STATE JUSTICE INSTITUTE ACT OF 1983

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

H.R. 3403

STATE JUSTICE INSTITUTE ACT OF 1983

JULY 13, 1983

Serial No. 26



Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

25-622 O WASHINGTON : 1984

F/N P.L. 98-620

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STATE JUSTICE INSTITUTE ACT OF 1983

WEDNESDAY, JULY 13, 1983

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to call, at 2 p.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, DeWine, Moorhead, and Sawyer.

Staff present: Michael J. Remington, chief counsel; Joseph V. Wolfe, associate counsel; and Audrey K. Marcus, clerical staff.

Mr. KASTENMEIER. The committee will come to order.

Today the committee is meeting to consider the bill, H.R. 3403, which would establish a State Justice Institute. As envisioned, the Institute would provide valuable assistance to the States in the administration of their judicial systems. The Institute would fill a large void in the way of resources and information services available to State courts systems which presently process more than 95 percent of the Nation's judicial caseload.

There was first introduced in the 96th Congress similar legislation which was subject to a hearing by this subcommittee and, unfortunately, even though it was processed by the Senate, we were not able to get favorable final action by the House before the conclusion of the Congress.

Now in this Congress, it is my hope that we will see this Institute become a reality. I am confident that the quality and efficiency of many of our State judicial systems would be greatly enhanced by the enactment of the legislative ideas at least embodied in this measure.

Without objection, a copy of the bill will be inserted in the record.

[The bill, H.R. 3403, follows:]

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98TH CONGRESS
1ST SESSION

H. R. 3403

To aid State and local governments in strengthening and improving their judicial systems through the creation of a State Justice Institute.

IN THE HOUSE OF REPRESENTATIVES

JUNE 23, 1983

Mr. KASTENMEIER (for himself, Mr. RODINO, Mr. MAZZOLI, Mr. FISH, Mr. MOORHEAD, Mr. KINDNESS, Mr. FRANK, Mr. CROCKETT, Mr. HUGHES, Mr. GLICKMAN, Mr. HYDE, Mrs. SCHROEDER, Mr. SAWYER, Mr. SYNAR, Mr. SAM B. HALL, JR., Mr. AKAKA, Mr. LOWRY of Washington, Mr. WON PAT, Mr. SOLARZ, Mr. EDGAR, Mr. LEHMAN of Florida, Mr. STOKES, Mr. SUNIA, Mr. LELAND, Mr. AUCOIN, Mr. OBERSTAR, Mr. PRITCHARD, Mr. FEIGHAN, Mr. BONKER, Mr. MITCHELL, Mr. HERTEL of Michigan, Mr. SIMON, Mr. BEVILL, Mr. GONZALEZ, Mr. SMITH of Florida, Mr. FRANKLIN, Mr. MORRISON of Washington, Mr. REID, Mr. HAMMERSCHMIDT, Mr. WEISS, and Mrs. VUCANOVICH) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To aid State and local governments in strengthening and improving their judicial systems through the creation of a State Justice Institute.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "State Justice Institute Act of 1983".

DEFINITIONS

SEC. 2. As used in this Act, the term—

(1) "Board" means the Board of Directors of the State Justice Institute;

(2) "Director" means the Executive Director of the State Justice Institute;

(3) "Governor" means the Chief Executive Officer of a State;

(4) "Institute" means the State Justice Institute established under section 3 of this Act;

(5) "recipient" means any grantee, contractor, or recipient of financial assistance under this Act;

(6) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States; and

(7) "Supreme Court" means the highest appellate court within a State unless, for the purposes of this Act, a constitutionally or legislatively established judicial council acts in place of that court.

ESTABLISHMENT OF INSTITUTE; DUTIES

SEC. 3. (a)(1) There is hereby established a private nonprofit corporation which shall be known as the State Justice

Institute. The purpose of the Institute shall be to further the development and adoption of improved judicial administration in State courts in the United States.

(2) The Institute may be incorporated in any State, pursuant to section 4(a)(5) of this Act. To the extent consistent with the provisions of this Act, the Institute may exercise the powers conferred upon a nonprofit corporation by the laws of the State in which it is incorporated.

(b) The Institute shall—

(1) direct a national program of assistance designed to assure each person ready access to a fair and effective system of justice by providing funds to—

(A) State courts;

(B) national organizations which support and are supported by State courts; and

(C) any other nonprofit organization that will support and achieve the purposes of this Act;

(2) foster coordination and cooperation with the Federal judiciary in areas of mutual concern;

(3) make recommendations concerning the proper allocation of responsibility between the State and Federal court systems;

(4) promote recognition of the importance of the separation of powers doctrine to an independent judiciary; and

(5) encourage education for judges and support personnel of State court systems through national and State organizations, including universities.

(c) The Institute shall not duplicate functions adequately performed by existing nonprofit organizations and shall promote, on the part of agencies of State judicial administration, responsibility for success and effectiveness of State court improvement programs supported by Federal funding.

(d) The Institute shall maintain its principal offices in the State in which it is incorporated and shall maintain therein a designated agent to accept service of process for the Institute. Notice to or service upon the agent shall be deemed notice to or service upon the Institute.

(e) The Institute, and any program assisted by the Institute, shall be eligible to be treated as an organization described in section 170(c)(2)(B) of the Internal Revenue Code of 1954 and as an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 which is exempt from taxation under section 501(a) of such Code. If such treatments are conferred in accordance with the provisions of such Code, the Institute, and programs assisted by the Institute, shall be subject to all provisions of such Code relevant to the conduct of organizations exempt from taxation.

(f) The Institute shall afford notice and reasonable opportunity for comment to interested parties prior to issuing

any rule, regulation, guideline, or instruction under this Act, and it shall publish any such rule, regulation, guideline, or instruction in the Federal Register at least thirty days prior to its effective date.

BOARD OF DIRECTORS

SEC. 4. (a)(1) The Institute shall be supervised by a Board of Directors, consisting of eleven voting members to be appointed by the President, by and with the advice and consent of the Senate. The Board shall have both judicial and nonjudicial members, and shall, to the extent practicable, have a membership representing a variety of backgrounds and reflecting participation and interest in the administration of justice.

(2) The Board shall consist of—

(A) six judges, to be appointed in the manner provided in paragraph (3);

(B) one State court administrator, to be appointed in the manner provided in paragraph (3); and

(C) four members from the public sector, no more than two of whom shall be of the same political party.

(3) The President shall appoint six judges and one State court administrator from a list of candidates submitted by the Conference of Chief Justices. The President may reject such list and request submission of another list. The Conference of Chief Justices shall submit a list of at least fourteen individ-

uals, including judges and State court administrators, whom the conference considers best qualified to serve on the Board. Prior to consulting with or submitting a list to the President, the Conference of Chief Justices shall obtain and consider the recommendations of all interested organizations and individuals concerned with the administration of justice and the objectives of this Act.

(4) The President shall appoint the members under this subsection within sixty days after the date of enactment of this Act.

(5) The initial members of the Board of Directors shall be the incorporators of the Institute and shall determine the State in which the Institute is to be incorporated.

(b)(1) Except as provided in paragraph (2), the term of each voting member of the Board shall be three years. Each member of the Board shall continue to serve until the successor to such member has been appointed and qualified.

(2) Five of the members first appointed by the President shall serve for a term of two years. Any member appointed to serve for an unexpired term resulting from the death, disability, retirement, or resignation of a member shall be appointed only for such unexpired term, but shall be eligible for reappointment.

(3) The term of the initial members shall commence from the date of the first meeting of the Board, and the term

of each member other than an initial member shall commence from the date of termination of the preceding term.

(c) No member shall be reappointed to more than two consecutive terms immediately following such member's initial term.

(d) Members of the Board shall serve without compensation, but shall be reimbursed for actual and necessary expenses incurred in the performance of their official duties.

(e) The members of the Board shall not, by reason of such membership, be considered officers or employees of the United States.

(f) Each member of the Board shall be entitled to one vote. A simple majority of the membership shall constitute a quorum for the conduct of business. The Board shall act upon the concurrence of a simple majority of the membership present and voting.

(g) The Board shall select a chairman from among the voting members of the Board. The first chairman shall serve for a term of three years, and the Board shall thereafter annually elect a chairman from among its voting members.

(h) A member of the Board may be removed by a vote of seven members for malfeasance in office, persistent neglect of or inability to discharge the duties of the office, or for any offense involving moral turpitude, but for no other cause.

(i) Regular meetings of the Board shall be held quarterly. Special meetings shall be held from time to time upon the call of the chairman, acting at his discretion or pursuant to the petition of any seven members.

(j) All meetings of the Board, any executive committee of the Board, and any council established in connection with this Act, shall be open and subject to the requirements and provisions of section 552b of title 5, United States Code, relating to open meetings.

(k) In its direction and supervision of the activities of the Institute, the Board shall—

(1) establish such policies and develop such programs for the Institute as will further the achievement of its purpose and the performance of its functions;

(2) establish policy and funding priorities and issue rules, regulations, guidelines, and instructions pursuant to such priorities;

(3) appoint and fix the duties of the Executive Director of the Institute, who shall serve at the pleasure of the Board and shall be a nonvoting ex officio member of the Board;

(4) present, to government departments, agencies, and instrumentalities whose programs or activities relate to the administration of justice in the State judiciaries of the United States, the recommendations of

the Institute for the improvement of such programs or activities;

(5) consider and recommend to both public and private agencies aspects of the operation of the State courts of the United States considered worthy of special study; and

(6) award grants and enter into cooperative agreements or contracts pursuant to section 6(a) of this Act.

OFFICERS AND EMPLOYEES

SEC. 5. (a)(1) The Director, subject to general policies established by the Board, shall supervise the activities of persons employed by the Institute and may appoint and remove such employees as he determines necessary to carry out the purposes of the Institute. The Director shall be responsible for the executive and administrative operations of the Institute, and shall perform such duties as are delegated to such Director by the Board and the Institute.

(2) No political test or political qualification shall be used in selecting, appointing, promoting, or taking any other personnel action with respect to any officer, agent, or employee of the Institute, or in selecting or monitoring any grantee, contractor, person, or entity receiving financial assistance under this Act.

(b) Officers and employees of the Institute shall be compensated at rates determined by the Board, but not in excess

of the rate of level V of the Executive Schedule specified in section 5316 of title 5, United States Code.

(c)(1) Except as otherwise specifically provided in this Act, the Institute shall not be considered a department, agency, or instrumentality of the Federal Government.

(2) This section does not limit the authority of the Office of Management and Budget to review and submit comments upon the Institute's annual budget request at the time it is transmitted to the Congress.

(d)(1) Except as provided in paragraph (2), officers and employees of the Institute shall not be considered officers or employees of the United States.

(2) Officers and employees of the Institute shall be considered officers and employees of the United States solely for the purposes of the following provisions of title 5, United States Code: subchapter I of chapter 81 (relating to compensation for work injuries); chapter 83 (relating to civil service retirement); chapter 87 (relating to life insurance); and chapter 89 (relating to health insurance). The Institute shall make contributions under the provisions referred to in this subsection at the same rates applicable to agencies of the Federal Government.

(e) The Institute and its officers and employees shall be subject to the provisions of section 552 of title 5, United States Code, relating to freedom of information.

GRANTS AND CONTRACTS

SEC. 6. (a) The Institute is authorized to award grants and enter into cooperative agreements or contracts, in a manner consistent with subsection (b), in order to—

(1) conduct research, demonstrations, or special projects pertaining to the purposes described in this Act, and provide technical assistance and training in support of tests, demonstrations, and special projects;

(2) serve as a clearinghouse and information center, where not otherwise adequately provided, for the preparation, publication, and dissemination of information with respect to State judicial systems;

(3) participate in joint projects with government agencies, including the Federal Judicial Center, with respect to the purposes of this Act;

(4) evaluate, when appropriate, the programs and projects carried out under this Act to determine their impact upon the quality of criminal, civil, and juvenile justice and the extent to which they have met or failed to meet the purposes and policies of this Act;

(5) encourage and assist in the furtherance of judicial education;

(6) encourage, assist, and serve in a consulting capacity to State and local justice system agencies in the development, maintenance, and coordination of crimi-

nal, civil, and juvenile justice programs and services; and

(7) be responsible for the certification of national programs that are intended to aid and improve State judicial systems.

(b) The Institute is empowered to award grants and enter into cooperative agreements or contracts as follows:

(1) The Institute shall give priority to grants, cooperative agreements, or contracts with—

(A) State and local courts and their agencies,

(B) national nonprofit organizations controlled by, operating in conjunction with, and serving the judicial branches of State governments; and

(C) national nonprofit organizations for the education and training of judges and support personnel of the judicial branch of State governments.

(2) The Institute may, if the objective can better be served thereby, award grants or enter into cooperative agreements or contracts with—

(A) other nonprofit organizations with expertise in judicial administration;

(B) institutions of higher education;

(C) individuals, partnerships, firms, or corporations; and

(D) private agencies with expertise in judicial administration.

(3) Upon application by an appropriate Federal, State, or local agency or institution and if the arrangements to be made by such agency or institution will provide services which could not be provided adequately through nongovernmental arrangements, the Institute may award a grant or enter into a cooperative agreement or contract with a unit of Federal, State, or local government other than a court.

(4) Each application for funding by a State or local court shall be approved by the State's supreme court, or its designated agency or council, which shall receive, administer, and be accountable for all funds awarded by the Institute to such State or local court.

(c) Funds available pursuant to grants, cooperative agreements, or contracts awarded under this section may be used—

(1) to assist State and local court systems in establishing appropriate procedures for the selection and removal of judges and other court personnel and in determining appropriate levels of compensation;

(2) to support education and training programs for judges and other court personnel, for the performance of their general duties and for specialized functions, and to support national and regional conferences and seminars for the dissemination of information on new developments and innovative techniques;

(3) to conduct research on alternative means for using nonjudicial personnel in court decisionmaking activities, to implement demonstration programs to test innovative approaches, and to conduct evaluations of their effectiveness;

(4) to assist State and local courts in meeting requirements of Federal law applicable to recipients of Federal funds;

(5) to support studies of the appropriateness and efficacy of court organizations and financing structures in particular States, and to enable States to implement plans for improved court organization and finance;

(6) to support State court planning and budgeting staffs and to provide technical assistance in resource allocation and service forecasting techniques;

(7) to support studies of the adequacy of court management systems in State and local courts and to implement and evaluate innovative responses to problems of record management, data processing, court per-

sonnel management, reporting and transcription of court proceedings, and juror utilization and management;

(8) to collect and compile statistical data and other information on the work of the courts and on the work of other agencies which relate to and effect the work of the courts;

(9) to conduct studies of the causes of trial and appellate court delay in resolving cases and to establish and evaluate experimental programs for reducing case processing time;

(10) to develop and test methods for measuring the performance of judges and courts and to conduct experiments in the use of such measures to improve their functioning;

(11) to support studies of court rules and procedures, discovery devices, and evidentiary standards, to identify problems with their operation, to devise alternative approaches to better reconcile the requirements of due process with the needs for swift and certain justice, and to test their utility;

(12) to support studies of the outcomes of cases in selected subject matter areas to identify instances in which the substance of justice meted out by the courts diverges from public expectations of fairness, consisten-

cy, or equity, to propose alternative approaches to the resolving of cases in problem areas, and to test and evaluate those alternatives;

(13) to support programs to increase court responsiveness to the needs of citizens through citizen education, improvement of court treatment of witnesses, victims, and jurors, and development of procedures for obtaining and using measures of public satisfaction with court processes to improve court performance;

(14) to test and evaluate experimental approaches to providing increased citizen access to justice, including processes which reduce the cost of litigating common grievances and alternative techniques and mechanisms for resolving disputes between citizens; and

(15) to carry out such other programs, consistent with the purposes of this Act, as may be considered appropriate by the Institute.

(d) The Institute shall incorporate, in any grant, cooperative agreement, or contract awarded under this section in which a State or local judicial system is the recipient, the requirement that the recipient provide a matching amount, from private or public sources, equal to 25 per centum of the total cost of such grant, cooperative agreement, or contract, except that such requirement may be waived in exceptionally

rare circumstances upon the approval of the chief justice of the highest court of the State and a majority of the Board of Directors.

(e) The Institute shall monitor and evaluate, or provide for independent evaluations of, programs supported in whole or in part under this Act to insure that the provisions of this Act, the bylaws of the Institute, and the applicable rules, regulations, and guidelines promulgated pursuant to this Act, are carried out.

(f) The Institute shall provide for an independent study of the financial and technical assistance programs under this Act.

LIMITATIONS ON GRANTS, COOPERATIVE AGREEMENTS, AND CONTRACTS

SEC. 7. (a) With respect to grants made and contracts or cooperative agreements entered into under this Act, the Institute shall—

(1) insure that no funds made available by the Institute to a recipient shall be used at any time, directly or indirectly, to influence the issuance, amendment, or revocation of any Executive order or similar promulgation by any Federal, State, or local agency, or to undertake to influence the passage or defeat of any legislation by the Congress of the United States, or by any State or local legislative body, or any State proposal

by initiative petition, unless a governmental agency, legislative body, a committee, or a member thereof—

(A) requests personnel of the recipient to testify, draft, or review measures or to make representations to such agency, body, committee, or member; or

(B) is considering a measure directly affecting the activities under this Act of the recipient or the Institute;

(2) insure all personnel engaged in grant, cooperative agreement, or contract assistance activities supported in whole or part by the Institute refrain, while so engaged, from any partisan political activity; and

(3) insure that each recipient that files with the Institute a timely application for refunding is provided interim funding necessary to maintain its current level of activities until—

(A) the application for refunding has been approved and funds pursuant thereto received; or

(B) the application for refunding has been finally denied in accordance with section 9 of this Act.

(b) No funds made available by the Institute under this Act, either by grant, cooperative agreement, or contract, may be used to support or conduct training programs for the

purpose of advocating particular nonjudicial public policies or encouraging nonjudicial political activities.

(c) The authority to enter into cooperative agreements, contracts, or any other obligations under this Act shall be effective only to such extent, and in such amounts, as are provided in advance in appropriation Acts.

(d) To insure that funds made available under this Act are used to supplement and improve the operation of State courts, rather than to support basic court services, funds shall not be used—

(1) to supplant State or local funds currently supporting a program or activity; or

(2) to construct court facilities or structures, except to remodel existing facilities to demonstrate new architectural or technological techniques, or to provide temporary facilities for new personnel or for personnel involved in a demonstration or experimental program.

RESTRICTIONS ON ACTIVITIES OF THE INSTITUTE

SEC. 8. (a) The Institute shall not—

(1) participate in litigation unless the Institute or a recipient of the Institute is a party, and shall not participate on behalf of any client other than itself;

(2) interfere with the independent nature of any State judicial system nor allow financial assistance to

be used for the funding of regular judicial and administrative activities of any State judicial system other than pursuant to the terms of any grant, cooperative agreement, or contract with the Institute, consistent with the requirements of this Act; or

(3) undertake to influence the passage or defeat of any legislation by the Congress of the United States or by any State or local legislative body, except that personnel of the Institute may testify or make other appropriate communication—

(A) when formally requested to do so by a legislative body, committee, or a member thereof;

(B) in connection with legislation or appropriations directly affecting the activities of the Institute; or

(C) in connection with legislation or appropriations dealing with improvements in the State judiciary, consistent with the provisions of this Act.

(b)(1) The Institute shall have no power to issue any shares of stock, or to declare or pay any dividends.

(2) No part of the income or assets of the Institute shall inure to the benefit of any director, officer, or employee, except as reasonable compensation for services or reimbursement for expenses.

(3) Neither the Institute nor any recipient shall contribute or make available Institute funds or program personnel or equipment to any political party or association, or the campaign of any candidate for public or party office.

(4) The Institute shall not contribute or make available Institute funds or program personnel or equipment for use in advocating or opposing any ballot measure, initiative, or referendum, except those dealing with improvement of the State judiciary, consistent with the purposes of this Act.

(c) Officers and employees of the Institute or of recipients shall not at any time intentionally identify the Institute or the recipient with any partisan or nonpartisan political activity associated with a political party or association, or the campaign of any candidate for public or party office.

SPECIAL PROCEDURES

SEC. 9. The Institute shall prescribe procedures to insure that—

(1) financial assistance under this Act shall not be suspended unless the grantee, contractor, person, or entity receiving such financial assistance has been given reasonable notice and opportunity to show cause why such actions should not be taken; and

(2) financial assistance under this Act shall not be terminated, an application for refunding shall not be denied, and a suspension of financial assistance shall

not be continued for longer than thirty days, unless the grantee, contractor, person, or entity receiving financial assistance has been afforded reasonable notice and opportunity for a timely, full, and fair hearing. When requested, such hearing shall be conducted by an independent hearing examiner appointed by the Institute in accordance with procedures established in regulations promulgated by the Institute.

