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The Kentucky Judicial Council

George Ragland Jr.
University of Kentucky

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NOTES

THE KENTUCKY JUDICIAL COUNCIL

In yet another matter Kentucky has joined the ranks of progress and in so doing has become the fourteenth state to provide for a continuous, systematic study of the administration of justice by an organized agency, namely, the Kentucky Judicial Council. The Act creating the council was passed by the 1928 legislature,¹ and has been more recently sustained in a test case before the Court of Appeals.² Regardless of the constitutional technicalities involved, the decision upholding the measure’s validity clearly seems a sound one.

Indeed there has already been one meeting of the Council. At the call of the Chief Justice of the Court of Appeals, the Council held its first meeting on December 27, 1928, and perfected matters of organization and adopted by-laws. According to the provisions of these latter the body will meet henceforth at Frankfort on Thursday of the first week of the April recess of the Court of Appeals and Thursday of the second week of November.

While the Kentucky Judicial Council as constituted and empowered at present is unquestionably a step in the right direction, there are several features which might be improved by a comparative study of the experience of the other thirteen states along similar lines, as well as the experience of the Federal Council of Senior Circuit Judges, which was the forerunner of most of the state councils, and the English Rule Committee, which in turn furnished the basic concept for all of the above mentioned bodies. The English Rule Committee was originally constituted under the Judicature Act of 1875, while the Federal Council of Senior Circuit Judges was formed by Congress in 1922. The thirteen states which had adopted the Judicial council idea in some one of its several variations previous to

¹ Kentucky Acts, 1928, c. 20, p. 145; Baldwin’s 1928 Supplement to Carroll’s Kentucky Statutes, sec. 1126a-1.
² Coleman, Auditor v. Hurst, 11 S. W. (2d) 133 (decided November 27, 1928).
Kentucky's adoption and the dates of adoption are, respectively: Wisconsin, 1913; New Jersey, 1915; Ohio and Oregon, 1923; Massachusetts, 1924; Washington and North Carolina, 1925; California, 1926; North Dakota, Connecticut, Kansas, and Rhode Island, 1927; and Virginia, 1928. At the present time there is agitation for enactment of similar legislation in a number of other states, notably Texas, Michigan, Pennsylvania, and Missouri.

It is believed that a critical study of the Act creating the Kentucky Judicial Council together with a comparative study of the legislation and experience of these other states may prove quite worthwhile. The Act could easily be amended should this prove necessary, as indeed it has proved necessary in at least one other state, namely, Oregon. Therefore it is the purpose of this note to furnish the framework for such a study. To this end let us consider the various matter under the following heads: Personnel, Power and Duties, Compensation and Expenses.

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1Wis. Stats. 1913, s. 113.08. See comment as to present status and powers Wis. Stats. (1927), p. 3108.
2N. J. Laws 1915, c. 93, p. 147.
3Ohio Laws 1923, p. 364. Text of Act may also be found in 21 Ohio Law Bulletin 241-243.
4Oregon Laws 1923, c. 149, p. 211. Text of Act may also be found in 7 Journal American Judicature Society 35-36. The Oregon statute was amended in 1925, L. 1925, c. 164, p. 244.
6Wis. Stats. 1925, c. 45, p. 38. Text of Act also found in 9 Journal American Judicature Society 102-103.
7Public Laws of N. C. 1925, c. 244. Text of Acts also found in 13 American Bar Association Journal 275.
14See the discussion in the following law periodicals: 6 Texas Law Review 468-470; 6 Michigan State Bar Journal 201; 9 Journal American Judicature Society 77-79; and 28 Law Series Missouri Bulletin 47. For the situation in Missouri especially, as well as the situation in several additional states see C. H. Paul, The Growth of the Judicial Council Movement, 10 Minnesota Law Review 85-89.
PERSONNEL

As far as the matter of personnel is concerned the Kentucky Judicial Council may well be studied from two distinct angles, namely, from the standpoint of the quantity and the quality, respectively, of its constituent membership. The Kentucky Council is composed of all of the Judges of the Court of Appeals and all of the Circuit Judges of the State—a total of forty-four. Is this not too cumbersome and unwieldy a body? The English Rule Committee is composed of twelve, while the Federal Council of Senior Circuit Judges has ten members, including the Chief Justice of the Supreme Court. Most of the state councils have an even lesser number of members. Oregon has five members, Rhode Island seven, New Jersey, Kansas and Connecticut eight, Massachusetts, Washington and Ohio nine, California eleven, and Virginia has a maximum membership of sixteen and a minimum of fourteen. Only North Dakota and North Carolina have a larger personnel than does Kentucky; the former has fifty members, while the latter has approximately the same number. These two states, as well as Wisconsin, have adopted a variation of the original judicial council plan and include all of the more important judges of the state in the council’s membership. Apparently it is after this fashion that the Kentucky plan is drawn. Yet the reports issued by the various councils to date would indicate that by far the more satisfactory results are being obtained from the smaller councils. Commenting on the North Carolina situation the North Carolina Law Review has said: “...This body of fifty men is much too large for effective administration.”

