Spring 2012

Strengthening Judicial Independence in the New Constitutional Democracies of Central and Eastern Europe

Hon. John M. Walker, Jr.
Daniel Schuker, Yale Law School

Available at: https://works.bepress.com/daniel_schuker/2/
Strengthening Judicial Independence in the New Constitutional Democracies of Central and Eastern Europe

Hon. John M. Walker, Jr.† & Daniel J.T. Schuker††

I. INTRODUCTION

Last summer, chief justices and leading jurists of Central and Eastern Europe convened in Prague for a three-day Conference of Chief Justices—the first regional gathering of its kind. The participants, representing the judiciaries of fifteen countries in the area, discussed the particular challenges they face in building effective judiciaries consistent with the rule of law.

Rule of law development is an issue of paramount importance in these countries. Many continue to struggle not only to combat corruption within their legal systems, but also to overcome the legacy of Soviet dominance and Communist rule. The array of challenges is as diverse as it is formidable. Judges in the region seek to (1) maintain institutional independence in legal and political cultures that frequently fail to respect it; (2) successfully manage relations with the executive and legislative branches; (3) fight corruption and achieve transparency within the judiciary; (4) address severe delays and backlogs in the courts’ caseloads; (5) strike the appropriate balance between individual (decisional) judicial independence and accountability; and (6) redefine and sharpen judicial roles and responsibilities within their respective systems. Sound

† Senior Circuit Judge, United States Court of Appeals for the Second Circuit; Chair, Committee on Judicial Conduct and Disability, Judicial Conference of the United States; Member, Committee on International Judicial Relations, Judicial Conference of the United States. Judge Walker helped develop and lead the 2011 Conference of Chief Justices of Central and Eastern Europe, on behalf of the CEELI Institute in Prague. The views expressed herein do not necessarily reflect those of the Second Circuit, the Judicial Conference, the Conference of Chief Justices, or the CEELI Institute.

†† Yale Law School, J.D. expected 2013. Mr. Schuker also worked on the 2011 Conference of Chief Justices of Central and Eastern Europe.

1. The countries participating in the 2011 conference were Albania, Bulgaria, Croatia, the Czech Republic, Georgia, Hungary, Kosovo, Latvia, Lithuania, Montenegro, Romania, Serbia, Slovakia, Slovenia, and Ukraine. The remaining countries in the region include Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Estonia, Macedonia, Moldova, Poland, and Russia.
judicial administration is fundamental to strengthening the legal framework, protecting human rights, and fostering economic development.

At this inaugural Conference of Chief Justices of Central and Eastern Europe, the participants affirmed their intent to hold a regular annual or biennial conference. At these gatherings, the chief justices can meet privately to share difficulties and concerns while exchanging ideas for improving judicial administration in the face of significant obstacles. The participants also received words of encouragement and inspiration from the Chief Justice of the United States, John G. Roberts, Jr., who participated for two days in this first conference. Future conferences will rotate among the countries of the region. In 2012, the conference will take place in Albania.

This Essay considers avenues for further progress in judicial administration throughout Central and Eastern Europe. In one sense, the challenges to the judiciaries of formerly Communist Europe echo those faced two centuries ago in the United States by Chief Justice John Marshall, who strove to establish the American judiciary as an independent, effective, and respected branch of government. In another sense, the challenges resemble those addressed by America’s leading judges during the first half of the twentieth century as they elaborated administrative systems within the judiciary to guide the functioning of the federal courts. Those parallels, of course, are imperfect. A correct appreciation of the progress made requires sensitivity to the array of unique cultural issues stemming from these European countries’ own historical experiences.

Part II of this Essay considers various conceptions of the rule of law and their application to Central and Eastern Europe’s new constitutional democracies. It also assesses some of the region’s contemporary prospects and challenges. Part III describes the American experiences not only in establishing a strong Supreme Court, but also in developing an effective system for administering the federal judiciary. Last, the Essay takes stock of the prospective tasks facing the chief justices of Central and Eastern Europe. The 2011 conference initiated a clear-eyed assessment of the distance traveled and prospects for the region’s future development. This Essay underscores the value of continued dialogue and regular gatherings of the region’s judicial leaders.

