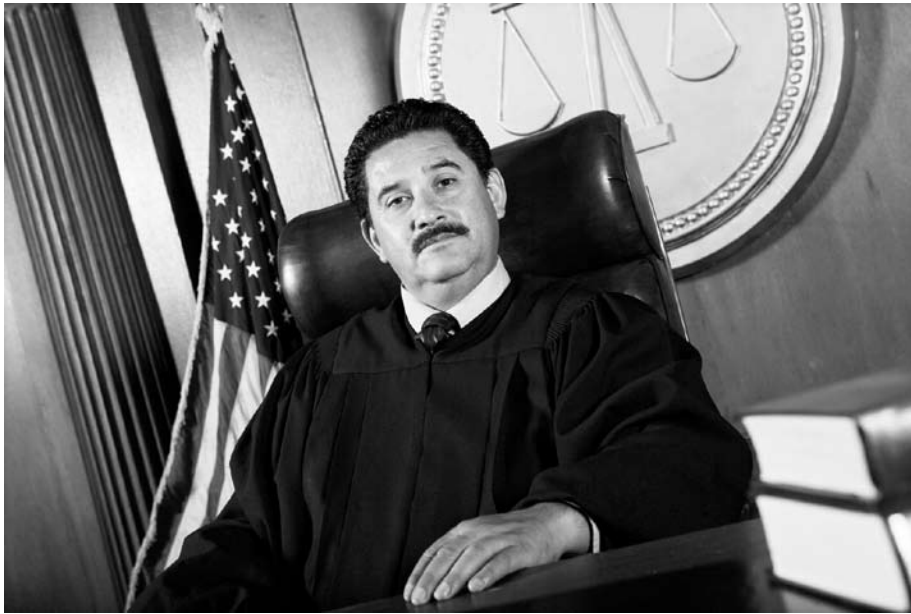
that focus on jury management in an effort to improve the performance of the court in both areas. As Doris Provine writes, however, "No two judges, it seems, do anything in precisely the same way in such areas as scheduling procedures, motion practice, alternative dispute resolution programs, and voir dire. Litigators ignore these local idiosyncrasies at their peril."⁸

In the area of *court administration*, there are case management issues with respect to managing such things as the time to disposition, the role of continuances, and the equitable distribution of cases. Interestingly, in the court culture, the reward for a judge being current with her or his cases is the assignment of more cases from those judges who are not — an interesting reward system. There are similar issues in the areas of personnel, budget, and technology. The main point is that the consequences of a lack of consistency in administrative procedures often are: it increases the complexity and costs of administration and adds confusion for those outside the court who need to use its services. If the core values of the court include cost-effectiveness and stewardship, the impact of numerous, individual administrative practices by judges warrants some discussion. The underlying question in these discussions is whether in a seven-judge court, for example, there are seven courts with one judge each or there is one court with seven judges?

On the topic of administrative inefficiencies that can result from a misapplication of judicial independence, it is important to note many judges are not aware of the administrative procedures of other judges or the impact of their own decisions on the administration of the court. Judges enter the system laterally rather than working their way up through the management ranks where

the impact of a lack of uniformity is felt most acutely. They also tend to work in relative isolation from the central administration of the court, focused most on their chambers, and simply never see the larger consequences for the court. This is why it is recommended, especially in developing a consensus on court administration procedures, that the court executive officer be included in these discussions. While, as Ralph Waldo Emerson stated, "a foolish consistency is the hobgoblin of little minds,"⁹ there are areas where procedural consistency is an important application of collegiality and results in the common good.

The final area that should be covered by discussions on governance in an effort to reconcile judicial independence and judicial administration is personal/off-the-bench conduct. While some of this is covered by the canons on ethics, there are many other "gray areas," which would be worthwhile to review. For example, the scheduling of vacations can be "surprisingly" volatile. In fact, one chief judge who advocated that any judge who planned to be gone for more than five consecutive days should notify the chief judge was removed from office. Apparently, the "slippery slope" argument prevailed — today it is notification, but tomorrow it will be approval. As the chief judge noted, "all I was trying to do was serve the public by making sure there were enough judges present to meet the demands of the docket. If we cannot manage a vacation policy, we are doomed." While it is unlikely the court is doomed, this situation does point to the difficulty managing the personal time of judges can entail. A second common area of contention involves a judge leaving for the day once his or her calendar is complete rather than being available to the court to assist other judges or



Conclusion

As Alexander Hamilton stated, “The administration of justice contributes, more than any other circumstance, to impressing upon the minds of people affection, esteem, and reverence towards their government.”¹⁰ This is a high calling and one every judge should take personally and seriously as they decide on the form of judicial self-governance they desire and are willing to support. If the goal of judicial independence is the fair and impartial administration of justice, than the goal of court governance needs to align with this priority. A court that is not well-governed will never be well-administered. A collegial form of governance, with its practical focus on the common good, offers one solid option for achieving this important integration.

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litigants. And a third example involves the frequent issue of who should represent the court with respect to the media? It is not uncommon for a chief judge to read in the morning paper a scathing criticism of the court or to have a local or state political official receive a private communication challenging a position taken by the local or state court.

One of the maxims of any governance model is to debate with many voices but govern with one. The first step, therefore, in developing

a sustainable governance model in the court is a healthy debate over how best to reconcile a judge’s need for independence and the court’s need to function with administrative coherence. These debates should take place at least in the four areas of case disposition decisions, trial/courtroom practices, court administrative activities, and personal /off-the-bench conduct, with advancing the meaningful dispensation of justice serving as the primary criterion for resolving any conflicts.

NOTES

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