In the matter of quality there is one outstanding defect in the Kentucky Council as now constituted: No lawyers are included among its personnel. Ten of the other thirteen states have had the wisdom to include the Bar as well as the Bench in the deliberations. A majority of these provide that the Bar shall be represented by a number almost equal to that of the Bench—a representation which varies from three to ten in number. The lawyer members may either be appointed by the governor of the state, as some of the statutes provide, or they may be named by the state bar association, as in other

states. It seems that a combination of these two methods of selection might prove happy. Only California, Oregon and Wisconsin have failed to include lawyers. Even in a state whose council is modelled after the Kentucky plan it is feasible to include the Bar, as North Carolina has so clearly shown. Several states provide that the attorney-general shall be a member, while others provide that at least one prosecuting attorney be included. Still others require that members of the legislature shall be included, while a single state, North Dakota, has the unique, though wise, provision that the dean of the State University Law School be a member. Massachusetts has devised a scheme which has proved a happy one and which has been copied in Connecticut and Rhode Island, namely, that former justices of the supreme judicial court be eligible for membership upon appointment by the chief justice. In this way Massachusetts has been able to command the services of so able a lawyer as the former Justice Loring.

The experience of the English as to the advisability of naming lawyers on their Rule Committee may be of value to us at this point. The Judicature Act of 1875 left the rule-making power in a sort of general council of the Bench. But this has been changed several times and as early as 1894 practicing attorneys were added. At present four of the twelve persons composing the Rule Committee must be lawyers, two barristers and two solicitors. These are representatives of the Bar and Law Council, respectively. Professor Sunderland has summed up the policy underlying the inclusion of lawyers in all such deliberations when he said: "Lawyers and judges are both officers of the court, and both must participate in any successful formulation of rules for the administration of justice." There is the added fact that most of our judges are already overloaded with duties and really do not have the time necessary for these additional burdens.

POWERS AND DUTIES

In England, of course, the Rule Committee, which is the forerunner of the judicial council idea, has, as its name indicates, power to make rules of court. In the United States, on the other hand, the judicial council has always been, with one notable exception, an advisory body. The reason for this is largely traceable to the history of the Federal Council of Senior Circuit Judges, the story of which is quite interesting. In 1922 there was, as there has been for some time, considerable agitation for legislation giving the United States Supreme Court the rule-making power on the law side as it has had for some years on the equity side. As Congress delayed action on the several bills which would have conferred this power, the bill establishing the council of judges was introduced as a sort of compromise to tide over special exigencies, and was promptly passed.\(^2\) It bore the approval of Chief Justice Taft, who has ever been an ardent advocate of judicial council legislation. And of course under the circumstances this council of federal judges was given only advisory powers as have most of the subsequently created state councils.

This feature is to be regretted. The judicial council should properly be more than an advisory body. The movement as originally conceived was intimately related to the rule-making power,\(^2^1\) and there is every reason why it should continue so; these two principles should be combined in the United States as they are in all parts of the British Empire.

California alone has chosen to give her judicial council more or less plenary rule-making powers. The council has power "to adopt or amend rules of practice and procedure for the several courts not inconsistent with laws that are now or that may hereafter be in force."\(^2^2\) And it is worthy of note that the California Council has been conspicuously effective

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\(^2^0\) See Journal American Judicature Society 174.
\(^2^2\) This was accomplished in California by a constitutional amendment. Laws of 1926 LXXXVIII. It is interesting to note that the constitutional amendment, when submitted to the people for ratification, polled about a two to one majority of the votes. 11 Journal American Judicature Society 9.
for already it has been instrumental in cutting down the "waiting period" in litigation from nearly two years to three months.\textsuperscript{23} One feature of the California measure which was modelled after the Federal plan has been of especial help in accomplishing so noteworthy a result, namely, the council has control over the assignment of judges to relieve emergency situations due to crowded court calendars. It is possible that the Kentucky council may work out a variation of this plan which may suit the particular needs better. At the first meeting of the council Judge Henry R. Prewitt asserted that circuit judges of the State are not doing enough of the special judges' work.