II. THE RULE OF LAW IN CENTRAL AND EASTERN EUROPE

Viewing the array of definitions, skeptics sometimes claim that the concept of the rule of law has lost nearly all meaning. But for the chief justices in Central and Eastern Europe, the issue is no exercise in abstraction. For them, the rule of law has acquired a particular valence: establishing the judiciary as a robust and independent branch of government with judges who are impartial, independent, and free from the improper external influences that, whatever their provenance, can no longer be tolerated. Their task comprises both internal and

---

2. See, e.g., JUDITH N. SHKLAR, POLITICAL THOUGHT AND POLITICAL THINKERS 21 (Stanley Hoffmann ed., 1998) (“It would not be very difficult to show that the phrase ‘the Rule of Law’ has become meaningless thanks to ideological abuse and general over-use.”). For an application of this notion to Central and Eastern Europe, see Frank Emmert, Rule of Law in Central and Eastern Europe, 32 FORDHAM INT’L L.J. 551, 553 (2009) (“[T]he concept of ‘rule of law,’ although often quoted, is poorly defined and understood[,] and this is an obstacle for countries aspiring to build a system based on rule of law.”).
external dimensions. In part, the chief justices must work within their judiciaries to root out corruption and improve efficiency. At the same time, they must stake out and implement a vigorous role for an independent judicial branch in their system of government. The challenge transcends matters of self-definition. The chief justices must carve out a place for the judiciary in countries that have long denied the courts a genuinely independent role.

A. Conceptualizing the Rule of Law

The literature on the rule of law emphasizes several facets of this broad yet indispensable concept. At its core, the rule of law limits the power of government and official discretion; it insists on regimes of prospectivity, equality, and formal legality; and it enshrines, in John Adams’s classic formulation, “a government of laws and not of men.” Notions of the rule of law operate along a spectrum. “Thin” conceptions emphasize formal legality, and “thick” substantive conceptions incorporate values such as individual rights and democratic governance. Even thicker understandings of the rule of law may also encompass government benefits and services.

Successful development of the rule of law rests upon a foundation supported by three indispensable pillars: (1) laws must be enacted and legal institutions created; (2) those institutions must be staffed by trained, competent people and made operational; and (3) the polity must shed old habits and negative attitudes toward the law, derived from a prior debilitating legal culture, and also develop a new respect for the law and its role in society.

Although much rule of law work around the world has emphasized the more tangible targets of laws and

3. The following definition of the rule of law, by former Chief Justice of England and Wales Tom Bingham, draws on a range of legal traditions, including the conventional formulation coined by the nineteenth-century Oxford professor Albert Venn Dicey: “[A]ll persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.” Tom Bingham, The Rule of Law 8 (2010).


5. See, e.g., Bingham, supra note 3, at 67; Tamanaha, supra note 4, at 110-12; see also Rachel Kleinfield, Competing Definitions of the Rule of Law, in Promoting the Rule of Law Abroad: In Search of Knowledge 30 (Thomas Carothers ed., 2006) (contrasting ends-based definitions of the rule of law with definitions that emphasize institutional features); cf. Randall P. Peerenboom, China’s Long March Toward Rule of Law, at xiii-xiv, 2-6 (2002) (discussing thick and thin conceptions of the rule of law and contrasting various perspectives in the context of contemporary China).

6. See, e.g., Tamanaha, supra note 4, at 112-13.

7. See John M. Walker, Jr., Advancing the Rule of Law Abroad, 43 Int’l Law. 61, 63-64 (2009). In an influential account, Lawrence Friedman analyzes the basic components of a “working legal system” in structural, substantive, and cultural terms. See Lawrence M. Friedman, Legal Culture and Social Development, 4 Law & Soc’y Rev. 29, 34 (1969). Friedman emphasizes legal culture as “the key concept” because this cultural component applies “to those values and attitudes in society which determine what structures are used and why; which rules work and which do not, and why.” Friedman, supra, at 35.
Building a robust legal culture is entwined with the larger and more diffuse task of embedding the rule of law more firmly into the social consciousness. The rule of law entails more than an arcane or arbitrary set of rules. Three decades ago, the Russian writer Aleksandr Solzhenitsyn delivered an address at Harvard University decrying the West’s “cold and formal” devotion to legal institutions. “Whenever the tissue of life is woven of legalistic relationships,” he declared, “this creates an atmosphere of spiritual mediocrity that paralyzes man’s noblest impulses.”