PRESIDENTIAL COORDINATION

SEC. 10. The President may, to the extent not inconsistent with any other applicable law, direct that appropriate support functions of the Federal Government may be made available to the Institute in carrying out its functions under this Act.

RECORDS AND REPORTS

SEC. 11. (a) The Institute is authorized to require such reports as it considers necessary from any recipient with respect to activities carried out pursuant to this Act.

(b) The Institute is authorized to prescribe the keeping of records with respect to funds provided under any grant, cooperative agreement, or contract under this Act, and shall have access to such records at all reasonable times for the purpose of insuring compliance with such grant, cooperative agreement, or contract or the terms and conditions upon which financial assistance was provided.

(c) Copies of all reports pertinent to the evaluation, inspection, or monitoring of any recipient shall be submitted on a timely basis to such recipient, and shall be maintained in the principal office of the Institute for a period of at least five years after such evaluation, inspection, or monitoring. Such reports shall be available for public inspection during regular business hours, and copies shall be furnished, upon request, to interested parties upon payment of such reasonable fees as the Institute may establish.

(d) Non-Federal funds received by the Institute, and funds received for projects funded in part by the Institute or by any recipient from a source other than the Institute, shall be accounted for and reported as receipts and disbursements separate and distinct from Federal funds.

AUDITS

SEC. 12. (a)(1) The accounts of the Institute shall be audited annually. Such audits shall be conducted in accordance with generally accepted auditing standards by independent certified public accountants who are certified by a regulatory authority of the jurisdiction in which the audit is undertaken.

(2) Any audits under this subsection shall be conducted at the place or places where the accounts of the Institute are normally kept. The person conducting the audit shall have access to all books, accounts, financial records, reports, files,

and other papers or property belonging to or in use by the Institute and necessary to facilitate the audit. The full facilities for verifying transactions with the balances and securities held by depositories, fiscal agents, and custodians shall be afforded to any such person.

(3) The report of the annual audit shall be filed with the General Accounting Office and shall be available for public inspection during business hours at the principal office of the Institute.

(b)(1) In addition to the annual audit, the financial transactions of the Institute for any fiscal year during which Federal funds are available to finance any portion of its operations may be audited by the General Accounting Office in accordance with such rules and regulations as may be prescribed by the Comptroller General of the United States.

(2) Any audit under this subsection shall be conducted at the place or places where accounts of the Institute are normally kept. The representatives of the General Accounting Office shall have access to all books, accounts, financial records, reports, files, and other papers or property belonging to or in use by the Institute and necessary to facilitate the audit. The full facilities for verifying transactions with the balances and securities held by depositories, fiscal agents, and custodians shall be afforded to such representatives. All such books, accounts, financial records, reports, files, and

other papers or property of the Institute shall remain in the possession and custody of the Institute throughout the period beginning on the date such possession or custody commences and ending three years after such date, but the General Accounting Office may require the retention of such books, accounts, financial records, reports, files, and other papers or property for a longer period under section 117(b) of the Accounting and Auditing Act of 1950 (31 U.S.C. 67(b)).

(3) A report of each audit under this subsection shall be made by the Comptroller General to the Congress and to the Attorney General, together with such recommendations with respect thereto as the Comptroller General considers advisable.

(c)(1) The Institute shall conduct, or require each recipient to provide for, an annual fiscal audit. The report of each such audit shall be maintained for a period of at least five years at the principal office of the Institute.

(2) The Institute shall submit to the Comptroller General of the United States copies of audits conducted under this subsection, and the Comptroller General may, in addition, inspect the books, accounts, financial records, files, and other papers or property belonging to or in use by such grantee, contractor, person, or entity, which relate to the disposition or use of funds received from the Institute. Such audit reports

shall be available for public inspection during regular business hours, at the principal office of the Institute.

AUTHORIZATION OF APPROPRIATIONS

SEC. 13. There are authorized to be appropriated to carry out the provisions of this Act not to exceed $20,000,000 for the fiscal year ending September 30, 1984, $25,000,000 for the fiscal year ending September 30, 1985, and $25,000,000 for the fiscal year ending September 30, 1986.

EFFECTIVE DATE

SEC. 14. The provisions of this Act shall take effect on October 1, 1983.

Mr. KASTENMEIER. I might add that I am gratified that 10 members of the subcommittee have cosponsored the bill, and 17 members, including the chairman and ranking minority member, of the full committee have become cosponsors. Thus, there is strong support indicated in the Judiciary Committee for the creation of the State Justice Institute.

Before introducing this afternoon's witnesses, I would also like to say that we will have only 1 day of hearings. Written statements will be received from the Judicial Conference of the United States and from the Department of Justice. In addition, the record will remain open to individuals and organizations wishing to comment on the proposed legislation.

Indeed, one of our colleagues from Oregon, the Honorable Les AuCoin, has submitted a very brief statement which he asks us to include in the record.

Without objection, his statement will be received and made part of the record.

[The statement of Mr. AuCoin follows:]

PREPARED STATEMENT BY THE HONORABLE LES AUCOIN BEFORE THE HOUSE SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE, JULY 13, 1983

Mr. Chairman, I appreciate the opportunity to testify in support of H.R. 3404, the State Justice Institute Act of 1983, and I want to commend you for your leadership in focusing attention on the critical, largely unattended problems of our overburdened state courts.

If the robed and blindfolded figure that symbolizes justice to America could speak, she would warn them to think twice before taking a grievance to court, because justice will not be swift and it will be more costly than they even imagined.

I am pleased today, on behalf of the Honorable Berkley Lent, Chief Justice of the Oregon Supreme Court, to urge the swift adoption of this bill so that we can begin to provide vital technical and financial assistance to help speed the delivery of justice in our state courts and assist in the nationwide fight against crime.

Help is especially needed in Oregon, Mr. Chairman. Oregon's state courts experience a 78 percent increase in the number of cases filed between 1977 and 1981—the third highest rate of increase in the nation. Today, Oregon's 10-member Court of Appeals holds the distressing distinction of having the highest caseload of any court of its size in the nation, with 3,403 cases filed in 1981.

While the judicial and administrative workload of Oregon's courts has increased dramatically, state and local support has lagged. As you know, Mr. Chairman, historically the courts have been without a constitutency to speak for them in state legislatures. The courts lose ground when times are bad. In Oregon, times have been very bad indeed.

To cite just one example, the Office of the State Court Administrator in Oregon, which is responsible for the administrative management of the Supreme Court, Court of Appeals and Tax Court, was forced to lay off 20 people because of a budget cut three years ago. All of those positions have yet to be made up, hampering everything from routine accounting and record keeping to the processing of appeals.

Judges and administrators have told me that the court system in Oregon is disintegrating because of the case overload and lack of resources. At the same time, average-income Oregonians and small business owners whose taxes support the court system can't afford to use it because the expense of litigation has become prohibitive.

As the Chief Justice of the United States has noted, the declining quality and increasing cost of justice in our state courts is a problem of national concern, because "the state courts are close to the people and they are the primary safeguard of the rights and privileges of individuals under both federal and state law."

In closing, Mr. Chairman, I want to associate myself with your remarks in the House of Representatives, June 23, on the introduction of this bill. It urgently needs to be enacted.

Mr. KASTENMEIER. Now, I would like to call on our first panel of witnesses representing the Conference of State Chief Justices. The Honorable Robert F. Utter, former chief justice and now justice of the Supreme Court of the State of Washington, is chairman of the Chief Justices' Committee on the State Justice Institute Act.

The Honorable Harry L. Carrico is chief justice of the Supreme Court of Virginia.

Gentlemen, you are most welcome and I invite you to proceed as you wish.

TESTIMONY OF HON. ROBERT F. UTTER, JUSTICE, SUPREME COURT OF WASHINGTON; AND HON. HARRY L. CARRICO, CHIEF JUSTICE, SUPREME COURT OF VIRGINIA, CONFERENCE OF CHIEF JUSTICES

Judge UTTER. Mr. Chairman, it is really with a feeling of great privilege that I appear on behalf of the Conference of Chief Justices representing the 50 farflung States of this Union to discuss a subject that you have identified this morning as one of national importance dealing inextricably with the role of law in these 50 States and our Federal Government.

I am, as you have indicated, Justice Robert Utter of the State of Washington. It has been my distinct privilege and pleasure to have appeared before this subcommittee in both the 96th and 97th Congresses to assist in testimony on this bill.

We deeply appreciate the leadership that you have shown on behalf of this measure and the patience. We appreciate the biparti-

san support that is also present for this bill. We express our appreciation to Chairman Rodino, to Mr. Fish, and to Mr. Moorhead for their support, as well as for the generous support of both parties.

We feel, as I am sure you have realized, that a deliberate pace is necessary in judicial matters, and we have seen the understanding of the concepts behind this bill improved by a large number of the Members of Congress. A better bill has been produced as a result of the time spent on this matter.

Without seeking to equate the State Justice Institute with the intercircuit tribunal, a matter that you were discussing and have before you now, I think there are important parallels to both bills. First, both bills were developed out of a special task force or commissioned studies seeking solutions to long and complex problems.

Second, both involve short-term authorizations and they certainly are frankly experimental in their approach. This bill that you have now before you has really nothing to compare it with, and we appreciate the willingness and opportunity to explore that subject with you.

We feel that the basic premise is that improvement of the quality of justice in the States is of equal importance to the Federal Government as well as to the States. The failure of the State judiciary at any level cannot be separated from concerns with justice at the Federal level.

Because we have been before this committee on previous times, I will not offer a full review of the legislation that you have before you, but I think it is of interest to look at current matters that are pending before this Congress and see how they impact on the States. Also, how this bill might be a part of the solution, rather than the problem.

One matter that has concerned us greatly is the proposed Product Liability Act, which was approved by the Senate Commerce Committee late in the 97th Congress, and again is before that committee as Senate bill 44. That bill would substitute a Federal statute for tort laws of the States in the rapidly growing field of product liability.

While the proposal would leave the trial or product liability cases in the State courts and not create new Federal question jurisdiction, it represents a major intrusion into State legal and judicial affairs with consequences that are unknown for a number of years. It seems ironic to me that while an intercircuit tribunal is at least being discussed to resolve some of the Federal problems that have arisen in State jurisprudence the impact of 50 different States construing the Federal issues involved in this Federal Products Liability Act and the consequent impact of those appeals on the Federal system has not been addressed.

A second area that is of great concern to us is the Armed Career Criminal Act. In another action, Congress approved the Armed Career Criminal Act which would permit Federal jurisdiction of the trial of an armed felon facing a third State charge of robbery or burglary. Except for the President's pocket veto of the omnibus crime bill which included it, that legislation would now be law. We understand it has been approved by the Senate Judiciary Committee as Senate bill 52.

Neither bill is wrong, we believe, in the concerns that they address, but they are symptomatic of the problem faced by State courts. The States courts were not consulted prior to the presentation of these bills and the impact of these bills and the way that the problems are addressed in the bills demonstrate, I think, the great need for State courts to be a part of the general concern expressed by the Federal Government in these areas.

They both seek Federal solutions to complex civil and criminal issues in the State. They were addressed in a piecemeal matter which extends Federal power and they have the potential for greatly increasing, I believe, the caseload in the Federal courts.

Proponents of the Property Liability Act argue that Federal preemption is necessary because the States have failed to use uniform laws. The same logic might well be applied in other fields. For instance, the American bar recently adopted a policy position opposing the Federal product liability law but at the same time called for Federal legislation on claims for damages arising from occupational diseases with long periods of latency, such as asbestosis.

You are aware, I am certain, of the large number of asbestos cases which are creating serious problems for the courts in many States, and even the Federal system. But again, what are the side effects of this legislation? Is a Federal law the most effective remedy?

The National Center for State Courts has launched an imaginative and promising effort, albeit with very limited resources, to deal with the problem at the State level. The initial analysis indicates that the volume of asbestos cases, while serious is not the major problem. The real problem, it appears, is that very few of these cases are settled and they are not settled because there is no claims process for them.

The State courts, as a result, have been those forums of first resort, rather than last resort. Instead of having a rational settlement process where a trial is only the last resort, the trial is the first inquiry with no interim way to solve the problem.

This is not the role the State courts are accustomed to playing and it is not a role they play well. One possible solution suggested by the study done by the national center looks to cooperative agreements among insurance carriers and manufacturers which would permit most claims to be filed with and settled by a central claims agency, either privately or in conjunction with the courts.

It is that type of approach, while unique, I think a State justice institute, once in place, can have a part in bringing about. Having this agency there as a body of first resort, to discuss with this Congress and its Members interested in judicial problems, ways to solve the problems, I believe would be of great benefit.

One of the areas that Congress is now involved in as well is a bit of new legislation authorizing Federal assistance to State and local criminal justice agencies. On this point, we only note that many of the problems that we experienced with the Law Enforcement Assistance Administration in the 1970's, which initiated the chain of events leading to this legislation, are still with us.

We have in mind the separation-of-powers and civil-criminal justice issues disclosed in our statement and do not wish to belabor them beyond noting that the administration's bill reported by the

Senate Judiciary Committee as Senate bill 53 is particularly troubling in that it originally contained no authority for funding any judicial branch programs, even if such programs were those most urgently needed by State and local governments receiving formula funds under the act. Nor has the Department of Justice been willing to accept meaningful Senate amendments in this regard.

If the State Justice Institute Act is passed and funded at anywhere near the authorization levels of H.R. 3403, those problems will lose some of their significance, but it is important to remember that the State Justice Institute would administer only a national discretionary program and would have no formula funds.

Thus, if the State Justice Institute Act is not passed, or is funded inadequately, State and local courts would again be without Federal assistance of the type going to executive branch functions of the criminal justice system.

We have reviewed the legislation proposed by this House and have a desire to work with this subcommittee on any meaningful amendments that you may wish to offer. There are changes, I think, that are apparent that may need to be made. Presidential flexibility in appointing members of the board, removal of board members for cause or for illness, authorization periods changing probably from 1984, 1986 to 1985, 1987, and lastly, an amendment clarifying approval of projects by the State's highest court, which must be consistent with State law.

The Conference of Chief Justices has supported various proposals which would curtail the growth of Federal caseloads. One of the matters that has been of most pride to me in working on this project has been to see an expression of sentiment on the part of the States that we can do it.

Federal diversity jurisdiction was one of the original issues that challenged the State courts and as long as 6 years ago, Chief Justice Sheran, the then chief justice of the supreme court of Minnesota, challenged the Conference of Chief Justices to accept their burden in cases that were now clogging the Federal system.

To my great pride, I must confess, astonishment, the Conference of Chief Justices at that time voted 50 to 0 to urge the Federal Government to bring cases, then in Federal courts, relating to diversity of jurisdiction, into the State courts, in spite of the enormous burden that would be imposed.

Of course, major metropolitan States, such as New York, New Jersey, Massachusetts, Michigan, Florida, and California all have special problems that would be created if diversity jurisdiction in Federal courts were abolished. But the interesting thing to me is that the courts of the States, rather than taking the attitude, "Let the Federal Government do it," have expressed a willingness to explore this issue and finding meaningful ways in which State courts could assume that burden.

Limitation on Federal habeas corpus jurisdiction is another area where State courts can be of great assistance to the Federal Government. Mr. Chairman, and members of this committee, if you combine diversity jurisdiction cases and habeas corpus cases, you are speaking of 36 percent of the total caseload burden before the Federal courts. The State courts have expressed a willingness to

take this burden from the Federal courts. Meaningful ways can be found to handle that within their own jurisdictional burdens.

That is no small offer. To me, it is a strong example of the willingness of State courts to make federalism something meaningful and to help the Federal courts. Minnesota, in a limited experiment in working with the Federal courts in that State, was able to reduce by almost 90 percent the number of Federal habeas corpus cases that came to the Federal court jurisdiction in that State through a span of years.

One of the things we are trying to do with the State Justice Institute is to be able to find a way to replicate experiments of that nature that will have an impact in a meaningful way on the caseloads facing Federal courts.

What State courts want most is, first of all, to be better than we are. We recognize our own failings. We recognize that there are many areas where we need to improve. We also want the public, lawyers as well, to recognize that we are better than they think we are. I think that is part of the problem of the inextricably intertwined difficulties relating to Federal and State jurisdiction.

It is the perception, and I urge an unfair one, of counsel who are concerned about diversity issues, that they cannot get as fair a hearing in State courts as they can in Federal courts, that somehow the quality of justice offered is less.

Until that perception is addressed, and addressed in a way that can assure the quality of justice is the same, the Federal court system is going to unavoidably be faced with a portion of the burden that State courts should be able to help them with.

What we need in the State Justice Institute, and what act provides, is an agency that will be met with a sophisticated approach to the interrelated problems of the State and Federal jurisdiction.

Ninety-eight percent of the cases heard in this country, in the court systems of this country, are heard in State courts. We share with the Federal courts in 98 percent of those cases, however, the responsibility for rights of all citizens that are guaranteed in the Federal Constitution.

I have a concern in addressing to members of this committee a desire to point out what the State Justice Institute is not, because we have worked carefully for so many years to try and focus narrowly on what we would hope to accomplish.

The first thing it is not is a Federal program imposed on State courts by the Federal Government. I served as a trial judge, as a juvenile court judge, as a court of appeals judge, and finally as chief justice in trying to resolve problems created by the imposition of Federal programs on State courts. I react adversely to those.

The State Justice Institute is not a financial assistance program for basic responsibilities for State courts. If those basic responsibilities are funded by the Federal Government, the States will never assume the proper burden for basic justice provided within their boundaries.

It is not a major burden, I submit, on the taxpayers of this Federal Government. It is a modest program in line with many of those now in the criminal justice field, the National Institute for Corrections, and others, which address different but important parts of the criminal justice area.

I think, lastly, it does not create a large new bureaucracy. It deals with and benefits from those agencies in place in the various States and because it is not a program imposed on them, it would have their full cooperation, both with their staffs and their ideas in trying to make this program work.

What we hope the Institute will be is, first of all, a federally chartered, nonprofit corporation whose policy will be set by a board appointed by the President. Grants would be given on project bases only. Priorities would set by the courts, those who actually are affected by the programs, and there would be support as well for national organizations serving the courts, such as the National College for the Judiciary and the Institute for Court Management as well.

Emphasis would be on research, education, demonstration, clearinghouse, and technical assistance programs that are national in scope.

The principal features of the Institute would be control of State officials with firsthand knowledge of the problems they are dealing with, responsive directly to the Judiciary Committees of this Congress. Responsibility would be placed on judicial officials charged with that responsibility in the States. We would hope by this to speed court improvements and promote economics of scale nationally.

We lastly, and I think far from least, would hope to have an agency capable of speaking and acting on behalf of the States. The perceived inadequacies of State courts have been responsible for many of the burdens on the Federal courts. We would hope by forthrightly and adequately addressing these perceived inadequacies to release some of the burdens that now exist on Federal courts.

The problems facing the State court systems are varied and long standing. In some cases, they are structural; in some cases, they are managerial; in some cases, they are problems not only of perception, but of reality as well. The thing that has consistently impressed me in dealing with the judges of the various States has been their willingness to become better, their wish to become better than they are and their desire to be recognized for the quality that they do have.

In conclusion, I would like to say that the State Justice Institute has been proposed by State judicial leaders as the mechanism by which they can focus attention on many common issues facing them and deal with these issues in the most appropriate and efficient manner.

Our experience with LEAA funding, however brief, taught us how much we could accomplish with even limited amounts of discretionary money, the kind of money we simply have not been able to obtain from State legislatures afflicted with what Maurice Rosenberg has termed the disease of "erratic thriftiness," but whose attention is understandably directed to matters of State concern, not national-level concerns.

The Conference of Chief Justices believes, then, the State Justice Institute is essential if State courts are to handle appropriately within the State context without Federal intervention growing national problems such as those associated with fields of product lia-

bility, asbestos litigation; that they are to assume, as they should, the burden of Federal diversity cases which constituted nearly 25 percent of the Federal civil filings in 1982.

We would hope to reduce the need for Federal habeas corpus and civil rights actions by State prisoners which constituted 12 percent of Federal civil filings in 1982; to eliminate the need for Federal prosecution and trial of State career criminals and the expansion of Federal jurisdiction and caseloads that that entails; and I think to have more importantly an effective voice in the formulation of policies and programs for administration of justice to initiate here in Washington to marshal the resources needed to implement those programs and policies.

We believe this act is essential, in short, if State courts are to adequately fulfill their role in our Federal system and Federal courts are to remain courts of limited jurisdiction with their special place in our constitutional scheme.