Possibly we should add that the Wisconsin Board of Circuit Judges, which is the variation of the judicial council obtaining in that State, has very limited rule-making powers. It may make rules for the circuit courts not inconsistent with statutes or with rules of practice adopted by the supreme court. By virtue of this power the Board has adopted several sets of rules.\textsuperscript{24} However, the leading authorities on procedural reform agree that the ideal way is to give the judicial council much more extensive rule-making powers, and consequently the American Judicature Society has drawn up a model Act which combines in a single instrument the judicial council idea and the rule-making power.\textsuperscript{25}

Even those states which have not given the council rule-making powers and which have confined it to a purely advisory capacity have, however, more satisfactory provisions for the rule feature than does Kentucky. Apparently each of the other states has a provision that the council shall submit such suggestions as it may deem advisable for the consideration of the judges of the various courts with relation to rules of practice and procedure. To be sure there is the provision in the Kentucky Act that the council shall "study the organization, rules, methods of procedure, and practice of the judicial system of the Commonwealth," but its only report is to be to the legislature. Probably the explanation is that any further stress

\textsuperscript{24} The latest rules may be found in Wis. Stats. (1927), p. 3147.
\textsuperscript{25} 6 Journal American Judicature Society, No. 4.
on rules of court was considered unnecessary since all of the principal judges of the State are members of the council.

To show the close connection between the judicial council and the rule-making power we may note that eight of the fourteen states having judicial councils have also given to the courts a more or less plenary rule-making power. These states are: Wisconsin, New Jersey, Washington, North Carolina, California, North Dakota, Connecticut and Virginia. In a ninth state, Oregon, the judicial council has proposed recently an amendment to the constitution which would confer on the supreme court of the state the complete power to make rules for all of the courts of record of the state. It is probable that the same object could be accomplished in Kentucky without a constitutional amendment and by an appropriate statute, as in most of the other states which have returned the power to control procedural details to the courts. Surely the Kentucky Council could give itself to no more worthy endeavor than the restoration of the rule power to the courts. The code system of regulating procedure is all too ineffective when it attempts to regulate all of the minute details of procedure—details which are more properly the subject of the rule-making power. All of the good which has been accomplished by the Code could well be saved in a short practice act, such as the one which has supplanted the Code in New York, supplemented by rules of court. Even the father of the Codes, David Dudley Field, recognized the superiority of this latter system, for he said in 1891: “In one respect the English Act (Judicature Act of 1875) has an advantage over the American (Code), in that it is shorter, numbering only 100 sections or articles, intended to be supplemented, as it was supplemented, by rules of court.” Well might the Kentucky Judicial Council undertake the task of overhauling the Kentucky Code along modern lines.

As to most of the other provisions about the powers and duties of the council, the Kentucky Act does not differ greatly from other statutes. It provides that: “It shall be the duty of each Circuit Judge to prepare and submit to the Council


at such sessions a report setting forth the conditions in the Circuit Court over which he presides and of the business dispatched and pending in said Circuit Court. It shall be the duty of said council to report biennially to the General Assembly of the Commonwealth of Kentucky concerning the work of the various branches of the judicial system of the Commonwealth together with any recommendations it may have for the modification or amelioration of existing conditions or for any amendments to the Codes of Practice and Procedure. A majority of the statutes give the council the power to compel the attendance of witnesses and the production of necessary papers, a thing which the Kentucky Act does not provide.

COMPENSATION AND EXPENSES

The Kentucky Act is absolutely the only statute which provides that the members of the judicial council shall receive pay; all of the others providing that members shall serve without compensation other than expenses. Each member of the Kentucky council is to receive six hundred dollars a year, payable in equal monthly installments. The other statutes merely provide that the traveling expenses and other incidental expenses of the members shall be paid. The first Oregon statute did not even provide for expenses, but this proved ineffective, so the statute was amended to allow expenses. It is difficult to say whether the Kentucky innovation is a wise one or not, but suffice it to say that it is a departure from the conventional idea.

Let no one mistake the advantage and significance of the Kentucky Judicial Council even as the matter stands. It cannot but accomplish great good. Yet this is no reason why it should not be made even better—better in each and every one of its outstanding aspects and especially in the matters of personnel and power. All Kentuckians may look forward with confidence to the accomplishment of many things by the council. Judging from the experience of other states we can safely predict the following achievements for the organization:

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28 Oregon Laws 1925, c. 164, p. 244.
(1) Unification of the State's judiciary;  
(2) Simplification of procedure;  
(3) A continuous, systematic, scientific survey;  

To put the matter in summary fashion we may hope that the Kentucky Judicial Council, in a measure at least, lives up to the picture of the situation created by its English prototype, as portrayed by Professor Sunderland: "By the creation of the Rule Committee, responsibility, previously scattered, was localized through the addition of active members of the practicing bar, a broader outlook was obtained, and better contacts were established with the commercial communities and with the public generally. These measures obviously promote efficiency and have been adopted in other parts of the British Empire." May they soon have spread to still another portion of the Anglo-American world—Kentucky.

George Ragland, Jr.