Solzhenitsyn spoke from hard experiences in a country where the work of legal institutions indeed consisted of little more than “cold and formal” commands, “without any objective legal scale.”

A society under the rule of law—not the rule by law that existed in the


11. Id.
Soviet Union—cultivates the opposite view. In an atmosphere quite different from Solzhenitsyn’s, John Adams reflected on the rule of law and suggested a more value-laden formulation. “It is very true there can be no good government, without laws,” Adams wrote, “but those laws must be good, must be equal, must be wisely made . . . .” The laws must in turn be “impartially interpreted” by the individual judges who compose the judiciary. In Central and Eastern Europe today, the chief justices are striving to build the institutional capacity and popular authority to uphold that role.

Rather than simply issuing steely commands, the rule of law offers a foundation for liberty: political liberty from oppressive rule, legal liberty from arbitrary judgments, and personal liberty for individuals to act without undue government interference. A strong, effective, and independent judiciary plays a vital role in ensuring that the law will reach all corners of society. That is what judges across Central and Eastern Europe seek to achieve.

B. Prospects and Challenges in Central and Eastern Europe

The leaders of Central and Eastern Europe’s judiciaries preside over relatively new institutions. Although the countries’ historical legacies extend further back to Austro-Hungarian, Ottoman, Russian, and other hegemonies, the countries are principally bound together by their Soviet and Communist experiences. The judges today operate within frameworks of constitutional

12. See, e.g., M.D.A. Freeman, The Rule of Law—Conservative, Liberal, Marxist, and Neo-Marxist: Wherein Lies the Attraction?, in PERESTROIKA AND THE RULE OF LAW: ANGLO-AMERICAN AND SOVIET PERSPECTIVES, supra note 8, at 37, 41. Today, for example, the People’s Republic of China lays claim to the rule of law, but by any objective assessment its present system is still mainly one of rule by law. See, e.g., JIANFU CHEN, CHINESE LAW: TOWARDS AN UNDERSTANDING OF CHINESE LAW, ITS NATURE, AND DEVELOPMENT 363 (1999); Weisen Li, China’s Road to Rechtsstaat: Rule of Law, Constitutional Democracy, and Institutional Change, in THE INSTITUTIONAL DYNAMICS OF CHINA’S GREAT TRANSFORMATION 98, 103 (Xiaoming Huang ed., 2011); see also Li, supra, at 103 (noting that the Chinese term fazhi, which can be translated as “rule of law” or “rule by law,” is “often ambiguously used . . . in scholarly writings and political discourses, as well as political rhetoric”); Rule by Law, N.Y. TIMES, http://www.nytimes.com/ref/world/asia/ rule_index.html (last visited Apr. 16, 2012) (providing a series of recent case studies on China’s legal development).


15. See TAMANAH, supra note 4, at 33-36.

democracies that have taken shape during the last two decades. Each judge lived through the stirring events of 1989 and their immediate aftermath—the riveting moments that form part of recent history in Prague, Warsaw, Budapest, as well as other capitals in the region. More recently, several countries have witnessed not only political change but also terrible armed conflicts. Now, these jurists face the difficult task of building political support for the judiciary, breaking persistent habits in the legal culture, and remaining vigilant against the prospect of backsliding. Many Central and Eastern European judiciaries also continue to struggle with underfunding. Progress toward judicial independence has varied across the region.