We thank you, again, for this opportunity to present our views. Chief Justice Carrico is prepared to expand on these introductory remarks, if you wish. We will be pleased to respond to any questions you have.

[The statement of Judge Utter follows:]

STATEMENT OF THE
CONFERENCE OF CHIEF JUSTICES

ON

H.R. 3403, THE STATE JUSTICE INSTITUTE ACT

BEFORE

THE HOUSE JUDICIARY SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

July 13, 1983

Mr. Chairman and Members of the Subcommittee:

The Conference of Chief Justices again is pleased to present its views on the State Justice Institute Act, legislation which we believe is essential to an appropriate relationship between the judicial branches of the 50 states and the national government here in Washington. We also believe it essential to the effective continuation of the rule of law as we have known it over the nearly 200 years of our federal history.

I am Robert F. Utter, Justice of the Supreme Court of the State of Washington and chairman of the conference of Chief Justices' Committee on the State Justice Institute Act. My colleague is the Honorable Harry L. Carrico, Chief Justice of the Supreme Court of Virginia and a member of the Conference's Committee on State-Federal Relations.

I had the pleasure of appearing before this Subcommittee when it considered and approved the State Justice Institute Act in the 96th and 97th Congresses and am delighted to be here today with Chief Justice Carrico to renew our support and bring the issues up-to-date.

However, Mr. Chairman, we first must express to you the Conference's deep appreciation for the leadership you and the Subcommittee have shown in bringing this legislation to the attention of the House. We also are indebted to Peter Rodino as chairman of the full committee, to Hamilton Fish, the ranking minority member, to Carlos Moorhead, ranking minority on the Subcommittee, and to all the others on the long list of cosponsors who joined you in introducing the bill.

We are, in truth, overwhelmed by this impressive show of support and are particularly pleased that it comes from distinguished members on both sides of the aisle. We trust this is a harbinger of equally good news at subsequent stages of the legislative process.

As I have indicated, Mr. Chairman, this is our third appearance before the Subcommittee on this legislation and I am, indeed, delighted to return for most of us in

the judiciary know, as Chief Justice Carrico can attest from recent efforts to establish an intermediate court of appeals in Virginia, that basic judicial reforms, or even modest programs for court improvement, should not be underaken by the impatient or the short-winded. We trust we are neither. But we have gained over the past three or four years a deeper insight into what must be the feelings of Chief Justice Burger when he laments the sometimes glacial pace of the Congress in its consideration of reforms deemed urgent by the federal judiciary.

There is great value, of course, to a deliberate pace in such matters and this is well illustrated by the history of the current proposal for an Intercircuit Tribunal of the United States Court of Appeals. The conference of Chief Justices has not taken a position on this bill but you have been wise, it seems to me, in not acting hastily on the various proposals to expand the capacity of the federal appellate system to resolve issues of national law. The limited, and admittedly experimental approach of the present bill makes sense, and will in time provide the right solution to what most agree are problems of great complexity at the apex of our judicial system.

Without seeking to equate the State Justice Institute with the Intercircuit Tribunal in any substantive way, we can cite important parallels in that (1) both bills were developed out of special task force or commission studies seeking solutions to complex, long-term problems; (2) both involve short-term authorizations; and (3) both are frankly experimental in their approach. It follows that neither involves a permanent or unalterable Congressional commitment should they not prove effective in addressing the problems they were designed to solve.

The Conference of Chief Justices always has looked upon the State Justice Institute Act as a first step in structuring an appropriate and mutually beneficial relationship between state court systems and the federal government. In our initial testimony before this subcommittee we said: "We do not profess to have arrived at a perfect solution but we do feel we have structured an agency by which <u>to begin</u> what would be the first

federal program for state courts in which the Congress looked directly at, and attempted to resolve, the complex issues involved." We described the legislation as "a landmark of major significance in the history of our justice system", and said it "would create a unique national resource to meet a unique national need."

We have always known that what we were proposing was unprecedented and therefore subject to change as we gained experience. That still is our position.

We have repeatedly testified, then, that the State Justice Institute legislation is premised on the belief that improvement in the quality of justice administered by the states is not only a goal of fundamental importance in itself, but is essential to attainment of important national objectives including a reduced rate of growth in the caseload of the federal courts and preservation of the historic role of state judiciaries in our federal system. We believe, in short, that the futures of state and federal judiciaries are inextricable. That is why we have come to you with the State Justice Institute Act.

Because the Subcommittee previously has reviewed this legislation in detail, Mr. Chairman, we do not propose a full statement of its hisotry at this time. Rather, we would like to concentrate on recent developments in the Congress which we believe reinforce our past positions and point more directly than ever to the need for a State Justice Institute.

There have been three bills of particular interest, all of them with good prospects of becoming law. The first is the proposed Product Liability Act which was approved by the Senate Commerce Committee late in the 97th Congress and again is before that committee as S. 44. This bill would substitute a federal statute for the tort laws of the states in the rapidly growing field of product liability. While the proposal would leave the trial of product liability cases in the state courts, and not create new federal question jurisdiction, it represents a major federal intrusion into state legal and judicial affairs with unknown consequences of vast potential for the federal system.

In another action, congress approved the Armed Career Criminal Act which would permit federal prosecution and trial of an armed felon facing a third state charge of robbery or burglary. Except for the President's pocket veto of the omnibus crime bill which included it, this legislation would now be law. We understand it has again been approved by the Senate Judiciary Committee as S. 52.

Both of these bills, by seeking federal solutions to complex civil and criminal issues in the state courts, might well cause more problems than they could solve. They would seem to raise many questions which have not been thoroughly examined and represent piecemeal, hit-and-miss approaches to broader problems of state-federal jurisdiction that we should be considering. In the meantime, either directly or indirectly, they would extend federal power into areas traditionally reserved to the states and needlessly, perhaps, increase the caseloads of the federal courts, including the United States Supreme Court whose justices are telling us with increasing urgency that they are unable to carry their present load.

We cannot help but note that the Supreme Court already is in need of assistance in resolving conflicts between the circuits of the relatively small federal system. At least that is the principal reason for the proposed Intercircuit Tribunal, as we understand it. What, then, would be the effect on the Supreme Court's caseload if 50 state supreme courts are required to interpret a federal statute preempting only a limited but very intricate portion of the tort law of their states? With such a precedent would any area of state tort law be secure from federal preemption?

Proponents of the Product Liability Act argue that federal preemption is necessary because the states have failed to use their own uniform law procedures. The same logic might well be applied to other fields. For instance, the American Bar Association recently adopted a policy position opposing the federal product liabilty law but at the same time called for federal legislation on claims for damages arising from occupational diseases with long periods of latency such as asbestosis. You are aware, I am certain, of the large number of asbestos cases which are creating serious problems for the courts of many states and even the federal system. But again, what would be the side effects of such legislation? Is a federal law the most effective remedy?

The National Center for State Courts has launched an imaginative and promising effort, albeit with very limited resources, to deal with this problem at the state level. The initial analysis indicates that the volume of asbestos cases, while serious enough, is not the basic problem. The real problem, it now appears, is that very few of these cases are settled. This is because there is no claims process for them and, therefore, no one to settle with. Each claim tends to result in many cross-claims with the result that there are too many parties and too many lawyers involved. State courts, which should be the forums of last resort in such matters, become the forums of first instance. This is not a role they are practiced in playing and they do not play it well. One possible solution looks to cooperative agreements among insurance carriers and manufacturers which would permit most claims to be filed with, and settled by, a central claims agency, either privately or in conjunction with the courts.

The National Center looks to this effort as a basis for action on similar problems in the future. There is reason to hope, then, that many of the more difficult problems facing our justice system, both civil and criminal, can be resolved within a state context, without direct federal intervention and the unknowns that implies for our dual court system. What we need are the resources to deal with these problems at the state level and the State Justice Institute has been designed to provide them.

The third area of recent Congressional action that bears on the State Justice Institute legislation involves new bills authorizing federal assistance to state and local criminal justice agencies. On this point we will only note that many of the problems we experienced with the Law Enforcement Assistance Administration in the 1970s, and which initiated the chain of events leading to the legislation we are considering today, are still with us. We have in mind the separation-of-powers and civil-criminal issues discussed below and do not wish to belabor them in this context beyond noting that the administration's bill, reported by the Senate Judiciary Committee as S. 53, is particularly troubling in that it originally contained no authority for funding any judicial branch programs, even if such programs were those most urgently needed by state and local governments receiving formula funds under the act. Nor has the Department of Justice been willing to accept meaningful Senate amendments in this regard.

If the State Justice Institute Act is passed, and funded at anywhere near the authorization levels in H.R. 3403, these problems will lose much of their significance. But it is important to remember that the State Justice Institute would administer only a national discretionary program and would have no formula funds. Thus, if the State Justice Institute Act is not passed, or is funded inadequately, state and local courts would again be without federal assistance of the type going to executive branch functions of the criminal justice system.

The remainder of our statement, Mr. Chairman, necessarily covers much the same ground as the statement provided to the Subcommittee last September when you last acted on the State Justice Institute Act. It provides a brief history and summary of the legislation which may be appropriate for the hearing record if not for presentation at this time.

We will close this portion of our remarks by stating our desire to work with the Subcommittee in making any technical or substantive amendments that are appropriate in light of changed circumstances. We are pleased that the bill as introduced includes an

amendment to Sec. 4 (a) (3) which gives the President greater flexibility in appointing members of the Board of Directors and trust this meets the concerns expressed by the Department of Justice over the limitations placed on the President by previous language.

In this regard, we also should note the need for an additional amendment that would authorize removals of board members for cause and provide for appointments to fill vacancies as these develop through expiration of terms, death, resignation, or otherwise. We would be happy to suggest such language if that be your wish.

We also would suggest the need, given requirements of the budget and appropriations processes, to begin the authorization period with fiscal year 1985 instead of 1984 and continue it through fiscal 1987 instead of fiscal 1986. Such an amendment would conform with the companion Senate bill as reported by subcommittee.

It also has been suggested that Section 3 (b) (3), which authorizes the Institute to "make recommendations concerning the proper allocation of responsibility between the State and Federal court systems", may be in conflict with the bill's prohibition on lobbying by the Institute. We would be amenable to modification or elimination of this provision, particularly in light of pending legislation to create a federal commission to study questions of state-federal jurisdiction on which the Conference of Chief Justices would be represented.

We also think the bill would be improved by an amendment clarifying the fact that approval of projects by a state's highest court must be consistent with State law.

The product liability and career criminal bills discussed above are only the latest of the legislative proposals that involve important issues of state-federal jurisdiction. As you are aware the Conference of Chief Justices supports various proposals which would greatly curtail the growth of federal caseloads through elimination of federal jurisdiction in diversity of citizenship cases and through limitations on federal habeas corpus review of state convictions. The Conference also has expressed its willingness to assist the

federal courts in the adjudication of federal question cases although we are aware that this could raise many difficult issues.

Assumption of diversity cases also would pose serious problems for the metropolitan courts of several states including New York, New Jersey, Massachusetts, Florida, and California. But the Conference of Chief Justices is very definitely of the view that caseload and jurisdictional issues are central to problems facing the federal courts and that state courts, with appropriate preparation, can and should relieve the federal courts of a portion of their growing burden. It also is clear that we first must put our own houses in order and that is what we are struggling to do in states throughout the nation.

What we have in mind then is an agency which will permit a sophisticated approach to problems of state courts within our federal system. As you know, state courts not only process the overwhelming majority (98 percent) of the cases in our state-federal judicial system but under the supremacy clause share with the federal courts responsibility for protecting the rights of all citizens under the Constitution and laws of the United States.

State courts, of course, existed before the federal courts and the federal constitution, in explicitly providing for only the United States Supreme Court, anticipated that state courts would be the courts of original jurisdiction for federal as well as state law questions. State courts, in fact, did hear federal question cases for the first 100 years of our national life. It was not until the Judiciary Act of 1875 that these

cases were moved to the federal courts.

But despite the growth of the federal system state courts remain the courts that touch our citizens most intimately and most frequently and it is from their experiences in state courts as litigants, jurors, witnesses or spectators that the vast majority of our citizens make their judgments as to the strengths, weaknesses and fairness of our judicial system. To the average citizen it matters not whether the court is state or federal. His concern is with the fa rness and effectiveness of the judicial process.

It has been the very deep concern of state chief justices for the improvement of their own systems that has led us to propose creation of a State Justice Institute.

I should note that the studies which led to this proposal were conducted by a Task Force of the Conference of Chief Justices and the Conference of State Court Administrators, in 1978 and 79 and that the legislation was drafted before the Carter administration made its decision not to fund LEAA in fiscal 1981 and to phase the agency out of existence. Thus, the bill was drafted to accommodate the Institute to the existing LEAA structure. It can stand alone at this time but it also would compliment the new justice assistance program proposed by the House in H.R. 2175.

In attempting to summarize this legislation it is important to stress what it would not do.

First, and most importantly, the Institute would not be a federally conceived and directed program imposed in any manner on the state courts. That is what we had under LEAA and that is what the State Justice Institute has been designed to correct. This is a proposal of state judicial leaders themselves and has been endorsed by a wide range of judicial and legal interests. It was designed to deal with violations of the separations of powers doctrine inherent in the LEAA program which was controlled at both the state and federal levels by officials of the executive branch; to permit the improvement of courts on a systemwide basis, i.e., in a manner consistent with their interrelated civil and criminal functions; and to protect the independence of state courts to the fullest extent

possible.

Second, the legislation does not propose a financial assistance program, i.e., it would not provide funds for salaries or routine operation of courts. This has never been the intention of the legislation and a prohibition on such funding is spelled out explicitly in the bill. We want state courts to remain state courts in every sense and we therefore want the states to retain the basic funding responsibility.

Third, the Institute would not be a major burden on the federal taxpayer. Rather, it would be a modestly funded national discretionary program without formula funds and subject to Congressional oversight and annual budget review.

Fourth, the Institute would not create a large new federal bureaucracy. It would function with a small staff in conjunction with existing judicial agencies of the states and the courts themselves. It could support but not duplicate services of existing agencies such as the National Center for State Courts and the National Judicial College.

In brief outline, the State Justice Institute would be a federally chartered non-profit corporation whose policy would be set by a board of directors appointed by the President. The board would be composed of six active state judges representing trial as well as appellate courts, one court administrator, and four public members knowledgeable in matters of judicial interest and concern. The board also would appoint the executive director, set funding priorities, and approve all project grants. Grants would be made on a project basis only with priority going to the courts themselves and to existing national organizations that work in conjunction with them for improvement of the judicial system. The emphasis would be on research, education, demonstration, clearinghouse, and technical assistance programs that are national in scope and would serve the needs of the courts throughout the nation.

As this outline indicates, the Institute would have these principal features:

-- It would be under control of state judicial officials with first-handed knowledge of the problems facing their courts.

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— It would be responsive directly to the judiciary committees of the Congress and not to unknown middle level officials at the agency or department level for its general program authority, its effectiveness, and its funding requirements.

— It would place the responsibility for improvement of state courts systems on the judicial officials charged with this responsibility under their own state constitutions and laws.

— It would speed the process of court improvement and permit large economies of scale by concentrating on programs of national scope that would serve the needs of all 50 states.

And finally, it would put in place an agency capable of speaking and acting on behalf of state court systems as we seek solutions to the complex federal-state jurisdictional issues that are so critical to the future of both federal and state judicial systems.

I will only note for now that it is the perceived inadequacies of state judicial systems, whether real or not, that has provided the principal basis for the successful opposition that has been mounted thus far to proposals for abolition of federal diversity of citizenship jurisdiction, and which stand in the way of other possible jurisdictional changes including those that might reduce burdens on the federal courts resulting from habeas petitions by state prisoners and many Section 1983 actions.

While LEAA has provided substantial funding for state court projects and is rightly credited with making possible a significant court improvement effort, the relationship between LEAA and state court systems was never a smooth nor well-conceived one. Although state courts were directly affected they were not mentioned in the original Safe Streets legislation in 1968 and became involved in the LEAA program only incrementally and by administrative decision.

Congress did not direct its attention to the problems courts were having with LEAA until it amended the act in 1976 to provide a statutory base for judicial

participation in the block grant program. The judiciary's complaints were stated in a series of resolutions adopted by the Conference of Chief Justices beginning in 1974.

In general, these resolutions made the point that federal funding for state court programs presented a special set of issues that should be dealt with outside the framework of support for the executive branch components of the criminal justice system. In particular, they protested control by executive branch agencies at both the state and federal levels of funds allocated to judicial projects; the difficulty in obtaining funds for projects that involved the civil as well as criminal functions of the courts; and the small percentage of LEAA's block grant funds allocated to judicial programs. The civil-criminal issue was as vexing as the separation-of-power problem. Most courts, of course, perform their civil and criminal functions so as to make separation impossible. Can you imagine, for instance, the Federal Judicial Center conducting a project to improve the processing of criminal cases in the federal district courts without considering its impact on the civil dockets of those courts. It simply could not be done, as programs to implement the Speedy Trial Act have shown. Yet that was expected of courts in many states under the LEAA block grant program.

These problems and related issues of concern to state judiciaries have been under discussion for several years before subcommittees of the House and Senate Judiciary Committees. Spokemen for the Conference of Chief Justices testified on the issues in 1976 and 1979 at hearings on reauthorization bills for LEAA, and in the 1977 hearings on diversity jurisdiction and Access to Justice. The Conference also expressed its views in statements to the President's Reorganization Project for Justice System Improvement in 1977 and 1978.

When efforts to obtain appropriate amendments to the LEAA act failed, the Conference, in 1978, appointed its Task force on a State Court Improvement Act to:

"recommend innovative changes in the relations between state courts and the federal government and find ways to improve the administration of justice in the several states without a sacrifice of the independence of state judicial systems."

Thus, the legislation was developed by state judicial officials themselves to deal with the problems they perceived in their existing relationship with the federal government. In this sense, as Professor Daniel J. Meador stated in testimony in 1980, the State Justice Institute "does not represent any new or radical departure from already established federal-state relationships." From a historical perspective he added, "the creation of such an entity would be a natural next step in the evolution of the state courts' relationship to the federal government."

We did not set out, then, to replace LEAA, but to fashion a more effective and constitutionally correct mechanism for bringing national resources and perspectives to bear on the problems of state judiciaries. But our solution does call for an entirely new approach to a national program involving the courts: a federal agency responsive to the needs of 50 independent state courts systems that does not trangress the separation of powers doctrine or violate the principles of federalism.

I will not attempt to detail at this time the kinds of services the Institute would provide or the kinds of programs we would expect to see funded. But is is clear that the initial effort should be directed primarily at national programs with broad application to all, or numerous states. These include national clearinghouse, technical assistance, research and training programs that provide the most cost-effective basis for developing and sharing expertise and experience on a broad range of efforts essential to the modernization of state court systems. Because courts, particularily in states with

unified systems, are becoming big business, these include adoption and maintenance of sound management systems with efficient mechanisms for planning, budgeting and accounting; the use of modern technology for the managing and monitoring of caseloads; and the development of reliable statistical data.

Assistance also would be provided to state systems seeking means to improve methods for the selection and retention of qualified judges, to conduct educational and training programs for judicial personnel, to reduce legal costs while improving citizen access to the judicial process, to increase citizen involvements in dispute resolution, to guarantee greater judicial accountability, and to structurally reorganize outdated judicial systems.

While reliable data on the caseloads of state court systems has not been available historically it is clear these systems have been subjected to the same complex of forces that have led to burgeoning caseloads in the federal courts. State caseloads have become so burdensome, in fact, as to threaten a breakdown of the judicial systems in major metropolitan areas.

The problems facing state systems are varied and longstanding. They involve structural and managerial shortcomings as well as qualitative factors in the performance of the basic judicial functions. But as various as the problems may be, they tend to be shared by state courts throughout the national and are amenable to solution through shared national resources if made available on a continuing basis. An important start at providing continuing services has been made by the National Center for State Courts in Williamsburg, Virginia, and the National Judicial College in Nevada.

It is the need we see for an independent agency that underlies, of course, our entire approach. And it is because we see the need as national that we turn to the national government, and not the states, for our support. While the administration of justice is the most fundamental of state responsibilities, the functioning of states courts is, under the supremacy clause, inextricably intertwined with that of the federal courts

and is increasingly being affected by Congressional enactments. This point has been made by a number of observers including Professor Meador who has stated that the administration of justice "is increasingly becoming an undivided whole, a seamless web," because of "the increasing overlapping of jurisdictions between courts of the states and courts of the Union." In both civil and criminal matters, he said, "state courts today are, to an unprecedented degree, engaged in deciding federal law issues." In view of this fact, he added, the federal government can hardly be indifferent to the quality of justice in the states.

This point also was stressed in the report of the Conference of Chief Justices' Task Force which found that in virtually all state civil cases the federal government is "completely dependent upon state judges to implement fundamental federal policies." This is true, the Task Force added, whether federal issues before a state judge arise under the supremacy clause or under concurrent jurisdiction resulting from Congressional enactments. State courts also must process cases arising under the many state laws enacted to implement programs authorized under federal law.

This is not intended to argue that the federal government could or should reimburse the states as a quid pro quo. It is only to state the obvious: what the Congress and federal courts do can impact heavily on state courts and what state courts do, or do not do, can affect the federal system. However, the fact of the "seamless web" does point to a federal interest in the quality of justice in the states. And this Federal interest, we believe, combined with the many benefits that a State Justice Institute could offer to the federal government as well as the state courts collectively, make it a legitimate national function and responsibility. More directly to the point, there is no organization or procedure through which 50 separate state legislatures can act in concert on a program such as we propose. Nor is there a precedent, to my knowledge, for it. But there is abundant, many would say much too abundant, precedent for federal involvement in such a national program and we believe it will serve the national interest well.

Among other things, the work of the SJI would implement and enhance the work of the Federal Judicial Center, the National Institute of Justice and the Bureau of Justice Statistics. We think it will provide a vehicle by which the Department of Justice and the judiciary committees of the Congress can factor the role of state courts into their thinking as they consider legislation impacting on the total justice system; state as well as federal.

We think the SJI will promote a healthy competition for excellence between our various state systems, as well as with the federal courts, and use to the fullest the marvelous laboratory for experimentation in new approaches provided by the 50 independent state courts under our federal system; and we think the SJI respects the separation of powers and makes federal what is best done at the national level while leaving the basic responsibility for the administration of justice to the states where it belongs. This is our understanding, at least, of what the Federal system is all about.

Before closing I will briefly address the budgetary concerns that necessarily are involved in a new program such as we propose. The Conference of Chief Justices, as I have indicated, believes the State Justice Institute will be the catalyst for reforms that will result in substantial benefits for the federal judiciary as well as the states. For instance, a recent study by the Administrative Office of the United States Courts shows that the federal courts, through elimination of diversity jurisdiction alone, would save $180.6-million over the next five years in reduced costs for new judges, court facilities, clerks, etc. On the other hand, the State Justice Institute, even if fully funded at the authorization levels in H.R.3403 would cost only $70-million over the next three years. Over the long term, obviously, the cost-benefit ratio could be even more in favor of the federal government.

I should also comment briefly on the role assigned the Conference of Chief Justices in choosing the board of directors for the Institute. This may appear self-serving to some and an unnecessary limitation on the President's appointing authority.

But the considerations that led to this provision are eminently practical and, we believe, necessary if the Institute is to achieve its major purposes.

Under the statutes and constitutions of most states Chief Justices are the officials most clearly responsible to the public for the operation of judicial systems. Thus, the bill places ultimate responsibility for SJI funded programs of state and local courts on the state's highest court. They can take the credit, or the blame for them. But who, other than a small and transient Board of Directors, is to be responsible to the Congress for the operation of the Institute itself? As the national organization of the highest state judicial officials, we believe the Conference of Chief Justices can play a broader and more effective role in this regard. This is especially true if we view the Institute as the vehicle by which state courts systems collectively can assist in the formulation and implementation of policies, some of which may involve federal legislation, that will affect both the state and federal judicial systems. In this role we believe it is important that the Institute reflect the views of state judicial leaders accountable to their own citizens and state governments. In other words, the Institute should reflect a concensus of state judicial opinion on important political issues if it is to fulfill one of its basic functions i.e., to serve as an institution through which state courts collectively can work over the long term with the federal government on matters of mutual concern, particularly questions of jurisdiction and federal review of state convictions which are likely to remain with us for many years to come.

The bill now requires the Conference, in selecting panels of nominees for the President, "to obtain and consider the recommendations of all interested organizations and individuals concerned with the administration of justice and the objectives of this Act." It also requires that the Board "shall have both judicial and nonjudicial members, and shall, to the extent practicable, have a membership representing a variety of backgrounds and reflecting participation and interest in the administration of justice."

It has been our understanding from the beginning that the judicial members of the Board would be representative of trial and special courts as well as appellate courts. It has never been our intention that Chief Justices constitute a majority of the Board and we do not believe this would be the result under the bill in its present form. But we do think it important that the Conference have a role in the nominating process and we are very firmly of the opinion that it should be retained.

In summary the State Justice Institute has been proposed by state judicial leaders as the mechanism by which they can focus attention on the many common issues facing them and deal with these issues in the most appropriate and efficient manner. Our experience with LEAA funding, however brief, taught us how much we could accomplish with even very limited amounts of discretionary money, the kind of money that we simply have not been able to obtain from state legislatures who tend to be afflicted with what Professor Maurice Rosenberg has termed the disease of "erractic thriftness" but whose attention is understandably directed to state level and not national level concerns.

The Conference of Chief Justices believes, then, that the State Justice Institute is essential if state courts are to:

- Handle appropriately within a state context and without federal intervention growing national problems such as those associated with the fields of product liability and asbestos litigation;
- Assume as they should the burden of federal diversity cases which constituted nearly 25 percent of federal civil filings in 1982;
- Reduce the need for federal habeas corpus and civil rights actions by state prisoners which constituted some 12 percent of federal civil filings in 1982;
- Eliminate the need for federal prosecution and trial of state career criminals and the expansion of federal jurisdiction and caseloads that this entails; and
- Have an effective voice in the formulation of national policies and programs for improvement of the administration of justice and to marshal the resources needed to implement these programs and policies.

We think it essential, in short, if state courts are to adequately fulfill their role in our federal system and federal courts are to remain courts of limited jurisdiction with their special place in our constitutional scheme.

Thank you again for this opportunity to present our views.

Chief Justice Carrico is prepared to expand on these introductory remarks, if you wish, and we will be pleased to respond to any questions you might have.

Mr. KASTENMEIER. We are very pleased to hear from you again, Justice Utter, a most able presentation. I do not know that you covered everything in your statement, but to the extent that you may not have, your statement, in its entirety has been, of course, made a part of the record.

Chief Justice Carrico, I know you have a very brief statement. We would be very pleased to hear from you before we go on to questions.

[The statement of Justice Carrico follows:]

PREPARED STATEMENT OF THE CHIEF JUSTICE OF THE VIRGINIA STATE SUPREME COURT, HARRY L. CARRICO

Mr. Chairman, I appreciate the opportunity to appear before this distinguished subcommittee to voice my support and the support of my peers across the country for the creation of the State Justice Institute. I endorse wholeheartedly the remarks of Justice Utter, who has worked prodigiously on behalf of the Conference of Chief Justices to bring the Institute to this point in its development.

We are very grateful, Mr. Chairman, for the support the Institute proposal has received in this and prior Congresses. These indications of support demonstrate to me a rather solid interest in the worthiness of the Institute's purpose, as expressed in section 3(a)(1) of the bill you are now considering: "to further the development and adoption of improved judicial administration in State courts in the United States." May this interest be sufficient to make the Institute a reality at this session.

It is in the national interest, I believe, to improve judicial administration in state courts; after all, they handle 96 percent of the cases filed throughout the country. And these are not just run-of-the mine cases. Included are matters of major constitutional and precedential importance, involving complex questions of both Federal and State law. A State judge, almost as much as his or her Federal counterpart, must keep abreast of changes in Federal law, for he or she is called upon regularly to apply some Federal decisional or statutory rule. Hence, it is essential that State judges have opportunities for further study in all aspects of the law.

The Institute could be of material assistance in providing these opportunities. Section 3(a)(2)(b)(5) of the proposed legislation states that the Institute "shall . . . encourage education for judges and support personnel of State court systems through National and State organizations, including universities." And section 6(a)(5) authorizes the Institute "to award grants and enter into cooperative agreements or contracts . . . in order to . . . encourage and assist in the furtherance of judicial education."

I consider this one of the more significant features of the proposed legislation; I happen to believe that providing judicial education is one of the most pressing needs of the day. No one should be subjected to a doctor who fails to keep abreast of developments in the field of medicine. Nor should any citizen be required to submit his or her important affairs to a judge who decides cases on the basis of last year's law. While one's freedom and property may not be as dear as his or her health, the difference is in degree only, and a slight degree at that.

There are, of course, other important features of the proposed legislation, all directed, I believe, to strengthening and improving the State court systems. In sum, quoting the language of section 3(b)(1), the legislation would provide a source of funding to enable the Institute to "direct a national program of assistance designed to assure each person ready access to a fair and effective system of justice." With

this as its goal, the Institute, if created, would bring new meaning to something Chief Justice Burger once said: "The state courts of this country are the basic instrument of justice under our system, and this, of course, is the heart of what we call federalism."

Judge CARRICO. Thank you very much.

I am Harry L. Carrico. I am the chief justice of the supreme court of Virginia and I appreciate the opportunity to appear before this distinguished subcommittee to voice my support and the support of my peers throughout the country for the creation of the State Justice Institute.

I endorse wholeheartedly the remarks just made by Justice Utter. He has worked prodigiously on behalf of the Conference of Chief Justices to bring the Institute to this point in its development, and we are indebted to him for his dedicated attention to this project.

We are very grateful in the conference, Mr. Chairman, for the support the Institute proposal has received in this and prior Congresses. These indications of support demonstrate to me a rather solid interest in the worthiness of the Institute's purpose, as expressed in section 3(a)(1) of the bill you are now considering, "To further the development and adoption of improved judicial administration in State courts in the United States."

May this interest be sufficient to make the Institute a reality at this session of Congress.

It is in the national interest, I believe, to improve judicial administration in State courts. After all, they handle, as has been indicated here this afternoon, from 95 to 98 percent of the cases filed throughout the country. These are not just run-of-the-mine cases. Included are matters of major constitutional and precedential importance involving complex questions of both Federal and State law.

The State judge, almost as much as his or her Federal counterpart, must keep abreast of changes in Federal law, for he or she is called upon regularly to apply some Federal decisional or statutory rule.

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No one should be subjected to a doctor who fails to keep abreast of the latest developments in the field of medicine. Nor should any citizen be required to submit his or her important affairs to a judge who decides cases on the basis of last year's law.

While one's freedom and property may not be as dear as his or her health, the difference is in degree only, and a slight degree at that.

There are, of course, other important features in the proposed legislation, all directed, I believe, to strengthening and improving the State court systems.

In sum, according to the language of section 3(b)(1), the legislation would provide a source of funding to enable the Institute to direct a national program of assistance designed to assure each person ready access to a fair and effective system of justice.

With this as its goal, the Institute, if created, would bring new meaning to something Chief Justice Burger once said: "The State courts of this country are the basic instrument of justice under our system, and this, of course, is the heart of what we call 'federalism.'"

Again, Mr. Chairman, I appreciate the opportunity to appear and to express my gratitude to the committee for its support of this bill.

Mr. KASTENMEIER. We are indebted to you, Chief Justice Carrico, for your appearance here and your amplifying comments.

May I ask you to define the term "State court." Are we talking about any court of a State that would be a court of record or is there any necessity for defining further what courts are to be included?

Judge CARRICO. I would hope, sir, the Institute would not be limited or confined to courts of record. We have a three-tiered court system in Virginia. On the lower level is the district court, with one part devoted to the trial of civil and criminal matters and the other to juvenile and domestic relations cases. Then there is the circuit court, which is the trial court of records, and at the top is the supreme court.

It is with the courts at the lower level that the public has the greatest contact, and for many people the only contact with a court they ever have in their lives. We are undertaking at the moment, for example, a study to determine the feasibility of creating a new court in Virginia handling only family matters. As things stand now, there is a concurrence of jurisdiction between the juvenile and domestic relations courts and the circuit courts in domestic relations matters, which produces a yo-yo effect. Litigants are shifted backward and forward between the two courts at great expense and prolongation of litigation of a type that ought to be ended as early as possible.

I foresee the Institute making funds available to national organizations involved in family court matters, juvenile and domestic relations matters, that could in turn provide the necessary studies to help us to come to a determination on the feasibility of instigating a family court.

So I would hope that the services of the Institute would be available to any court in the State system of justice.

Mr. KASTENMEIER. I have one or two other questions, but I would like to yield first to my colleagues.

The gentleman from California, Mr. Moorhead.

Mr. MOORHEAD. I want to join our chairman in thanking you both for being here today.

If this legislation would become law, what issues do you anticipate would be priority items for the State Justice Institute?

Judge UTTER. I would think at least two of the issues addressed by acts of this Congress. The issue of career criminals, how they are handled, is of great importance. Our concern is not that those issues not be addressed, but that they be addressed in a way that can be effectively processed by the States.

The whole area of product liability, the massive number of cases and the inability of those cases to be resolved in the courts, is of great interest, not only to the Federal Government, but to State courts as well. Our concern, again, is not that that issue not be addressed, but that it be addressed in a way that preserves the integrity of the State system without overburdening the Federal system as well.

I would hope that if it is the will of Congress that diversity jurisdiction be removed from the Federal system, we could effectively find a way to handle those cases in State courts. Our courts have expressed a willingness to not only address that problem, but to take over that responsibility. It cannot be done lightly, as you know, Mr. Congressman. For the State of California to assume the diversity cases that are now before the Federal courts in your State, would be a massive burden.

Mr. MOORHEAD. They are jammed already.

Judge UTTER. They are, sir. But that is the type of issue, I think the type of priority issue that I would hope this State Justice Institute would enable us to be able to sit down with concerned Members of Congress and address ways in which we can both help each other.

The other issues, the administrative ones are multiple and let me just run over the list quickly without commenting exhaustively on them. The problems of selection and removal of judges, how that can be done effectively is always an issue of proper judicial administration.

Education and training was commented on by Chief Justice Carrico. The question of meeting Federal law with Federal funds that are provided to the State courts is a continuing issue clogging State courts and we need to address how that can be done effectively.

Court organization and finance, we need to be more sophisticated in the way we address those problems.

Court planning and budgeting, court management statistics, court delay. The question of judicial performance in the States; how do you rate what kind of job a judge is doing in a way to both help him if he can be helped, and remove him if he should be removed.

Court rules, responsiveness to public needs, access to courts, public education, all these are areas that I think the State Justice Institute would address.

Mr. MOORHEAD. You know, when we consider these diversity bills we get from time to time in this committee, and there is always one that is introduced, there is one major reason sitting behind that opposes it, and that is that most lawyers want to be able to shop for a court.

Judge UTTER. Of course.

Mr. MOORHEAD. The second argument that is given that the quality of the State courts—and speaking for California, I think the quality is extremely high, as I am sure it is in the States in which you gentlemen preside as chief justices and many of the other larger States. There is some problem, I assume, in some of the smaller jurisdictions, but it would seem to me that if we did get the State Justice Institute Act adopted, it would have a tendency to raise the standards in all of the States and maybe do away with the argument that has been traditionally used.

Judge UTTER. That is our hope. That is our hope and I heartily concur with it.

Mr. MOORHEAD. You probably know that most of us on this subcommittee have already sponsored the legislation. We think that something should be done of this kind and we certainly hope that we can work together with you as we consider the legislation on any amendments, any ways that the legislation can be made more beneficial or effective.

Judge UTTER. Thank you.

Judge CARRICO. Thank you.

Mr. KASTENMEIER. The gentleman from Ohio, Mr. DeWine.

Mr. DEWINE. No questions, Mr. Chairman.

Mr. KASTENMEIER. I just have one or two questions. I know Justice Utter has been through this before and most of the basic questions have been asked.

One of the functions that the Institute could serve is to voice the collective interests or problems confronting State judicial systems generally. I think you have indicated that.

In what fashion would it be superior to the representations that you make on behalf of the Conference of the Chief Justices of the States?

Judge UTTER. We would like to assume that the Conference of Chief Justices speaks for everyone and like to feel that the world focuses on us. Unfortunately, if you speak to the trial judges and the court of appeals judges and the court administrators, the juvenile court judges and the probate judges, they are quick to point out that while we do have the final authority in the States, we do not have their complete perspective on the problems.

I think that is one of the things, Mr. Chairman, that the State Justice Institute would be able to perform that would differ greatly in scope from what the Conference of Chief Justices does. As pointed out in our discussions and in our reports, the basis of membership on the Board of Directors of the Institute is a broadbased one. It would include members, I would hope, from all levels of the trial courts.

I think we cannot overlook that it is the chief justices who will have to carry out the policies in the States and that is an important distinction to make. The act will not work if it goes in opposition, in effect, to what the chief justices feel needs to be done in the States, because they are the ones who are responsible to the executive branch and to the voters for the execution of policy.

But the Institute gives a much broader base from which to enunciate that policy than the Conference does. I yield to my colleague, Chief Justice Carrico, on that.

Judge CARRICO. I think that is the complete answer to the question. Unless all levels of the judiciary in the States feel themselves a part of this, it, of course, will not succeed. I think that in the way the Institute is proposed, both the lowest and highest judge can have a say in the policies that will be voiced through the Institute. I think that is very important.

Mr. KASTENMEIER. As a followup on that, I believe the legislation contains what might be commonly known as an antilobbying provision and I am not that sanguine about what precisely the language is. Would that run counter to the function we are talking about in terms of enabling the Institute to speak with a single voice as to concerns of the problems of the State judicial systems?

On page 20, a restriction on activities of the Institute, section 8(a)(3) says "The Institute shall not undertake to influence the passage or defeat of any legislation of the Congress of the United States or by any State or local legislative body, except," and then there are some exceptions.

I am wondering when you consider that language if it is unduly restrictive in terms of your concept of the operation of the Institute.

Judge CARRICO. When I read that, Mr. Chairman, I thought it at first a curious provision, but then when I thought about it, I could see the merit of it. As you indicate, there are exceptions. They are very broad exceptions and would, I believe, permit the personnel of the Institute to do those things that it would be set up to do.

I have always wondered where lobbying begins and where it ends because those of us in the State judiciary have to have certain contacts with our State legislatures. I would hate to be accused of having lobbied. I look upon lobbying as standing in the halls of our State capitol and buttonholing members of the legislature as they go by and importuning them for a raise effective the beginning of the next biennium.

But I think it is perfectly proper under the Canons of Judicial Ethics for judges to appear before legislative committees, legislative groups, to support and urge the passage of any measure that aids in the administration of justice. I would hope that the interpretation put on this provision would permit that same activity, but would discourage, in fact, prohibit, the sort of buttonholing activity we look on as perhaps not being consistent with a judicial group.

Mr. KASTENMEIER. Well, I think you are undoubtedly correct. The exceptions are broad and ought to permit appropriate testimony, appearances, or communications. However, you might review that just to make sure that it is not going to prove to be an unanticipated burden in some respect in terms of inhibiting what the Institute really ought to be doing or ought to be involved in.

Judge CARRICO. Could we communicate our views to the subcommittee if we feel the provisions are too restrictive?

Mr. KASTENMEIER. Yes; please, by letter to the subcommittee.

Judge CARRICO. By letter, right.

Mr. KASTENMEIER. We would encourage you to do so.

[The information follows:]

CHIEF JUSTICE
HARRY L. CARRICO
JUSTICES
GEORGE M. COCHRAN
RICHARD H. POFF
A. CHRISTIAN COMPTON
W. CARRINGTON THOMPSON
ROSCOE B. STEPHENSON, JR.
CHARLES S. RUSSELL
SENIOR JUSTICE
ALEX M. HARMAN, JR.

SUPREME COURT OF VIRGINIA
SUPREME COURT BUILDING
RICHMOND, VIRGINIA 23219

CLERK
ALLEN L. LUCY
DEPUTY CLERK
DAVID B. BEACH
EXECUTIVE SECRETARY
ROBERT N. BALDWIN
ASST. EXECUTIVE SECRETARY
FREDERICK A. MOONEY, JR.
CHIEF STAFF ATTORNEY
JOHN THOMAS BRUCE
STATE REPORTER
NEILL H. ALFORD, JR.

October 5, 1983

The Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice
3127 Rayburn House Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

This is to supplement my testimony at the subcommittee's hearing July 13, 1983 on H.R. 3403, the State Justice Institute Act, and addresses the anti-lobbying provisions of the bill, Sec. 8(a)(3), which provide that the Institute shall not:

> "undertake to influence the passage or defeat of any legislation by the Congress of the United States or by any State or local legislative body, except that personnel of the Institute may testify or make other appropriate communication--
>
> (A) when formally requested to do so by a legislative body, committee, or a member thereof;
>
> (B) in connection with legislation or appropriations directly affecting the activities of the Institute, or
>
> (C) in connection with legislation or appropriations dealing with improvements in the State Judiciary, consistent with the provisions of this Act."

You asked if these provisions might not be too restrictive for the Institute to act, as the Conference of Chief Justices believes it should, as a national representative of state court systems.