In Central and Eastern Europe, the rule of law is tightly linked to the institutional charge of establishing a true separation of powers. Under the European Continental system of administrative law, even in states not previously subject to Communism, the administration of law is closely associated with the executive. In the Continental tradition (particularly in contrast with common law systems), law serves chiefly to enable rather than limit administrative functions. Although judges in Central and Eastern Europe during the last two decades have generally welcomed the practice of judicial review, they operate under a lengthy extending back before the Second World War, see Martin Mendelski & Alexander Libman, History Matters, but How? An Example of Ottoman and Habsburg Legacies and Judicial Performance in Romania 1-4 (Sept. 30, 2011) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1935897, which examines differences in litigation behavior in contemporary Romania. The study finds that “historical legacies matter for the functioning of judicial institutions, but only in combination with current contextual factors (such as income or, to some extent, education). Specifically, ... while in poor regions Ottoman legacy is associated with higher demand for litigation than the Habsburg one, the situation is reversed in rich regions ....” Mendelski & Libman, supra, at 32.

17. For a firsthand account, see, for example, TIMOTHY GARTON ASH, THE MAGIC LANTERN: THE REVOLUTION OF ’89 WITNESSED IN WARSAW, BUDAPEST, BERLIN, AND PRAGUE (1990).


historical shadow, darkened further by Communist and Soviet pasts. The rule of law in this region refers not simply to the way in which justice is dispensed, but to a larger conception of the role of law in civil society.

The chief justices can work both externally and internally to develop a receptive legal culture. In more concrete terms, and toward that end, they can strive to (1) increase the judiciary’s institutional stature with respect to the executive and the legislature and (2) construct a judicial administrative system to help the courts operate more effectively and more efficiently. The next Part considers the American judiciary’s efforts on both of those fronts.

III. JUDICIAL DEVELOPMENT IN THE UNITED STATES

The American experience, of course, does not offer a perfect model for the judiciaries of Central and Eastern Europe, but two historical moments may prove instructive. Under Chief Justice Marshall, the U.S. Supreme Court of the early nineteenth century labored mightily to enhance its institutional stature. And then, during the early twentieth century, the federal judiciary took important steps toward administrative unity. In both instances, concerted actions by individual jurists, combined with favorable historical circumstances, proved essential. Historians may debate whether that perseverance was determinative. Yet, eventually, persistence opened a window for progress.

A. Chief Justice Marshall and the Supreme Court’s Institutional Stature

The Constitution vested “[t]he judicial Power of the United States” in the Supreme Court and other lower courts that Congress would establish.23 Although the document’s framework ultimately laid the groundwork for a strong Court, the evolution of the Court’s stature was in many respects historically contingent. Much depended on the political skill and timing of the Marshall Court, and Chief Justice Marshall in particular, during the first third of the nineteenth century. For Central and Eastern Europe’s judiciaries as well, such qualities may become important attributes.

The Supreme Court that John Marshall inherited in 1801 was a relatively weak institution.24 Although the Court had taken a few significant cases, such moments came infrequently during the 1790s.25 The Justices’ caseload remained light.26 Many of the leading constitutional questions of the day never reached the fledgling Court.27 In 1793, the Court issued one of its first major decisions, Chisholm v. Georgia,28 only to be effectively overruled five years later when Congress and the states swiftly enacted the Eleventh Amendment. The first Chief

25. NEWMYER, supra note 24, at 151.
28. 2 U.S. (2 Dall.) 419 (1793).
Justice, John Jay, told President Adams: “I left the Bench perfectly convinced that under a System so defective, it would not obtain the Energy[,] weight[,] and Dignity which are essential to its affording due support to the national Government; nor acquire the public Confidence and Respect, which, as the last Resort of the Justice of the nation, it should possess.”36 Jay declined Adams’s offer of reappointment, and Adams turned to John Marshall. The new Chief Justice confronted a daunting institutional task.