In our view these restrictions should not unduly confine the Institute but only assure Congress and the public that its activities will be limited to programs for improvement of the courts. We fully support the ban on all partisan activity and any lobbying unrelated to the Institute's basic functions. But we believe the Institute should be free to speak and act on behalf of state courts in recommending new initiatives or when actions by the Congress or agencies of the federal executive and judicial branches are likely to affect the operations of state judicial systems.

To this end it may be helpful to add a subparagraph (D) to Sec. 8(a) which would specifically authorize the Institute to present its views to Congress and State legilsatures:

> "in connection with any legislation or constitutional amendment affecting the powers, jurisdiction, or independence of state court systems."

Such a provision would be consistent with two other provisions of the bill which specifically authorize the Institute to cooperate with executive and judicial branch agencies of both state and federal governments. For instance Sec. (6)(a)(3), authorizes the Institute to:

> "participate in joint projects with government agencies, including the Federal Judicial Center, with respect to the purposes of this Act."

We believe this authorizes the Institute to work with such federal agencies as the National Institute of Justice, the Bureau of Justice Statistics, the Judicial Conference of the United States, and the Administrative Office of the United States Courts as well as the Federal Judicial Center.

A second provision, Sec. 4(k)(4), directs the Institute's Board of Directors to:

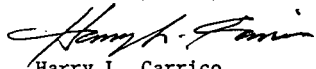
> "present, to government departments, agencies, and instrumentalities whose programs or activities relate to the administration of justice in the State judiciaries of the United States, the recommendations of the Institute for the improvement of such programs or activities.."

To overcome any doubt about the Institute's authority to independently communicate its views to Congress and state legislatures this section could be amended to add the underlined language below:

> "present, to <u>legislative committees and to</u> government departments, agencies, etc."

Both of the suggested amendments are more technical than substantive in nature but we would urge their adoption to overcome any possible doubt as to the Institute's authority to speak for state judiciaries in either state or national forums.

Yours very truly,



Harry L. Carrico
Chief Justice

HLC/cl

Mr. KASTENMEIER. Actually, under the bill, of course, the board of directors decides where to locate the Institute. Do you have any feelings about that? Would it be better if the legislation situated the Institute or do you think in good time the board of directors would be the more appropriate deciding source?

Judge UTTER. We had initially, when the act first was proposed, indicated Washington, D.C., as the location of the Institute. I think every bit of logic in the world directs that it be very near Washington, D.C., but someone pointed out that if we mandated that it be here, we have locked ourselves into the rents and the costs that are here in the District as well.

That was the sole reason, Mr. Chairman, for changing that in subsequent drafts of the bill. I cannot imagine it being located anywhere other than close to the Capitol, given the mandate of the act. I think if the act is passed, you may well find us either in Fairfax County or in Maryland, just over the border.

Judge CARRICO. I would extend a special invitation for the Institute to come to Fairfax, Mr. Chairman. That is my home county, as well as being in my beloved State.

Mr. KASTENMEIER. Well, we already have a facility down in Williamsburg.

Judge CARRICO. I think we all feel this way, Mr. Chairman: We so much want to see this Institute a reality that the location of its headquarters becomes rather a secondary matter.

Mr. KASTENMEIER. I appreciate that and I appreciate your comments. There is a vote on. I would like to take this occasion to state to you that we will make every effort to move this legislation forward this year. We appreciate your appearance, Chief Justice Carrico, and of course, again the appearance of—for the third or fourth times, perhaps—of Justice Robert Utter. Thank you, gentlemen.

Judge CARRICO. Thank you, sir.

Judge UTTER. Thank you, Mr. Chairman.

Mr. KASTENMEIER. If Professor Etheridge will indulge us, I would like to say 10 minutes. I understand the system broke down and we may be taking the votes by other methods. So it might be a bit longer, but it should be about 10 or 15 minutes hopefully.

Until that time, we will stand in recess.

[Recess.]

Mr. KASTENMEIER. The committee will come to order.

Incidentally, the Chair would like to state that the statement of the Judicial Conference, represented by the Honorable Elmo B. Hunter, U.S. District Judge for the Western District of Missouri, on this subject is received and, without objection, made part of this record.

[The statement of Judge Hunter follows:]

PREPARED STATEMENT

OF

HONORABLE ELMO B. HUNTER
UNITED STATES DISTRICT JUDGE
FOR THE
WESTERN DISTRICT OF MISSOURI

AND

CHAIRMAN
OF THE
COMMITTEE ON COURT ADMINISTRATION
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES
AND THE ADMINISTRATION OF JUSTICE,
COMMITTEE ON THE JUDICIARY,
UNITED STATES HOUSE OF REPRESENTATIVES

ON

H.R. 3403

WEDNESDAY
JULY 13, 1983

Mr. Chairman, and distinguished members of the Subcommittee, I am pleased to be able to submit written testimony on behalf of the Judicial Conference of the United States on the subject of the creation of a St te Justice Institute as envisioned in H.R. 3403. I am pleased that you have reintroduced this important measure. I regret that I could not appear before you in person, but long-standing commitments prevent me from doing so.

As Chairman of the Judicial Conference's Committee on Court Administration, I am pleased to present the views of the Conference in support of this legislation. Over the last decade, major strides have been taken to improve the State court systems through the gracious efforts of the Conference of State Chief Justices, the National Center for State Courts and a variety of other bodies. However, the State court systems need additional, on-going, permanent support to sustain an innovative momentum and to allow the States fiscal freedom to institutionalize innovations that have proven effective. Many organizations have supported innovation and research in the State court systems in the past.

While the federal judicial system will not be directly affected by the creation of a State Justice Institute, there are clear benefits that will flow from the work of the Institute. There is an ongoing interchange of ideas between the federal and State court systems, perhaps best illustrated in the Federal Rules of Civil Procedure: many States have adopted the Federal Rules and you will find that State rules of procedure were the basis on which many federal rules were originally drafted. We continue to develop ways in which the federal and State courts can learn from each other. My committee has a Subcommittee on Federal - State Relations composed of both federal and State judges. If H.R. 3403 becomes law, I hope that the Subcommittee on Federal - State Relations will become the focal point of our relations with the State Justice Institute.

Substantive Elements of the Bill

Section 1 of H.R. 3403, of course, appropriately titles the bill. Section 2 of the bill defines, among others, the term "State" to appropriately include not only the States, but the District of Columbia, the Commonwealth of Puerto Rico and the territories. Inclusion of these political entities, while not technica y "States", is important; the judicial systems of the District, Commonwealth and the territories should also benefit from the creation and function of the Institute and should be accorded the opportunity to contribute to its goals.

Section 3 establishes the Institute with the purpose of furthering "the development and adoption of improved judicial administration in State courts of the United States." The Institute is authorized to be incorporated in any State and to exercise the powers of a nonprofit corporation under the laws of the State of incorporation. The Institute is directed to do several very noteworthy things that I would like to emphasize.

First, the Institute would direct a national program of assistance to assure that each person has access to a fair and effective system of justice. The State court systems are and will remain the primary systems for delivery of legal and equitable justice. I would not suggest that any State court system is either unfair or ineffective, but all court systems can learn from each other and improve procedures for the delivery of legal and equitable justice. There is a need for a national program to encourage cross-fertilization.

Second, the Institute would foster coordination and cooperation between the federal and State courts and make recommendations concerning the proper allocation of responsibility between the federal and State systems. The concept of Federalism should be constantly studied. This is an area that our Subcommittee on Federal - State Relations has already taken up and further consideration is welcomed.

Third, the Institute would promote recognition of the importance of the separation of powers to the independence of judicial systems under our Constitution and the State

constitutions. The doctrine of separation of powers is not very well understood; its history is more anecdotal than analytical. Many different structures of a Republican form of government can function effectively within a democratic society, but all carry forward the idea of separate, if mixed, powers. There is a real need for further illumination of the doctrine as it is reflected in judicial systems and such an undertaking by the Institute is a laudible goal.

Finally, the Institute would encourage education for judges and State court personnel. Many organizations undertake parts of the continuing educational function of judges and State court administrative personnel, but the Institute would undertake this responsibility on a much broader, coordinative scale.

The Institute would be required not to duplicate functions that are already being adequately performed by existing organizations. This limitation is very important. The Institute is given a broad, umbrella role in the promotion of efficiency and effectiveness in the State court systems, but where a particular function is being performed well, there is little sense in duplicating that work; rather there is a great deal of sense in fostering and coordinating that work with others.

Section 6 of the bill provides one of the major operating means for the Institute: the awarding of grants and the performance of cooperative agreements and contracts in carrying out its mission. These grants and contracts are authorized for the conduct of research and demonstration projects, to serve as a clearinghouse for information on the State judicial systems, to participate in joint projects with government agencies, including the Federal Judicial Center, to evaluate its programs, to encourage and assist in judicial education, and to provide consulting and technical services. These grants and contracts would be available to State and local governmental bodies, and a matching grant of 25% would be required. Section 13 authorizes a very modest appropriation for each of the next three fiscal years, but the Institute is also authorized to receive funds from other sources, functioning as a non-profit corporation.

Under section 4, the Institute would be supervised by a Board of Directors consisting of six judges, one court administrator and four other members. The Conference of State Chief Justices is required to submit a list of fourteen judges and court administrators to the President for consideration. The Conference of State Chief Justices is eminently qualified to suggest individuals who would be fit to serve on the Board of Directors of the Institute. Nominations by the President for all positions on the Board are subject to the advice and consent of the Senate. I have one small suggestion at this point. Section 4(a)(4) requires that the President nominate the Board of Directors within sixty days of the enactment of the bill. It would seem to me that sixty days is a very short period of time for the Conference of State Chief Justices to determine an initial panel of suggested Board members and for the President to consider that suggestion. I would, of course, defer to their judgment, but I do suggest that this timing question be given further consideration.

I will not delve into the technicalities of corporate life and detail the authority and duties of the Board, but each and all appear to be both reasonable and appropriate. Nor will I detail the procedures and limitations placed upon the Institute's authority to make grants and contracts. In each of these matters, I would defer to the your judgment with the simple note that the entire structure appears to me to suit the purposes intended for the Institute.

Policy Factors Supporting Enactment

I suspect that I need to say very little to convince this Subcommittee of the need and appropriateness of this legislation. State courts have provided and will continue to provide the broadest range of judicial "citizen service". Federal support, together with the authority of the Institute to receive funds from other sources, will help assure that State courts continue to be the most useful and effective courts for the adjudication, both quickly and with less expense, of many of the disputes in our society.

The purposes to be served by creating a State Justice Institute are endorsed by the

Judicial Conference. In light of the increased need for coordination between State and federal courts, the Judicial Conference has established a subcommittee of my committee to deal exclusively with federal-State relations, as I have previously noted. This subcommittee is chaired by Judge Mary Anne Richey, a United States District Judge for the District of Arizona. Chief Justice Albert W. Barney, Jr., of the Supreme Court of Vermont, and a past chairman of the Conference of Chief Justices, is a member of that Subcommittee. In addition, three other State judges are members of the Subcommittee on Federal-State Relations, include Justice George Danielson, your former colleague. Through this subcommittee and my committee, the Judicial Conference will be studying various issues relating to ways to improve the division of federal and State court jurisdiction, coordination of areas of common concern and improving the ability of our respective systems to function harmoniously within our Constitutional dual system of courts. We look forward to a productive interchange of ideas with the Institute once it has been established.

One specific area of interest of this subcommittee is the creation and operation of the State Justice Institute. Over the years, funding for innovation in the State court systems has been erratic at best. States have been required to commit operating funds to experimentation, when operating funds have been scarce for the contemporary operation of the system. The creation of an umbrella organization specifically to provide funding and guidance in innovation will be welcomed by all judges, both State and federal. It is important that the Institute not provide funding for the day-to-day operation of the State court systems. The ultimate choice of whether a particular program or improvement should be implemented on a permanent basis should belong to the State judges and the State legislatures. But, at the same time, funds need to be provided on an independent basis for the court systems to innovate and expand our understanding of judicial administration. Through the State Justice Institute, as structured in H.R. 3403, not only would the Institute have federal funds with which to

make grants, but would have the added authority to receive funds from private sources — whether foundations, individuals, estates, or others — as a supplemental source of income and grant distribution. This would bridge the gap between State financing and private endowment to the benefit of the administration of justice.

Legislative Background

Legislation to create the State Justice Institute was first approved by the Senate and by this Subcommittee during the 96th Congress. H.R. 2407, in the 97th Congress, received the approval of this Subcommittee and the current proposal is a reintroduction of that bill. In the Senate, S. 537 was approved last year and a similar measure, Title IV of S. 645, was recently approved by the Judiciary Committee's Subcommittee on Courts. Recent action in the Senate and these hearings hopefully portend final enactment of this much needed legislation.

The Judicial Conference evaluated the proposals in the 97th Congress during its meeting in March of 1982, Conf. Rept., p. 20, and recommended enactment. I am pleased to support the passage of this legislation on behalf of the Judicial Conference. I personally believe we need the State Justice Institute to make further improvements in the judicial systems of the nation. We look forward to working closely with the Conference of Chief Justices and the National Center for State Courts toward this end and the operation of the Institute.

Mr. KASTENMEIER. Also, the Chair will state that we are in receipt of a letter of July 7, 1983—to which is attached two letters, one dated September 22, 1980; the other September 17, 1982. All three letters are from the Chief Justice of the United States, the Honorable Warren E. Burger. Those, too, will be received and made a part of the record.

[The letters from Chief Justice Warren E. Burger follow:]

SUPREME COURT OF THE UNITED STATES,
Washington, D.C., July 7, 1983.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, U.S. House of Representatives, Washington, D.C.

DEAR MR. KASTENMEIER: The Legislative Affairs Office of the Administrative Office has informed me that you have reintroduced a bill to create a State Justice Institute, H.R. 3403. I thank you for your continuing efforts to create this important Institute. We have corresponded on this matter on several occasions in the past and I reaffirm my wholehearted support for this proposal.

I know that the Conference of State Chief Justices will appreciate your work as do I. I have enclosed copies of my previous letters to you for your use.

Cordially,

WARREN E. BURGER.

SUPREME COURT OF THE UNITED STATES,
Washington, D.C., September 22, 1980.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House Judiciary Committee, U.S. House of Representatives, Washington, D.C.

DEAR MR. KASTENMEIER: I thank you and the Members of the Subcommittee for an opportunity to submit my personal views for inclusion in your hearing record on the State Justice Institute Act of 1980. I am happy that you have been able to devote time to evaluating this proposal in this busy year, and I take this opportunity to comment upon an idea which I believe to be significant, not only for our courts, but also for the public.

During my service as Chief Justice, I have been concerned with the problems of our state courts as well as those of our federal courts. The problems of justice are indivisible. If this Nation does not maintain a strong and effective court system at both the federal and state levels, our people will be denied justice. The value of any court system depends not only upon the soundness and fairness of its laws, but also upon its ability to "deliver" justice expeditiously and efficiently—and economically—to those who seek it.

My lifetime experience as a citizen, lawyer, and judge, has convinced me that the basic system of justice in this country always has been, and should continue to be, our state courts. If they are not efficient and effective, federal judicial efforts can never compensate the public adequately. Even if 800 federal judges were to be multiplied many times in number, they would still never be able to completely "deliver" justice as the state courts can. Some 26,000 state court judges handle 98 percent of all the judicial business in America's courts. Peoples' access to justice and their impressions of our judicial system are overwhelmingly influenced by their contact with our state court systems. Those systems cannot be effective unless they are adequately supported, not only with funding, but also with managerial ideas and talent.

Our federal judicial system was intended and structured to be a complement to our state judicial systems. That complementary relationship embodies our constitutional concepts of federalism and separation of powers. It was for this reason I proposed creation of the State-Federal Judicial Councils 11 years ago. More than 40 states now have such bodies. Since the state courts process the majority of the Nation's judicial work, any "shortfalls" in their performance will deny most litigants a tribunal. We must avoid any situation in which federal courts are pressured to become a refuge for citizens who seek a federal forum, not because their claim is of a truly federal nature, but because state courts are inadequate. Should our people ever lose confidence in their state courts, not only will our federal courts become more and more overburdened, but a pervasive lack of confidence in all courts will

develop. All courts, federal and state, rely upon public trust and public confidence. Their integrity is the key to their validity.

Just as justice is indivisible, the public perception of justice is indivisible. People generally do not distinguish between federal and state courts. The public is not concerned with the details of jurisdiction or interested in excuses. They are paying the bills for both systems and they want results.

There is, therefore, clearly an overriding national interest in improving access to and confidence in our state courts. Important as it is, our concept of federalism is not the only objective requiring their preservation. Our state courts are close to the people and they are the primary safeguard of the rights and privileges of individuals under both state and federal law. Together with our federal courts, they preserve and vindicate those rights guaranteed under the Constitution and federal laws. In recent years, national legislative policies and programs have increased the number of such federal rights adjudicated in state courts. The role our state courts play in evaluating and arbitrating the enforcement of state policies, and the state enforcement of national legislative policies and programs, is most significant.

Our national interest in strong state court systems renders national support for them entirely appropriate. Certain legitimate national objectives can only be achieved by our state courts within our federal system. Yearly we are placing more responsibility upon them, and we expect them to perform in spite of their increasing burdens. It is certainly within the national interest to help provide state courts with those capabilities needed to meet our expectations.

H.R. 6709 would create, as a non-profit corporation, a State Justice Institute, designed to implement a program of national assistance for state court systems. The basic purpose of the bill is improving access to fair and efficient court systems by developing and promoting improved methods of judicial administration. H.R. 6709 fully acknowledges the need to preserve the independence of our state court systems. It fully recognizes our constitutional and traditional concept of federalism. I believe enactment of this legislation can only enhance and promote constructive coordination between our state and federal court systems. The improvements in judicial administration which would be derived through a State Justice Institute will enable all courts to better "deliver" justice. The purposes to be served by H.R. 6709 are not without precedent. Federal funds totaling $325 million have reached our state court systems over the past decade. While that amount is equivalent only to three percent of the total for the aggregate state court budgets, its impact has far exceeded that which would be presumed from the numerical ratio alone.

It is my considered judgment that creation of a State Justice Institute is an appropriate way in which to assist state courts and simultaneously strengthen the doctrines of federalism. In that context, the State Justice Institute has been recommended by the Conference of Chief Justices, the Appellate Judges Conference, and the Council of the American Bar Association's Division on Judicial Administration. The creation of the State Justice Institute will be a major step forward in preserving and improving strong and effective state court systems. Such systems are essential. Increasingly, citizens are demanding that the state courts provide the highest quality of justice. At the same time, our Federal government is placing more responsibilities and more burdens on those state courts. I believe they deserve the federal government's cooperation and assistance in meeting those expectations.

When I proposed the creation of the National Center for State Courts at the Williamsburg National Conference on the Judiciary on March 12, 1971, that was an expression of my deep-felt conviction that no level of quality in performance of the federal courts would affect the long-deferred maintenance of many of the state court systems.

Cordially yours,

WARREN E. BURGER.

SUPREME COURT OF THE UNITED STATES,
Washington, D.C., December 17, 1982.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I have been asked by the Conference of Chief Justices—an organization that I hold in high esteem and of which I am an Honorary Life Member—to reiterate my long-standing support for creation of a State Justice Institute. I am happy to do so.

As you may recall, during the 96th Congress you solicited my views on the need for creation of a non-profit entity to provide technical and financial assistance to improve the administration of justice in State and local courts throughout the United States. On September 22, 1980, I sent you a letter which you kindly incorporated in the hearing record on the then-pending State Justice Institute proposal. For your convenience, I have appended a copy of that letter. I continue to hold the opinions I expressed at that time. I also have attached a copy of my speech to the American Law Institute (Washington, D.C., June 10, 1980), in which I set forth several tentative perceptions about Federal and State jurisdiction. Because those perceptions arguably may have become reality, my comments may aid your inquiry.

There clearly is a substantial Federal interest in improving access to, the quality of, and public confidence in our State court systems. The State courts, pursuant to the Constitution, share with their Federal counterparts responsibility for enforcing the Constitution and laws made pursuant thereto. State courts routinely handle almost 98 percent of all the judicial business in this country's courts. The expectations that citizens have of our State courts are essentially the same as those they have for our Federal courts—equal justice rendered in a fair manner, as expeditiously and inexpensively as possible. As aptly observed by a respected and eloquent spokesman for State courts (former Chief Justice Robert J. Sheran, Minnesota), in testimony before your subcommittee:

From the perspective of those who supply judicial services, we have in this country two separate and independent systems—the one Federal, the other State. . . . But from the standpoint of the citizen user, the distinction between Federal and State courts carries no real meaning. He knows that he has a legal problem which must be solved, sometimes by proceedings in court. Whether access to justice is by way of a Federal court or a State court is, to him, immaterial.