During the next thirty-four years, the Court’s stature grew considerably. Although the precise historical trajectory remains a subject of debate, some broad themes emerge.30 Chief Justice Marshall, of course, demonstrated his sharp political sense in canonical opinions from Marbury v. Madison31 to McCulloch v. Maryland,32 During his first year in office, the new Chief Justice instituted a practice of presenting an “Opinion of the Court,” rather than setting forth the individual Justices’ views in seriatim opinions.33 Not only would the Justices have to confer before issuing a decision, but they would also have to strive to synthesize their views into a single institutional voice. Chief Justice Marshall demonstrated his political acuity in several other distinctive ways: he often couched controversial nationalistic claims in relatively uncontroversial case holdings;34 his Court’s decisions usually overturned unheralded “outlier practices” rather than attempting to quash widely supported laws;35 and, when political realities left no viable options, “[h]e knew when to duck.”36 During its more than

30. For a thoughtful and concise account of how Chief Justice Marshall enhanced the Court’s stature, see Klarman, supra note 24, at 1153-81.
31. 5 U.S. (1 Cranch) 137 (1803). From 1801 to 1808, the Court generally met in a sparse committee room on the ground floor of the Capitol. The building’s architect, Benjamin Latrobe, described the room as “half-finished . . . [] meanly furnished, and very inconvenient.” JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 285 (1996). The Justices, however, announced the Marbury decision not from their regular committee room, but from the living room of Stelle’s Hotel across the street. Id. at 319.
32. 17 U.S. (4 Wheat.) 316 (1819).
33. This development can be traced to Tablot v. Seeman, 5 U.S. (1 Cranch) 1 (1801). See SMITH, supra note 31, at 295.
34. Klarman, supra note 24, at 1160; see id. at 1160-61. In Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), for example, the Court invalidated a New York law that supported an unpopular steamboat monopoly. But Chief Justice Marshall also used the opinion to emphasize the scope of congressional power under the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3. See DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848, at 235 (2007); NEWMYER, supra note 24, at 313-15.
35. Klarman, supra note 24, at 1161; see id. at 1161-63 (discussing Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810); United States v. Peters, 9 U.S. (5 Cranch) 115 (1809)). For an alternative perspective, see Mark A. Graber, The Passive-Aggressive Virtues: Cohens v. Virginia and the Problematic Establishment of Judicial Power, 12 CONST. COMMENT. 67, 90 (1995), which argues that “Marshall Court opinions may have announced bold principles of constitutional law, but in cases where the Justices feared hostile political forces, they used the passive-aggressive virtues to avoid issuing rulings that might antagonize the judiciary’s more powerful opponents.”
36. Klarman, supra note 24, at 1163; see id. at 1124-25 (assessing the Marshall Court’s avoidance of a direct confrontation with the Jeffersonians, just six days after the Marbury decision, in
three decades, the Marshall Court also benefitted from a series of fortunate historical turns. Even if the Court’s increased stature resulted from a combination of skill and luck, the Chief Justice harnessed the factors that stood within his control. He kept a tireless focus on preserving and enhancing the Court’s institutional authority.

The Court under Chief Justice Marshall underwent an extraordinary transformation. The relationship between deciding a particular case and building an institutional framework is complex, as Chief Justice Marshall understood. In case after case, he bore the institution’s long-term interests in mind. By the time Alexis de Tocqueville traveled to the United States in the 1830s, the French visitor could confidently assert that “a mightier judicial authority has never been constituted in any land.”

Had the Court not moved to assert its powers and establish such foundational principles of constitutional law during the Republic’s early years, it is possible that the institution would have followed a very different path. And even with its remarkable achievements, the Marshall Court operated on a trajectory spanning several decades. That arc of sustained improvement is perhaps the crucial lesson for today’s chief justices of Central and Eastern Europe.

Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803); id. at 1163-64 (describing the Marshall Court’s apparent “retreat,” in several cases during the 1827-1831 period, from taking an expansive interpretation of the Commerce Clause or the Contracts Clause, U.S. CONST. art. I, § 10, cl. 1); see also R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 205 (“[Chief Justice Marshall’s] strategy was to lead when he could, bend when he had to. His goal, judging from the last ten years of his Court, was to consolidate previous gains and save the Court from its enemies.”); William E. Nelson, The Historical Foundations of the American Judiciary, in THE JUDICIAL BRANCH 3, 22 (Kermit L. Hall & Kevin T. McGuire eds., 2005) (“Marbury v. Madison and Stuart v. Laird were narrower decisions that strove to harmonize majoritarian democracy and legal principle, not to make one either superior or subordinate to the other.”). Chief Justice Marshall once remarked that he was “not fond of butting against a wall in sport.” Letter from Chief Justice John Marshall to Justice Joseph Story (Sept. 26, 1823), reprinted in 1 CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 395, 396 (1908).

37. See Klarman, supra note 24, at 1164-81 (noting, among other examples, the Jeffersonians’ approval of judicial review prior to Marbury, the failed effort to remove Justice Chase, the basic ideological agreement among the Justices, the lack of coordination among the states in proceedings before the Court, and the timing of South Carolina’s 1832-1833 nullification attempt just after the Court’s decision in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)).

38. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 149 (J.P. Mayer ed., George Lawrence trans., Perennial Classics 2000) (1835); see also Klarman, supra note 24, at 1154-55 (quoting a comparable passage from Tocqueville on the Court’s importance).

39. See Klarman, supra note 24, at 1156 (“[I]t is conceivable that had the Court not begun exercising the judicial review power when it did, that practice never would have become accepted.”). As Klarman notes, Marshall biographer R. Kent Newmyer maintains that “[c]ontinuous disuse of the Supreme Court’s powers after 1801 could easily have institutionalized weakness.” Id. at 1156 n.237 (quoting R. Kent Newmyer, John Marshall and the Southern Constitutional Tradition, in AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH 105, 120 (Kermit L. Hall & James W. Ely, Jr. eds., 1989)).
B. The Judicial Conference and Administration of the Federal Court System

Another critical period for the federal judiciary arrived a century later. Today, the Judicial Conference of the United States is responsible for making the policy that governs the nationwide administration of the federal court system. No such entity existed until the third decade of the twentieth century. Although the expansion of the administrative state had begun at the latest by the late nineteenth century, the federal judiciary did not immediately follow suit. After the end of the First World War and the institution of Prohibition, the federal courts were clogged by a severe case backlog. Former President William Howard Taft had long advocated a variety of federal judicial reforms. Upon becoming Chief Justice in 1921, he took advantage of growing support and advocated new legislation, with the support of Attorney General Harry Daugherty.

Congress did not enact all of Chief Justice Taft’s proposals, but it did agree in 1922 to establish a Conference of Senior Circuit Judges. That conference would convene annually in Washington to advise the Chief Justice “as to the needs of [each judge’s] circuit and as to any matters in respect of which the administration of justice in the courts of the United States may be improved.” The conference was also empowered to help relieve backlogs among the federal courts through temporary reallocations of judicial manpower. Specifically, it would “make a comprehensive survey of the condition of business in the courts,” and based upon that information it could “prepare plans for assignment and transfer of judges to or from circuits or districts where the state of the docket or condition of business indicates the need.” The Act, in short, established a basis for integrating the federal judiciary into a coherent whole—with governance beginning to emanate from the judges themselves.


44. Id., 42 Stat. at 838.

45. Id.
The Act’s ambitions seemed novel in the United States of 1922. Previously, the federal courts had operated largely as isolated entities.46 Through a national conference, judges would maintain—even strengthen—their independence, but the federal courts could now act as a single administrative entity. Through improved management, they could collectively better serve their institutional mission of dispensing justice. Felix Frankfurter and James Landis, Harvard professors at the time, called the conference’s establishment nothing less than “the beginning of a new chapter in the administration of the federal courts.”47

Under Chief Justice Taft’s successors, the federal judiciary solidified its administrative independence from the other branches. In 1939, Congress transferred core administrative responsibilities, including budgetary discretion, from the Department of Justice to the judiciary itself.48 The new Administrative Office of the United States Courts, whose director would be appointed and supervised by the Chief Justice, would oversee the federal courts’ operations and prepare the judiciary’s own budget proposals.49 The Administrative Office would eventually become an important judicial liaison to Congress as well.50

Division and delegation are central to the work of the national Judicial Conference. Initially, the membership consisted of the Chief Justice and the chief judge of each of the judicial circuits. In 1948, the institution acquired its now-familiar name51—the Judicial Conference of the United States—and within a decade it formally added federal district judges to its roster.52 Today, although the full conference meets, in accordance with tradition, twice a year,53 it operates primarily through its Executive Committee and numerous subject-matter-based committees.54 Most committees include judges from across the circuits.55

46. With three decades of hindsight, Felix Frankfurter noted that “federal judges throughout the country were entirely autonomous[,] little independent sovereigns. Every judge had his own little principality. He was the boss within his district, and his own district was his only concern.” Felix Frankfurter, Chief Justices I Have Known, 39 VA. L. REV. 883, 898 (1953); see also Post, supra note 41, at 26 (quoting Frankfurter and other historical sources on the changes brought by the Act).