It is true that the State and Federal court systems have their respective strengths. There are approximately fifteen times the number of State judges of general jurisdiction as Federal, and State courts resolve vastly more cases and controversies. Because State courts handle cases for more people and resolve more problems, those courts are in the front line of the judicial system. Frequently State judges are more flexible and innovative than their lifetime tenured Federal brethren since they derive their authority and jurisdiction from fifty State Constitutions which are not uniform.

On the other hand, the two pillars of Article III of the Constitution—life tenure and a bar against dimunition of salary—have allowed the Federal courts to provide a quality forum for certain legislative and constitutionally identified rights and obligations. Where a national interest is identified by Congress, Federal courts apply the law of the land in a generally uniform manner. Moreover, many ideas about court management, procedural reform, and judicial administration have first been developed and tested in the Federal courts and then exported to the State courts and of course the "traffic" in ideas and innovations works both ways.

As regards ties between the two court systems, I have always felt that the relationship between them is a complementary one, and not of an adversary nature. Ideas developed in one should, in theory, naturally flow to the other. And for this reason, more than a decade ago I proposed creation of State-Federal Judicial Councils. Almost every State now has such an entity. I also find much satisfaction in seeds that I planted when I proposed creation of the National Center for State Courts at the Williamsburg National Conference on the Judiciary on March 12, 1971. Today that seed has grown into a mature tree. I recently took a further step and, using my powers as Presiding Officer of the Judicial Conference of the United States, created a Subcommittee on Federal-State Relations. The subcommittee is composed of the following Federal and State judges: Honorable Mary Anne Richey, Chairman (District of Arizona); Honorable Albert W. Barney, Jr. (Chief Justice, Vermont Supreme Court); Honorable George E. Danielson (California Court of Appeals); Honorable S. Hugh Dillin (Southern District of Indiana); Honorable J. Foy Guin (Northern District of Alabama); Honorable James L. Latchum (District of Delaware); Honorable Vincent McKusick (Chief Justice, Maine Supreme Court); Honorable Theodore McMillian (Eighth Circuit); and Honorable Dallin Oaks (Utah Supreme Court). It is my hope that the new Federal-State Subcommittee will not only serve State and Federal judiciaries but will also satisfy the important function of identifying basic principles of federalism and assessing how best, in light of these principles, jurisdiction should be allocated between State and Federal courts.

With these thoughts in mind, let me state that it is my overriding belief that we cannot rest upon our laurels and do nothing in preparation for the future. More, rather than less, needs to be done—especially in the area of improving the State court systems which generally have been undersupported.

I turn now to the specifics of the legislative proposals to create a State Justice Institute (see H.R. 2407 and S. 537, as passed by the Senate on August 10, 1982). Since the two bills pending before your subcommittee are virtually identical, I will refer to them interchangeably.

The proposed legislation creates a State Justice Institute as a non-profit corporation, which is given the mandate to assist State courts to strengthen and improve themselves. Through creation of a funding mechanism, a means exists to satisfy the general purpose of the legislation—to improve access to fair, expeditious courts throughout the country at the lowest possible cost. The proposal, in my opinion, is wholly consistent with traditional concepts of federalism and separation of powers. The proposed Institute would have a Board of Directors, composed of representatives of State judiciaries and would provide an important mechanism for establishing priorities. As is proper, the Institute is asked to coordinate with the Federal Judicial Center, which of course has more than a decade of experience in research, educational, training, and technical assistance. The amount of money authorized to be appropriated is modest indeed, and pales in comparison to what has been done in the past. I agree with the proposal's requirement that any State or local judicial system receiving funds administered through the Institute provide a matching amount equal to twenty-five percent of the total cost of the particular program or project. I also agree with the proposition reflected in the bills that the Institute is not to interfere with the judicial independence of any court, or allow financial assistance to be used for the funding of regular judicial and administrative activities of any State judicial system. It should not be the role of the Federal government—or any entity thereof—merely to pay the bills of necessary components of routine State judicial expenses. The Federal role should be restricted to improving the State courts.

I thank you for your support and for the time and effort you have expended in improving this country's judicial machinery, State as well as Federal. I know that we are committed to the same goal—improving the delivery of justice by this country's justice system. I stand ready to assist in achieving that goal. With warm appreciation for your efforts, I am,

Cordially yours,

WARREN E. BURGER.

Mr. KASTENMEIER. At this point, I would like to call on the distinguished Judge Jack Etheridge, who is a member of the Special Committee on Alternative Means of Dispute Resolution, on behalf of the American Bar Association.

You are most welcome.

TESTIMONY OF HON. JACK P. ETHERIDGE, PROFESSOR OF LAW, EMORY UNIVERSITY, AMERICAN BAR ASSOCIATION

Judge ETHERIDGE. Thank you, Mr. Chairman. It is a pleasure to be here before this committee. I would like to express the appreciation of the American Bar Association for the opportunity.

The president of this association, Mr. Morris Harrell, has asked me to express his personal regards to you and his regrets that he is not here. He had a commitment which simply prohibited his coming. He is very interested in this. Indeed, this bill represents one of his major legislative priorities and he was particularly disappointed not to be able to come. I am quite honored to speak in his stead.

May I first of all thank you and the members of your committee and your counsel, Mr. Remington, for your work and concern in this area. It is an extremely important bill and the American Bar Association, by its endorsement by the House of Delegates of the American Bar Association, have, I think, indicated that concern, that interest in this legislation, in the hope that it will be enacted at an early date.

The American Bar Association is greatly concerned about the integrity and the efficiency of the justice system at whatever point it

affects the people of this country. It is very conscious of the substantial caseloads and complex and multiparty litigation that is now afflicting the State courts.

So I would like to speak from the perspective not only of one representing the American Bar Association, but one who has for a good many years served as a trial judge in a heavy urban court as well. Perhaps that is a perspective that differs a little bit from the perspective of the appellate court judge. To some extent, maybe that is a contribution for the committee during this day.

What the State Justice Institute represents, it seems to us, is a promise and a very great possibility that we can develop something here that will initiate quality programs designed to improve the functioning of the State adjudicatory processes.

As has often been said, the State courts and State judges deal with over 90 percent of all the matters that need adjudication in our court system in this country. I would like to suggest right away, in response to Congressman Moorhead's point made in a question earlier during this hearing, that as we see it, the strengthening of the State judiciary with all that that implies will have an enormous impact on the willingness and ability of the bar of this country, and indeed, the judiciary, to consider the question of diversification of its work and other aspects of it that might be considered to be transferred from the Federal system.

Let me just make these points with respect to that. State courts need to be strong and independent. The stronger a State court is, the stronger our whole system of justice is in this country.

In addition to that, State courts, as distinct in large part from Federal courts, can experiment and can afford diversification. Indeed, as Justice Frankfurter would often say as he constantly talked about federalism and the need to preserve it, these State courts afford laboratories for experimentation and for trial and error, which the Federal court simply cannot afford.

Interestingly enough, a strengthening of the State courts will also afford a degree of uniformity across our country that we think is greatly needed. This is a country in which, people move all over; often businesses are in many, if not all the States, and uniformity is an asset that we need to look toward and to encourage.

So we see the State Justice Institute as a great promise in assisting in strengthening of the State judiciary. I would like to comment on that by way of illustration in just a moment.

Let me say that the American Bar Association supports the bill in all of its aspects. We particularly wish to support the inclusion of six judges as members of the board. We think that the governance of this board by those who are making the decisions, who are in the courts, who deal not with adjudicative matters, but the administrative matters, is very important.

We also would wish to suggest that those six judicial members be from various courts, not just from the appellate courts. When we say that, we do not eliminate those who try cases in courts of limited jurisdiction and courts of general jurisdiction, and of course, appellate judges as well.

We would wish to point out that while the bill provides for the Conference of Chief Justices to submit 14 candidates to the President, we would think that the minutes or the record of this com-

mittee's deliberations on this bill ought to reflect that the President would not be limited to just those on that list, whether the first list to be submitted or the second one.

There are two matters that I would like to comment on to illustrate how I think the State judiciary could be strengthened. Of course, these are just illustrative. There are other matters as well, as set forth in the priorities in article 6 of the bill.

In particular, I want to focus on the importance of programs to improve alternatives to resolution of disputes, and judicial education. It is, I think, axiomatic that a good government must afford to its people practical and fair ways of resolving their disputes; not just one way. I think all of us who have practiced at the bar and who have been at the bench have learned—and if we have not, we certainly should have from experience—that litigation and advocacy often is not the best way to resolve disputes. Sometimes it is the wrong way.

As a professor of law, I confess somehow to my guilt, as I teach students, because sometimes the theme of all of our teaching is that disputes ought to be resolved by litigation. That is not the best way and I think we are moving in a direction which suggests that law schools are seeing this, and undertaking to teach lawyers generally that there are often other and better alternatives in dispute resolution.

The fundamental responsibility to provide mechanisms for resolution of disputes can be met with the help of this bill. A major endeavor of the American Bar Association, as you know, is to press for the accomplishment of the development of alternatives in dispute resolution.

As the chairman indicated, I am on the committee of alternative means of dispute resolution and thus have a particular interest in the development in this field and wish to comment on it very briefly to illustrate the point.

Several years ago, when this committee was first founded, we identified only about three or four dispute resolution centers in the country worthy of the name. Today, there are at least 200, if not more—which are effective and which are having a great impact.

I happen to be chairman of the Atlanta Neighborhood Justice Center, which is a very effective one, and which began with a little Federal support for 3 years. Things being relative, that "little" was substantial for us because it got us started.

Today, that neighborhood justice center receives not a dime of Federal money. It receives assistance from the county commissioners, from the city council, from United Way, from our moving about, and training others. It is a federally independent operation. We are very proud of that. It is taking 60 percent of its cases from the local courts and we deal with over 200 mediations a month and we have over 70 mediators to do that.

I think the important thing to see here is that we now have a new method of dispute resolution which is afforded to the courts and to the public. It began with Federal help.

I tell you without hesitation that there is nothing more that a trial judge would seek to have in resolving disputes than an additional option in making the judgments. The option of letting, for

example, people make up their own minds how to settle their own disputes.

It has greatly to do with the public's appreciation of their government as one which will serve them and not master them.

I think it has greatly to do with strengthening federalism, saying that the Federal Government is interested in helping to establish that quality of government which is missing when people cannot have access to the courts and not get their disputes resolved.

The rapid development in this field is illustrated in another aspect that you might be interested in. That is, two major law schools, including Harvard University and my own, Emory University, are offering courses in dispute resolution. They have been very greatly accepted by the students. Students are eager to undertake them because they see the bankruptcy of our court system and they see the need for support.

The second major point I would like to make to illustrate and indeed to respond to Congressman Moorhead's question earlier about strengthening the system is the support of education and training programs for judges. It is perfectly clear to me that a national college for the training of judges has a tremendous value for this country.

I have taught at the national college for about 10 or 15 years now and I have seen tremendous development and enhancement of the quality of judges around the country. There is, if you please, a network of judges around this country of those who have attended this college, who have learned a great deal about procedural matters, about the quality of work that should be expected of them. It seems to me that this justice institute could, indeed, have a great impact on the enhancement of national judicial education.

It is a sort of a scandal that we are still permitting judges throughout this country to go on the bench and then to serve without even a suggestion of education to enhance the quality of their work.

I think the State Justice Institute could have a great impact in that area.

I want to also propose that the evaluation of judges' performance is something that needs to be looked at, and it is very difficult to do that in a meaningful way State by State. The testing, the experimentation, in fact, the evaluation of the evaluations is something that could be done by the justice institute such as being proposed.

The administrative load in our courts is such that judges often feel themselves as traffic cops, not as judges. They often spend half their day managing their calenders. Much of that could be avoided by the improvement and development of technology in the management and administration of affairs by work sponsored by the State Justice Institute.

In essence, then, as I have tried to suggest by these few examples, the impact of State courts' rulings has an increasing resonance in other areas of the country. Trial court or a State appellate court's rulings these days can very well impact on businesses throughout the country. It often does. Increasingly, it does.

Therefore, the enhancement and strengthening of the judiciary in the States could very well have a great impact on the reduction

of work in the Federal courts because there is, and let's face it, there is a lack of confidence in the State judiciary by reason of the fact that until only in recent years have judges been expected to be specially trained and have there been some standards established that could be applied throughout the States.

Let me thank you very much for the opportunity to present these thoughts which will be and are expanded in the statement which has been submitted, and to encourage you to continue on with this important direction.

I do not think there is any gift a Congressman could give to our country that would exceed his or her efforts to enhance the quality of the judiciary in this country. As we have often heard—and as I have already said and you know quite well—people do not have little disputes. People have huge disputes. In their lives, it is a huge dispute, and when we talk about enhancement of the judiciary, what we really want to talk about and think about—I think you can is our Government's ability to deal with that person's or that corporation's dispute in such a way that he or she or it feels that they have obtained from their Government an opportunity to seek justice and to obtain justice that would not otherwise be afforded in a country that was not free.

Thank you so much for this opportunity.

[The statement of Judge Etheridge follows:]



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STATEMENT OF

JUDGE JACK ETHERIDGE
MEMBER, SPECIAL COMMITTEE ON ALTERNATIVE MEANS
OF DISPUTE RESOLUTION

ON BEHALF OF
AMERICAN BAR ASSOCIATION

BEFORE
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES AND THE
ADMINISTRATION OF JUSTICE
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

IN SUPPORT OF THE PROPOSED
STATE JUSTICE INSTITUTE ACT OF 1983, H.R.3403

JULY 13, 1983

Mr. Chairman and members of the subcommittee:

I am Judge Jack Etheridge of Atlanta, Georgia, and I am a Member of the American Bar Association's Special Committee on Alternative Means of Dispute Resolution. It is my privilege to appear before this subcommittee and to express the Association's support for prompt enactment of the proposed State Justice Institute Act. The President of the Association, Morris Harrell of Dallas, Texas, had very much hoped to have been able to personally appear before you today. A prior commitment made that impossible, but he has asked that I convey the Association's strong support for enactment of H.R.3403. He also asked that I emphasize the fact that the creation of the proposed Institute is one of Mr. Harrell's legislative priorities.

We commend you, Mr. Chairman, for your championing of this legislation to assist state court systems, and we are grateful for this opportunity to present the ABA's views from the unique perspective of the state judiciary. The endorsement of H.R.3403 by the American Bar Association's policy-making House of Delegates was wrought after careful consideration by our Board of Governors, based upon a report prepared and submitted by the Association's Judicial Administration Division.

As you know, the membership of the American Bar Association has an abiding concern for the integrity and efficiency of the justice system in this nation. We recognize that all of our courts at the state and federal levels are laboring under great pressures which are imposed by heavy case loads, complex and multi-party litigation, and time-consuming techniques of discovery and procedure. These pressures threaten to affect the deliberate and thoughtful quality of adjudication which is expected by the American public. It is increasingly true that trial judges find themselves devoting more time to the administration of their case loads rather than dealing with matters calling for adjudication.

Our citizenry expects prompt and just disposition of its disputes in a manner which is reasonable in cost and accessible to all. Yet the institutional and procedural impasse that is frequently seen in the administration of justice makes it increasingly difficult to satisfy these fundamental aspirations of all citizens. We think the proposed establishment of the State Justice Institute reflects these concerns and addresses a great need.

The State Justice Institute would have a vital impact upon needed improvements in administration of justice. The proposed Institute, through its funding and contracting authority, could effectively initiate quality programs designed to improve and enhance the functioning of state adjudicatory processes. The State Justice Institute would have the capacity to utilize federal funds in a manner consistent with the principles of the separation of powers and federalism. Such funds would be employed not for basic court services, but rather would be used as the moving force behind the goal of excellence which the public expects from our state court systems.

Federal assistance toward this goal is both appropriate and essential in that a distinct and symbiotic relationship exists between the federal and state judicial systems, with the states shouldering an overwhelming share of the nation's judicial burden. We share the expressed concern in the findings of the Task Force of the Conference of Chief Justices that the quality of justice in state courts reflects the quality of justice in the nation as a whole. Since some 90% of all adjudication is borne by the state court systems, it is essential that all resources -- including those of the federal government -- be utilized in seeking relief for state courts. Less, not more, adjudication should be our goal. However, as also determined by the Task Force, the participation of the state courts in the judicial process has increased due to recent congressional legislation, Supreme Court rulings and the diversion of cases to the state courts. In view of these findings, and in order to realistically achieve the desired standards of efficiency, education of judges, and public access to the courts which are requisite to a quality court system, the federal government must actively participate in the process.

Previous funding of programs to assist state courts through the Law Enforcement Assistance Administration initiated successful efforts to improve state court management and training. However, the integration of funds available to both the judicial and executive branches of government has raised serious questions concerning the separation of powers. The judiciary is a separate and independent entity and, in fact, many of its problems are distinct from those of other facets of the justice system. More important, the resulting competition between the judicial and executive branches for limited funds has restricted the ability of state courts to effectuate meaningful reforms. This problem has been exacerbated recently with increasing state property tax revenues being spread increasingly thin throughout state governments. This experience has demonstrated the necessity for a specific focus to serve judicial needs. The proposed State Justice Institute would provide the needed, exclusive attention to state judicial improvements.

The provisions of this legislation establish an innovative mechanism designed to strengthen the cooperative relationship between the federal government and state courts without breaching important precepts of federalism. Specifically, Section 4 would establish an eleven-member Board of Directors to set the Institute's policies pursuant to the statutory direction of Congress. This Board would be appointed by the President and would be composed of six judges, one state court administrator, and four public members.

We heartily support the inclusion of six judges as members of the Board. Although categories of judges are not specified in the legislation, it is our expectation -- and, we assume, that of the bill's sponsors -- that a cross-section of the judiciary, including trial, appellate and special court judges, will be represented to insure an adequate balance of experience and viewpoint.

The judges and state court administrator must be selected by the President from a list of no more than 14 candidates submitted by the Conference of Chief Justices. The Association recognizes that this method of appointment may be subject to constitutional limitations. However, we suggest that the role of state judges in this process is vital and should not be abandoned. We strongly urge the Congress to insure that state judges retain a dynamic part in the implementation of judicial processes on the state level. The experience and resources of these members of the judiciary would be invaluable in planning for achievement of the goals of this legislation.

The Association wholeheartedly supports the breadth of activities enumerated in Section 6 of the legislation as possible subjects of funded inquiry. In particular, we will briefly focus on the importance of programs to improve the alternative resolution of disputes and of judicial education.

Governments at all levels have a fundamental responsibility to provide mechanisms for the resolution of disputes, whether criminal or civil. Not all disputes, however, need to be litigated in the traditional mode. Indeed, those who observe our judicial system quickly learn that litigation, whether one "wins" or "loses," can be a hardship for all parties. The advice found in the July 1, 1850 notes for a law lecture among the papers of Abraham Lincoln are as true today as they were then:

> "Discourage litigation. Persuade your neighbor to compromise whenever you can. Point out to them (sic) how the nominal winner is often the real loser -- in fees, expenses and waste of time. As a peace-maker, the lawyer has a superior opportunity of being a good man."

We are therefore especially enthusiastic in voicing support for that aspect of this legislation which supports the testing and evaluation of "experimental approaches to providing increased citizen access to justice, including processes which reduce the cost of litigating common grievances and alternative techniques and mechanisms for resolving disputes between citizens."

A major endeavor of the American Bar Association is to press for the accomplishment of this objective. Significant funds and considerable energies have been expended by state courts, the Association and other entities to develope alternative means of dispute resolution. The Special Committee on Alternative Means of Dispute Resolution, Chaired by Ron Olson of California, receives hundreds of inquiries from throughout the country about the establishment of dispute resolution centers. You will be interested to know that there are about 200 such centers now in existence. As a result of the success enjoyed by many of these experiemental centers, a broader access to opportunities for the resolution of disputes now exists. The various methods of resolution which have been devised are now utilized in other areas, e.g. mediation of school and employment disputes.

The significant point is that there has been, for a short period, some federal support for dispute resolution centers. One of these, The Neighborhood Justice Center of Atlanta, Inc., a private, non-profit organization supported by the bench and bar of the Atlanta area, began in 1977. Under the aegis of the Department of Justice and the concern of Attorney General Griffin Bell and Assistant Attorney General Daniel Meador, a number of judges, attorneys, court officials and ordinary citizens set out to find viable alternatives to adjudication in resolving disputes among citizens.

More than 200 cases are referred to the Center each month for mediation. The mediators are highly qualified and trained volunteers. Much has been learned about alternative techniques of resolving disputes, disputes which would otherwise consume much more time in the courts.

Although this center no longer receives federal funds, without federal assistance at the outset it might not exist today. Its success, like several others across the country, has been so great that it serves as a model in numerous other cities.

During the past two years, several promising programs have demonstrated the diversity which exists in the field. Both the Houston (TX) Neighborhood Justice, Inc., and the Cleveland Police Prosecutor's Mediation Program relieve the prosecutor's offices of hundreds of cases. The Waterbury (CT) Mediation Program is directly sponsored by the court; whereas the nearby New Haven center is sponsored by a neighborhood organization. The Tulsa (OK) Early Settlement Program is beginning to work closely with the police

department to receive citizens' complaints early. These are only a few of the locations which have undertaken successful alternative methods of dispute resolution. Each of them in their organizational stage, and in their development, would have greatly benefited from the work proposed to be undertaken by the State Justice Institute.

Thus, we can see from the experience of only a few years, in significant part encouraged by limited federal support, that even more justice can be rendered to our citizens through alternatives to traditional modes of dispute resolution.

Many groups across the nation have joined the American Bar Association, and the National Conference of State Trial Judges -- a Conference I had the honor to chair -- in supporting and encouraging the development of alternative dispute resolution programs and techniques. Your legislation, Mr. Chairman, which promotes this objective, also recognizes that the Congress ingends to assure the promise of equal protection for all in our legal system.

The second major point we wish to address concerns the proposed objectives in Section 6(c), to "support education and training programs for judges" and "to develop and test methods for measuring the performance of judges and courts and to conduct experiments in the use of such measures to improve their functioning." There have been dramatic strides in judicial education in this country during the past two decades, before which time virtually none existed. It is an antiquated notion that one may simply don a judicial robe, often equipped with only law school training and limited experience in the practice of law, to become a competent judge. Many states have developed programs of judicial education. Some are excellent, others are not. There is little consistency in the quality of judicial education among the states. On the national level, the National Judicial College has been an outstanding success utilizing volunteer, non-compensated veteran judges as teachers. In the past decade, the College has issued more than twelve thousand certificates to judges from every state in the nation. The impact of their training and the quality of their work, especially with respect to coping with enormous administrative burdens, has been dramatic.

In large part, the College has been financed with private funds. While we do not propose a substantial change in funding sources, it is clear that the investment of federal funds in support of judicial education would have a rewarding return. What exists today in this field is but a portion of that which is needed. Happily, such existing institutions as the College could effectively utilize additional resources to dramatically expand judicial competence without the unnecessary expense of creating new institutions.

The State Justice Institute would thus afford a unique opportunity to bring to the people of this country a better trained judiciary. This educational component can apply as well to the training of non-judicial personnel within the judical system. The nation's courts are at the threshold of vast improvements in records management, electronic reporting, and modern administrative processes, all of which have been the subject of important advances prompted by the National Center for State Courts. The State Justice Institute could have an extraordinary impact upon the improvement of management and record keeping procedures throughout the country. All courts operate in essentially the same manner, but it is often the use of outmoded methods which stifle efficient operations.

Judges' actions impact on all facets of life in America today -- yet insufficient attention has been given to developing improved measures for evaluation of judges' performance. The ABA, through its Section of Criminal Justice, has developed a proposal to produce guidelines for such evaluations. From our initial survey work in the states, we are aware that some experiments are already underway around the country to evaluate formally the performance of judges. Yet most -- such as bar polls -- are methodologically unsound, and have failed to achieve a central purpose of providing reliable data as to on-the-bench performance. We are therefore pleased to see this area identified as a focus for the State Justice Institute.

It is an example of the kind of national contribution which the Institute could make towards judicial administration -- yet which no one state can or would likely undertake itself.

The impact of a state court's rulings has an increasing resonance in other areas of the country. There is a growing appreciation that procedural, administrative and even substantive innovations and refinements in one state can often be replicated in other states, with a resulting cost-effective use of limited resources. The enhancement of respect for the judiciary where there exists some uniformity of standards and practices is very great indeed. Thus, we support one of the major functions of the Institute, to serve as a clearinghouse for the preparation, publication and dissemination of information regarding state judicial systems. The resultant studies, data, and demonstration projects could then more efficiently be aggregated and shared with court systems throughout the country. Like good judicial work, much of what is learned in one jurisdiction can have universal application. Here again, we think that common sense and good business and governmental practice dictates enactment of this bill.

Finally, we advocate the proposals to support various studies and research projects which will improve court organization and management, investigate the likely causes of court delay in resolving cases and evaluate methods of reducing the costs of litigation. A court system which is responsive to the needs of its citizens must be well ordered and efficient in order to maintain the confidence of the public.

Mr. Chairman, you are to be commended for your sponsorship of this important legislation. On behalf of the ABA, it has been an honor to be afforded this opportunity to express our support for prompt enactment of the State Justice Institute Act.

Mr. KASTENMEIER. Thank you, Judge Etheridge, for that presentation and for the work you have done in several fields within the American Bar Association and outside of it. Obviously, it has relevance to us on this committee, since we processed the minor dispute resolution. We are only sorry that it is not funded, but the principle is there.

But that does raise a question. You have indicated that the neighborhood justice center in Atlanta, found that while Federal funding was essential in the formative years, it has now been able to get along without Federal funding.

Do you foresee a similar possibility for the State Justice Institute? That is to say, that we might start with some seed money here but eventually either reduce or eliminate Federal funding for the State Justice Institute? Do you think that is possible?

Judge ETHERIDGE. I see the role of the State Justice Institute as different from the role of a local dispute resolution center. It would seem to me that the State Justice Institute could have as its great role the gathering of information about the successes, for example, of a neighborhood justice center and sharing that with other areas around the country.

I think that in time, the support of the State Justice Institute could be such that it would never have to be in enormous proportions, but there would always have to be that central gathering place of those interested in the universe of problems that afflict State courts.

This would be what I think would be a major role of the State Justice Institute.

If I may pursue that, the point that I wanted to make with the neighborhood justice center is, by way of illustration, that there must be a beginning with these new devices and this State Justice Institute could, in reviewing what is going on out in the country, assist in the beginning and then local agencies or governments could pick them up.

Mr. KASTENMEIER. You, of course, referred in the statement to the important educational work of the National Judicial College. We are familiar with that. What would the State Justice Institute's role be? Would it be primarily of helping to underwrite or fund such an institution or an existing institution, or would it go on to encourage the development of new programs or both?

Judge ETHERIDGE. I think certainly I would not envision that this Institute would be the principal funder of the National Judicial College. I think that each of the States, to the extent they serve their State judges, should contribute, but I do not think that would be enough.

I think this Institute should encourage and to some extent support the National Judicial College. Just as I think the State Justice Institute could well help States in developing their own judicial programs. They could very well be a catalyst, you see, sharing information and development and programs to enhance the training of local judges.

Mr. KASTENMEIER. Invariably, someone will say, well, since there is already such a thing as the National Center for State Courts, could that not really serve this function; could that not be en-

hanced in some fashion without creating yet another body which those that are not highly familiar with these programs might just confuse. What is the function of one versus the other?

How would you answer that?

Judge ETHERIDGE. I would say that the National Center has a very important role to do research in discrete projects and to develop on a contract basis with States if necessary, as they do now, the review of certain processes and procedures, but I do not see it capable of doing the broad kinds of things that a funded National Justice Institute could do.

Mr. KASTENMEIER. Even with new personnel and new competence?

Judge ETHERIDGE. No, sir, I do not believe that the National Center for State Courts is the proper vehicle for trying to bring together throughout this country the kinds of things that I think the State Justice Institute could do. I do not see it as a substitute for it or that this would be a substitute for the National Center.

Mr. KASTENMEIER. Thank you. I would like to yield to my colleague, the gentleman from Michigan.

Mr. SAWYER. Thank you, Mr. Chairman.

I have some reservations about this that the chairman's questions went to. I do not know that he has the reservations. I have supported it in the past, because the chief justice, then chief justice in my State, was an extremely attractive friend of mine, Mary Coleman, who leaned on me very heavily on this subject. I was sufficiently on the fence that that was all the push I needed.

I have the same question I raised last Congress as to why the National Center for State Courts, even if it might take some expansion or increase in its role, would not be a better forum to take over this kind of operation than to create a whole new.

You know, I still have that question. It would just seem to me that an expansion of an existing operation would make more sense than creating a whole new entity.

How do you view that?

Judge ETHERIDGE. I think that is a very important question and I am not sure I can answer that adequately for you. It does seem to me that the National Center of State Courts has, and historically has had as its role, a cooperative agreement with some of the States, although not all of them, to come in and do research projects and so forth.

I view this bill as a much richer opportunity, a much broader opportunity, than I think the National Center of State Courts could possibly do under its present structure.

Mr. SAWYER. I think I understand that, but why would the preferable approach not be to expand or fund additional operations by the National Center for State Courts, rather than create a whole new operation?

Judge ETHERIDGE. Well, I do not see this as a whole new—of course, it is a new operation—I do not think the bureaucratic——

Mr. SAWYER. Well, the tune of $20 or $25 million a year is fairly significant.

Judge ETHERIDGE. Sir?

Mr. SAWYER. I say, as I recall it, the funding aim is some $20 or $25 million a year, so this is quite a fairly significant operation.

Judge ETHERIDGE. Yes; it is significant, there is no doubt about that. I do not see any possibility, though, for the National States Courts to pick up, even if you appropriate that money to the National Center, and do the sorts of things that are envisioned in section VI of this statute. It seems to me that it is simply not possible under the present government and management of the National Center of State Courts.

Mr. SAWYER. Then there is also the college out in Nevada, as I recall, for State judges, new State judges?

Judge ETHERIDGE. Yes; National Judicial College.

Mr. SAWYER. And that is for training of State judges—this would not overlap with that, either?

Judge ETHERIDGE. Oh, no, I think not. I do not envision the Institute that is proposed as being an Institute for the training of judges. It seems to me what it could do and do very well would simply be to support and assist the National Judicial College.

The National Judicial College, as I am sure you understand, was started by the American Bar Association and is still in some measure a part of it. It has a unique role.

Mr. SAWYER. On the development of things like computerized docket handling and that sort of thing, which I know is being experimentally tried, at least in some places, do not the State courts kind of get a piggyback on what the Federal courts are doing in those areas, too? Their problems, other than size, are really no different regarding overcrowded dockets and that sort of thing. Why do we have to duplicate the same efforts, vis-a-vis the State court system, where they certainly have free full access to whatever is being developed in the Federal court system to address those same problems.

Judge ETHERIDGE. Mr. Sawyer, in all due respect, the difference between management of a Federal court and a State court is like night and day. The management of State courts has to do with huge dockets of criminal matters, divorce, domestic calendars, equity matters. It is an enormous problem in the State courts to deal with that where you have your moneys coming, month by month almost, sometimes annually, sometimes biannually from the county commissioners.

There is a huge problem in the State courts with getting enough money to run a court. We have counties in this country which go bankrupt because they have a 6-week trial and they have taken pleas in many times in cases that ought to be tried in order to avoid long trials.

Some of our poorer States simply cannot tolerate long trials. So the fiscal problem is so great that it would seem to me a State Justice Institute, interested and concerned with the management of State judiciary, could afford some really unique and novel opportunities for management that cannot be replicated from the Federal system. There are, of course, technical devices, like the preparation of the record, electronic preparation of the record and things of that sort that we can do.

Mr. SAWYER. I know that—I am very familiar with the difference between the docket of State courts and Federal courts, but the Federal courts also deal with an awful lot of trivia that you normally

do not think of. For examples, prisoner habeas corpus petitions, and black lung cases in different areas. They are loaded down with a lot of things, too, and of course, just like the State courts, the great bulk of their criminal cases are taking pleas, really, and sentencing.

It just seems to me, the Federal court system is engaged in this kind of research all the time and I just wondered if it was not just going full blast on two fronts.

Do not misunderstand me, I am not opposed to this. I am just kind of on the fence. As I say, now with G. Mennon Williams my chief justice instead of Mary Coleman, I am back on the middle of the fence.

I congratulate you on your fine university down there. I had one or two younger partners that we recruited out of that Emory Law School many years ago and they are very fine people and very great assets. That is way up north, too.

Judge ETHERIDGE. Good, glad to hear that.

Mr. SAWYER. Thank you. I yield back, Mr. Chairman.

Mr. KASTENMEIER. Thank you, Judge Etheridge, we appreciate your contribution today. We do depend on the American Bar Association for a great deal of our input on these questions and the——

Mr. SAWYER. May I interrupt you for just one comment, Mr. Chairman?

Mr. KASTENMEIER. Yes.

Mr. SAWYER. That is to say I forgot to mention, particularly in light of this witness, that Mary Coleman, in her younger days, was Miss Georgia in the Miss America contest. [Laughter.]

I yield back.

Mr. KASTENMEIER. Mary Coleman was your chief justice?

Mr. SAWYER. She was Miss Georgia.

Mr. KASTENMEIER. No wonder she is so influential with you. [Laughter.]

Mr. SAWYER. That is right.

Mr. KASTENMEIER. In any event, we appreciate your contribution today and this concludes our hearing on the State Justice Institute Act.

Until tomorrow at 10 a.m., when we reconvene on a different issue, the committee will stand adjourned.

[Whereupon, at 3:55 p.m., the subcommittee was adjourned, to reconvene at 10 a.m., Thursday, July 14, 1983.]

ADDITIONAL STATEMENTS

RESOLUTION
of the
NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES
on its
FEDERAL LEGISLATIVE PROGRAM

JUL 27 1982

Be it resolved that the National Council of Juvenile and Family Court Judges, at its 45th Annual Conference in Portland, Oregon, July 1982, hereby ratifies actions by the President and Legislation Committee since the Mid-Winter Meeting with respect to pending federal legislation and reaffirms its positions with respect to the following:

1. Support of adequate funding and administrative support for the Office of Juvenile Justice for fiscal years '83 and '84 and for the conduct of the Runaway and Homeless Youth Program provided for under Title III of the Juvenile Justice and Delinquency Prevention Act of 1974 as amended and reauthorized in 1980.

2. Support for H.R. 421 to establish a select committee on children, youth and families in the House of Representatives.

3. Support for S. 1701, the "Missing Children's Act"

4. Support for implementation and funding as originally envisioned by Congress when it enacted Public Law 96-272, the 1980 Adoption Assistance and Child Welfare Act.

5. Support for S. 537, the State Justice Institute Act to provide modest federal support for judicial and related training and other state court improvement programs.

6. Support of S. 2411, the Justice Assistance Act of 1982 to provide for the reauthorization of the National Institute of Justice and the Bureau of Justice Statistics, the establishment of a limited program of federal technical assistance and demonstration program programs, and for the coordination and support with the Department of Justice of the Office of Juvenile Justice and related programs.

UNANIMOUSLY ADOPTED.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
DIRECTOR

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

September 21, 1982

Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts, Civil
Liberties and the Administration of Justice
House Committee on the Judiciary
Washington, D.C. 20515

Dear Mr. Chairman:

In my capacity as Secretary to the Judicial Conference of the United States, I would like to express the Conference's support for the legislative proposals pending in your subcommittee (see S. 537 and H.R. 2407) to create a State Justice Institute.

The Conference examined the proposals during its March 1982 meeting, and decided to approve the objectives contained therein. Rather than paraphrasing the Conference's findings and recommendations, I would like to share with you the substance of the Conference resolution:

> S. 537 and H.R. 2407, 97th Congress, are companion measures to aid state and local governments in strengthening and improving their justice systems through the creation of a State Justice Institute. The Institute would be a private non-profit corporation governed by a board of directors consisting of six judges and one State court administrator appointed by the President from a list of nominees submitted by the Conference of State Chief Justices. In addition the President would appoint four members from the private sector. Although the Institute would be a separate private corporation, its staff would be employees of the United States for various personnel purposes. The Institute would be authorized to accept nonfederal funds and would be granted federal funding for three years. Federal funds, however, could not be used for operational purposes, and matching state funds in a smaller amount that Federal contributions would be required.
>
> It was the view of the Committee that the creation of an organization to foster improvements in state court systems is desirable and in the long run would be beneficial to the Federal courts. It therefore recommended the creation of a State Justice Institute, and the Conference approved provisions in S. 537 and H.R. 2407 which would achieve that objective.

Honorable Robert W. Kastenmeier
page two

The Conference did express reservations about the provisions in one section of the bills (see section 3(b)(3)) which provides that "[T]he Institute shall . . . make recommendations concerning the proper allocation of responsibility between the State and Federal court systems . . . ." The Conference prefers the course of action taken in at least two other bills (see S. 675 and S. 1530) insofar as they guarantee a better ratio of Federal judicial participation than does the State Justice Institute proposal. I am sure that the Conference would not oppose an amendment to strike section 3(b)(3) of the proposed legislation.

In addition, the Conference specifically refrained from taking a position on the amount of money to be allocated to the new program. That is a policy question for Congress -- through its authorizing and Appropriations Committees -- and for the executive branch. It is noteworthy, however, that the amount provided in S. 537 and H.R. 2407 is substantially less than that provided in the past.

In closing, there clearly is a substantial Federal interest in preserving and promoting the quality of this country's State courts. Under the Constitution, the State and Federal courts form a partnership to enforce not only the terms of the Constitution but also the laws made pursuant thereto. The Judicial Conference of the United States, and the Administrative Office of the United States Courts, stand ready, as partners, to work with their State judicial and administrative counterparts. Acting in concert, much can be done to improve the quality of justice, to reduce unnecessary costs of litigation and to diminish unwarranted delays in reaching final decisions. In this regard, creation of a non-profit entity to provide technical and financial assistance to improve State and local courts will be a needed step in the right direction. The working alliance between State and Federal courts will be strengthened rather than weakened.

Thank you for soliciting the views of the Judicial Conference on this important legislation.

Sincerely,

James E. Macklin, Jr.

for William E. Foley
Director

National Association of Women Judges

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District 12
Judge Linda T. Palmieri
County Court
Golden, Colorado

District 13
Judge Carol A. Fuller
Superior Court
Olympia, Washington

District 14
Judge Alice Duggan Sullivan
Oakland Municipal Court
Oakland, California

December 16, 1983

Honorable Robert W. Kastenmeier
United States House of Representatives
98th Congress
Rayburn Building
Room 2232
Washington, D.C. 20515

Dear Representative Kastenmeier:

At its annual meeting held in San Francisco, California, October, 1983, the Board of Directors of the National Association of Women Judges adopted the Resolution of the State Justice Institute Act dealing with funding for judicial education and other court improvement programs.

It was further resolved that the Chairperson of the Resolutions Committee send a properly inscribed copy of said Resolution to each member of the United States Congress. Accordingly, a copy of said Resolution is hereby enclosed.

Very truly yours,

CLARICE JOBES
President
National Association of Women Judges

Enclosure

NATIONAL ASSOCIATION OF WOMEN JUDGES

RESOLUTION

STATE JUSTICE INSTITUTE ACT

ADOPTED

5th Annual Meeting
San Francisco, California - October 10, 1983

WHEREAS, the State Justice Institute Act, introduced in the current Congress as S. 53 and H.R. 3403, provides for federal funding assistance for state court improvements, including funds for judicial education and other court improvement programs of organizations such as the National Association of Women Judges and the National Center for State Courts; and

WHEREAS, the State Justice Institute to be established by such legislation would provide federal funds for state court improvement in a manner consistent with principles of federalism and separation of powers acceptable to the state courts; and

WHEREAS, the National Association of Women Judges and the Foundation for Women Judges would be proper bodies to apply for grants from this institution if it were authorized and funded;

NOW, THEREFORE, BE IT RESOLVED that the National Association of Women Judges endorses the State Justice Institute Act and urges its passage and funding by the Congress; and

BE IT FURTHER RESOLVED that the Chairperson of the Resolutions Committee be instructed to send a properly inscribed copy of this resolution to each member of the United States Congress.

(10/11/83)

Judge Clarice Jobes, President

Justice Sybil Kooper, Secretary

NATIONAL ASSOCIATION OF WOMEN JUDGES

What is the National Association of Women Judges?

In October 1979, more than 100 women judges gathered in Los Angeles to share their common experiences and to discuss the status of women in the judiciary. The meeting culminated in the creation of the National Association of Women Judges. These founding members, among them Sandra Day O'Connor, recognized that until women achieve substantial parity with men in the legal profession and in the judiciary, there will be a need for an association devoted to advancing the needs of women judges and to addressing both their professional and their personal concerns.

The primary goals of the NAWJ are to:

- Promote the administration of justice;
- Discuss legal, educational, social, and ethical problems faced by women judges and develop solutions to them;
- Increase the number of women judges so that the judiciary more appropriately reflects the role of women in a democratic society;
- Educate other judges—male and female—about the problems encountered in the judicial system by female colleagues, attorneys, witnesses, litigants, and jurors.