50. See RESNIK & CURTIS, supra note 41, at 155 & 484 nn.22-26 (describing the establishment of the Administrative Office and its role with respect to Congress).


Judicial Conference is not the only layer of federal judicial administration: each court has a chief judge and administers itself, and circuit judicial councils (consisting of circuit and district judges and chaired by each circuit’s chief judge) operate at an intermediate level, with responsibilities that include addressing backlogs, acquiring space and facilities, and disciplining judges. But the Judicial Conference of the United States enables federal judges to play a major role, apart from the legislature, in developing policies that govern the entire federal court system.

The development of the Judicial Conference also suggests a broader point: in complex modern states, the administration of justice requires not only strong and independent individual courts, but also an institutional system for initiating funding requests, coordinating court administration, and achieving efficiencies. The precise contours of that system, and the timing of its establishment, will vary from country to country. Structurally, the American federal judiciary and the judiciaries in Central and Eastern Europe’s constitutional democracies differ in some respects. Whereas the U.S. Supreme Court sits alone atop the federal judiciary with both constitutional and ordinary review responsibilities, Central and Eastern European countries have established separate constitutional courts to dispose of constitutional questions. Still, the basic shared structural components of those systems—such as constitutional commitments to the separation of powers and an independent judiciary—suffice to support this comparison.

The histories of both the Marshall Court and the Judicial Conference reflect some of the challenges facing the judiciaries of Central and Eastern Europe today. Those judges too are working externally to enhance their independence

---


56. For an overview of regional and local governance structures of the federal judiciary, see Wheeler, supra note 55, at 11-16.


59. See id. § 332(d).

60. See generally WOJIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE (2005) (describing, inter alia, the model of judicial review in the region’s constitutional courts and the practical impact of that approach).

61. See, e.g., id. at 44; Dumbrovský, supra note 8, at 109; Daniel Smilov, Constitutional Culture and the Theory of Adjudication: Ulysses as a Constitutional Justice, in CENTRAL AND EASTERN EUROPE AFTER TRANSITION: TOWARDS A NEW SOCIO-LEGAL SEMANTICS 119, 119 (Alberto Febbrajo & Wojciech Sadurski eds., 2010).
from the political branches and internally to develop effective administrative systems. Other countries, to be sure, need not precisely emulate the American model: differences are evident in scale and scope as well as historical backdrop, and other successful models are available. But the difficult trajectory over time for developing effective judiciaries deserves emphasis. Addressing challenges of institutional stature and judicial administration required persistent efforts by American judicial leaders over many decades. The chief justices of Central and Eastern Europe will have to bring such perseverance to their own work as well.

IV. Conclusion

Oliver Wendell Holmes observed more than a century ago that “[t]he life of the law has not been logic: it has been experience.” 62 A similar sentiment holds for judicial administration. Justice Holmes’s axiom also reminds us to view the law as what he called “the story of a nation’s development.” 63 Each country’s judicial system is a product of its own history as well as its present actions. The solutions proffered by the chief justices of Central and Eastern Europe will be tailored to particular cultural contexts, just as were the achievements of the Marshall Court and the development of the Judicial Conference. Still, many of the tools and principles of effective judicial administration—often honed through years of experience—transcend national borders. Successful application takes time and requires both resolve and stamina from the judges themselves. In strengthening their judiciaries internally and building the courts’ roles externally, the chief justices face a difficult but vital balancing act. Initiatives such as the new Conference of Chief Justices of Central and Eastern Europe will help those judges understand and address the region’s struggles with strengthening the rule of law.

63. Id.