Who joins NAWJ?

Members of NAWJ come from every level of the judiciary and every region of the country. Our fellow members are often at the forefront of the legal profession, playing dynamic and influential roles in their communities. We like to think of ourselves as a group of uncommon individuals with a lot in common. When our members speak, they are listened to.

About the members:

- We have more than 400 members, representing over half the nation's women judges.
- State and federal trial, appellate, and supreme court judges, as well as administrative law judges, belong to the Association. Our membership includes several justices of the Supreme Court of the United States.
- Women and men of all political philosophies are welcomed as full-fledged members of NAWJ.

What are the advantages of membership in NAWJ?

NAWJ acts as a vital antidote to the ills of isolation and stress faced by many women on the bench. We form a strong, supportive network providing women judges with an opportunity to discuss common problems and gain strength, courage, and reassurance, as well as renewed energy and dedication, from our sisters on the bench.

NAWJ membership gives you:

- Annual conferences and periodic district meetings to give members regular opportunities to talk frankly and examine relevant issues through detailed, insightful educational programs.
- A newsletter published three times a year to keep you in touch with other members and informed about national developments.
- A network of support and influence, which in turn connects you with other significant groups such as the National Conference of Women's Bar Associations.
- Contact with women judges in other countries, which results in an invaluable exchange of perspectives and ideas.

What are the activities and accomplishments of NAWJ?

NAWJ is actively promoting the appointment of more women to the bench. We also develop and support judicial education programs aimed at eliminating gender bias among judges. The programs attempt to focus attention on the devastating impact of divorce on women and children; the demeaning, condescending, or unprofessional ways in which male judges sometimes treat female attorneys, witnesses, and litigants; and the elimination of the appearance of racial and sexual discrimination by judges outside the courtroom. The Association also sponsors programs aimed at making you a better and more efficient judge.

Specific NAWJ activities include:

- Active participation in the ABA's Judicial Administration Division and careful monitoring of issues particularly relevant to women judges and lawyers;
- Tracking of judicial openings to promote aggressively the appointment of more women to the bench;
- Cosponsorship of the National Conference on Court Technology to be held in Chicago in April 1984;
- Participation in the Conference of Chief Justices' Lawyer Competence project;
- Encouraging the formation and development of women's bar organizations;
- Submitting suggestions to the U.S. Office of Personnel Management for revisions in the federal Civil Service Examination for Administrative Law Judges;
- Sponsoring programs on how to become an administrative law judge and how to get elected to the state bench;
- Holding educational sessions for judges on elimination of gender bias, developed with the NOW Legal Defense Education Fund's National Education Program, which have been presented at the National Judicial College in Reno, Nevada, and are also used extensively in New York, California, and New Jersey.

INSTITUTE FOR COURT MANAGEMENT
1624 Market Street • Suite 210 • Denver, Colorado 80202 • (303) 534-3063

Harvey E. Solomon
Executive Director

December 19, 1983

Hon. Robert W. Kastenmeier
Chairman, Subcommittee on Courts,
Civil Liberties and the
Administration of Justice
2137 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Kastenmeier:

The Board of Trustees of the Institute for Court Management has authorized me to inform you that the Institute fully supports passage of the State Justice Institute Act.

Since its inception in 1970, the Institute has been dedicated to the nation-wide improvement of court management through a broad program of education, technical assistance, research and the publication of a professional periodical, The Justice System Journal. We believe that the State Justice Institute Act is a critically important piece of legislation. While much progress has been achieved in court administration in recent years, much needs to be done, particularly with regard to the training of judges and administrators in the concepts and techniques of sound court management. The funding that would be provided under the State Justice Institute Act would thus aid ICM's mission considerably. Please feel free to include this letter of support in the hearing record.

If we can provide you with any assistance in your efforts to encourage the passage of the State Justice Institute Act, do not hesitate to contact ICM. For your information, enclosed is our 1982 Annual Report.

Best wishes for success in the new year.

Sincerely,

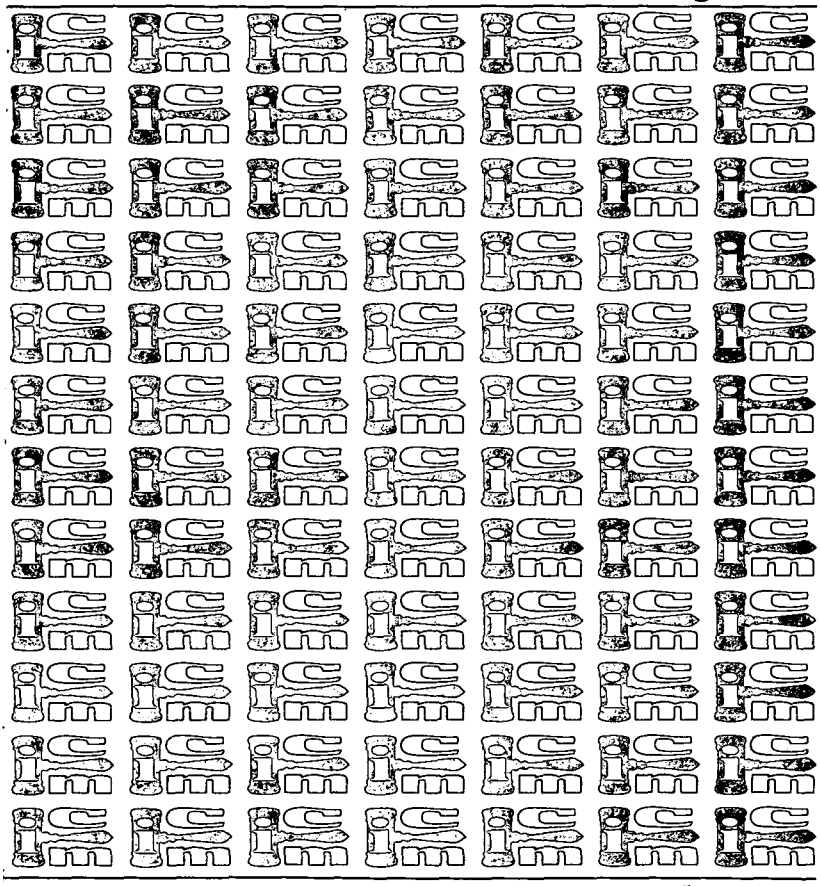
Harvey E. Solomon
Executive Director

HES/kmh

Enclosure

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Institute for Court Management

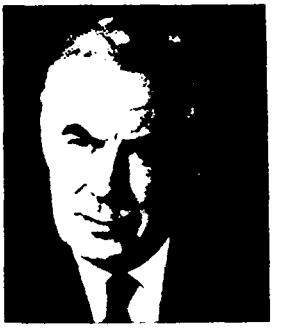


1982 Annual Report

"More important than a speedy trial act is a system of management and proper administration of the courts. In the last 10 years, there has been an enormous increase in the use of court administrators in this country, chiefly as a result of the creation of the Institute for Court Management in 1970. There were only a handful of court administrators in the country at that time; now there are hundreds — mostly in the state systems.

We've come to realize that judges can't do both the judging and the management function without some trained help. That is what the Institute for Court Management provided."

U.S. News and World Report (February 22, 1982)



Chief Justice
Warren E. Burger
Chairman
Visiting Committee
Institute for Court
Management

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The Institute is a nongovernmental, nonprofit organization sponsored by the American Bar Association, the American Judicature Society, and the Institute of Judicial Administration. Each of these organizations designates four members of the Institute's Board of Trustees.

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Institute for
Court Management
1624 Market Street,
Suite 210
Denver, Colorado 80202
(303) 534-3063

Message from Earl F. Morris, Chairman, Board of Trustees

Over the years, the Institute has worked closely in a variety of projects not only with our sponsoring organizations — the American Bar Association, American Judicature Society, and Institute of Judicial Administration — but also with the National Center for State Courts and the National Judicial College. In 1982, particularly with the latter two organizations, we explored ways of increasing cooperation and possibly affiliating in some formal way. These discussions are continuing and whatever the ultimate outcome, they have already produced a greater sense of understanding among the organizations and a stronger commitment to work together in the future. The Institute's efforts in this regard have been ably led by John J. Corson, Chairman of our Committee on Affiliation.

Judge Thomas J. Stovall of the District Court in Houston, Texas, joined the Institute's Board in October, 1982. Judge Stovall replaces Judge Horace W. Gilmore of the U.S. District Court in Detroit. Judge Gilmore, an original member of the Institute's Board, decided, after twelve years of distinguished service, not to accept reappointment. While we will miss Judge Gilmore's involvement in the work of the Board, we are fortunate to have Judge Stovall join us in view of his exceptionally strong background and experience in court administration.



Earl F. Morris, Esq.
Chairman, Board of Trustees

I am pleased to report that the Institute received increased corporate funding in 1982. In addition, the graduates of the Institute's Court Executive Development Program are to be commended for their generous support. The number of graduate donors increased 12.3% from 1981 to 1982 and the total amount contributed rose about 25%.

In recent years, outside fund raising has become a major concern of the Board because of a sharp reduction in federal funding and the budget constraints under which many state and local court systems are operating. Increased private sector support is therefore necessary if ICM is to carry on its vital mission. Since much of the business of the courts concerns the business of this country, we are confident that the additional support needed will be forthcoming. Our ability to add to our corporate funding base has been aided in particular by one of our newer Board members, George A. Birrell, Vice President and General Counsel of the Mobil Corporation.

In terms of support, it is important to acknowledge the continuing interest and backing of Chief Justice Warren E. Burger. Since 1970, when he called for the establishment of the Institute, the Chief Justice has consistently cited in his many public statements the importance of the Institute's work in the effort to improve the administration of the courts. We are most grateful for this support, and we were very pleased that the Chief Justice was able to join the Board of Trustees for lunch at both the March and December 1982 meetings in Washington, D.C. His involvement in our endeavors has been a great source of encouragement to the members of the Board, the staff and the graduates of the Court Executive Development Program. We look forward to continuing our close association with the Chief Justice in the years ahead.

Report of The Executive Director

Calendar year 1982 was a year of many accomplishments by ICM. During the year, we conducted 31 education and training programs which attracted a total of 1,023 administrators, judges and others involved in the functioning of the justice system. The national character of our work is demonstrated by the fact that ICM programs were presented in all sections of the country and attracted attendees from practically every state.

While these statistics demonstrate graphically the strength and vitality of the court management field, what is equally significant is the fact that the results were achieved despite severe national economic conditions. The prolonged recession has forced many states and local jurisdictions to cut budgets. These cuts, combined with a sharply reduced amount of federal support available for court improvement projects, have made it much more difficult for court administrative personnel to attend education and training sessions. Nevertheless, the average 1982 attendance at ICM programs was higher than in 1981. We are most gratified by these results and feel that they bode well for the future of the young and still developing court management profession.

As to research, the Institute's 1982 activities were both broad based and action



Harvey E. Solomon
Executive Director

oriented. Projects were completed which involved work in, or the collection of information from, courts, judges and lawyers in over 30 states. The issues addressed included delay reduction, fines as an alternative to incarceration, the use of telephone conferencing and the organization and management of municipal courts — the frontline of the justice system.

Because an important function of our education program is the dissemination of relevant research findings, the results of these projects were made available to a broad cross-section of court administrators and judges from all over the country. Research and training are closely aligned activities at ICM. Research can help define our training effort while training can serve to multiply the impact of study results. This is one of the unique aspects of the Institute's activities.

In 1982, the Institute's **Justice System Journal** continued its development as a major periodical in the field. The Spring 1982 issue (Vol. 7/1) concerned the timely topic of "Court Finances in an Age of Scarcity." Other notable articles published during the year dealt with the developing role of the judicial executive, court executives in the federal court system, criminal case processing, grand juries and judicial education. The **Journal,** which is published with the generous support of the West Publishing Company, serves as a forum for the exchange of ideas and information between practitioners and researchers, and, in this way strengthens our efforts to aid the courts in developing better management systems.

The pages that follow describe in greater detail ICM's 1982 programs and activities. All in all, we are proud of what has been accomplished, especially in view of the difficult economic situation confronting non-profit, publicly supported organizations such as the Institute. Despite recent fiscal problems, we are encouraged by the support we have received from the court administration community and we look forward to continuing our service to the state and federal court systems in the drive to improve court operations and administration.

Court Executive Development Program

In 1982, 22 men and women completed the Court Executive Development Program and became Fellows of the Institute in ceremonies held in the Chamber of the Colorado Supreme Court in Denver. Dean Marshal Kaplan of the Graduate School of Public Affairs of the University of Colorado at Denver was the graduation speaker. The new ICM graduates came from nineteen states and Canada and occupied positions in all levels of the state and federal judiciaries.

Since 1970, a total of 380 men and women have completed the program. Graduates serve throughout the state and federal court systems as state court administrators, federal circuit and district executives, trial court administrators, clerks of court and as heads of key court departments. Other ICM graduates teach in universities, serve as court planners, work as consultants, and occupy positions in other justice system agencies. Thus, as a result of the Court Executive Development Program, professional court administrators are in place throughout the country. The challenge now is to use these trained professionals so that they can contribute fully to the drive to improve court management.

The program has four parts which are described briefly below:

Phase I — Technology of Modern Court Management. Completion of this phase requires attendance at a minimum of five workshops, each lasting four to six days. The workshops cover various operational aspects of court management. Those presented in 1982 are listed in the Table on page 9. Attendance at a workshop on caseflow management is the only required course.

Phase II — Management in the Courts and Justice Environment. This is a four-week residential seminar which is academic in nature and emphasizes the application of modern management and organization theory to the administration of the courts.

Phase III — Court Study Project. Phase III is designed to broaden the participants' practical knowledge of research as a management tool and to enhance their analytical skills. This phase involves completion of an in-depth review of a specific management problem in the participant's home jurisdiction and the preparation of a written project report.

Phase IV — Final Seminar. Participants whose Phase III reports have been accepted are invited to attend a final one-week session designed to integrate and reinforce previous instruction and experience in the program. A major focus of the seminar is peer review and critique of the project reports.

Upon completion of the final seminar, a participant is awarded a certificate recognizing him or her as a Fellow of the Institute for Court Management. The certificate is signed by Chief Justice Warren E. Burger, who serves as Chairman of the Institute's Visiting Committee of Judges.

COURT EXECUTIVE DEVELOPMENT PROGRAM

DATES	PROGRAM/LOCATION	NUMBER OF PARTICIPANTS
June 5-11	Phase IV — Final Seminar Aspen/Denver, Colorado	22
July 4-31	Phase II — Management in the Courts and Justice Environment Breckenridge, Colorado	31
	TOTAL:	53

FINAL SEMINAR CLASS



Front Row: Richard Jugar, Patricia Johns, Susan Elliott, Marie Gardner, Rita Stellick, Robert Bernard, Patrick Aloia, Richard Saks, Matthew Tierney, and David Jackson
Back Row: John Ellenbecker, Dennis Morgan, William Carpenter, John Whitmyer, Ruben Carrerou, Robert Wessels, Geoff Gallas, William Hewitt, Mary Dayton, John Cariotto, Don Hendrix, Richard Groover, and Luther D. Thomas

PHASE II CLASS



Front Row: Mary Brittain, Margaret Satterthwaite, Goldeen Goodfellow, Eleanor Adams, Lorraine Engel, Betty Gittleman, William Daugherty, Lorraine Webber, Frank Kirkleski, Brian Matter, and James Casey
2nd Row: Nancy Morochnick, Jayme Wilson, Kathy Panek, Stephen Iannacone, Brian Goggin, Thomas Duckenfield, and John Corcoran
3rd Row: Burton Butler, David Warren, C. Duke Hynek, Geoff Gallas, Richard Weare, Perry Taitano, and Terry Kuykendall
4th Row: John Shope, Ruth Henry, Gloria Engel, Kevin Murray, Duane Hays, Michael McHugh, and Terry Simonson

Workshops and Seminars

The workshops and seminars offered by the Institute provide an opportunity for a wide variety of court personnel to improve their technical and managerial skills and update their knowledge about specific court management topics. These four- to six-day programs are conducted in Colorado and throughout the country. While most sessions concerned operational and managerial issues generally applicable to all courts, special workshops dealing with appellate and limited jurisdiction courts were also conducted. In addition, aside from the Executive Component workshop for teams of presiding judges and court administrators, a new course was presented specifically for judges involved directly in administration — Management for Chief and Presiding Judges. The program was conducted in association with the National Center for State Courts. Based on the program evaluations, we expect to include this workshop as a regular feature of ICM's educational offerings.

The Institute's workshops and seminars have proven over and over again to be valuable sources of innovation in the courts, with participants returning to their home jurisdictions to implement court management improvements based on what was covered in the sessions. The programs are a vital aspect of the continuing effort to upgrade court administration and make it more effective.

Mary Brittain, Staff Associate for Court Management Programs, is in charge of the workshop program and Joan Green, Program Coordinator, is responsible for the administrative arrangements. A table detailing the programs and number of attendees follows.

WORKSHOPS AND SEMINARS

DATES	PROGRAM/LOCATION	NUMBER OF PARTICIPANTS
February 21-27	Caseflow and Jury Management Atlanta, Georgia	44
March 17-20	*Management for Chief and Presiding Judges San Diego, California	23
March 28 - April 2	Management for Justice System Supervisors San Diego, California	25
April 4-7	Managing Limited Jurisdiction Courts Denver, Colorado	19
April 18-23	Records Management Philadelphia, Pennsylvania	29
June 13-18	Budgeting and Planning Snowmass, Colorado	22
June 27-30	Managing Adult Probation Services Snowmass, Colorado	30
July 12-14	**Appellate Court Administration New York, New York	30
September 12-17	Information Systems Denver, Colorado	28
October 3-6	Time Management Newport, Rhode Island	22
October 20-23	Strengthening the Executive Component of the Court Santa Fe, New Mexico	23
October 24-29	Personnel Administration Philadelphia, Pennsylvania	23
November 14-19	Caseflow and Jury Management Alexandria, Virginia	28
December 12-17	Managment for Justice System Supervisors Atlanta, Georgia	22
	TOTAL:	368

*Jointly sponsored by the National Center for State Courts
**Jointly sponsored by the Institute of Judicial Administration

On-Site Programs

In addition to the workshops and seminars offered for a national audience, the Institute designs and conducts on-site education programs for states and local jurisdictions. Pursuant to a contractural agreement, the Institute will present court management training programs for all levels of court personnel including judges, clerks and court administrators.

In 1982 the Institute presented ten on-site education programs. Three of these workshops were conducted pursuant to an agreement with the Los Angeles County Clerk's Office which calls for the Institute to present Phase I of the Court Executive Development Program on-site for Los Angeles and other California court personnel. Additional workshops will be presented in Los Angeles in 1983. Geoff Gallas, ICM's Senior Associate for Court Management Programs, is directing this on-site workshop series.

On-site education programs offer courts a significant way to stretch training funds while reaching a large number of people with quality education. The workshops presented in 1982 are summarized below.



Janet Smoots, *Administrative Clerk,* **Mary M. Brittain,** *Staff Associate for Court Management Programs, and* **Joan B. Green,** *Program Coordinator.*

ON-SITE PROGRAMS

DATES	PROGRAM/LOCATION	NUMBER OF PARTICIPANTS
January 25-27	Court Management Seminar for Assignment Judges and Trial Court Administrators Edison, New Jersey	36
February 14-17	Improving Court Management Shreveport, Louisiana	34
March 1-5	Introduction to Management Concepts and Techniques for the Judicial System Los Angeles, California	45
March 10-13	*Management for Justice System* Supervisors Lebanon, New Hampshire	32
May 12-14	Strengthening the Executive Court Component (Minnesota/Wisconsin) St. Paul, Minnesota	36
May 24-28	Caseflow and Jury Management Los Angeles, California	56
June 10-11	Criminal Case Management for the 80's for the Bronx and Queens New York, New York	34
June 28-29	Managing Limited Jurisdiction Courts Casper, Wyoming	120
September 27 - October 1	Budgeting and Planning Long Beach, California	74
October 27-30	Caseflow Management for Vermont Judges Stowe, Vermont	39
	TOTAL:	506

*Supported by a grant from the Frost Foundation, Denver, Colorado.

Juvenile Justice Management

Since 1973, the Institute has conducted an extensive series of management training programs directed to juvenile justice professionals. For the last several years, five workshops have been held annually. The programs offered in 1982 are listed in the adjacent Table.

H. Ted Rubin and Geoff Gallas, Senior Associates at ICM, have co-directed these programs since their inception. Professor Gary Albrecht, a sociologist at the University of Illinois Medical Center in Chicago, has been the third faculty member. Together they bring to the programs a broad and flexible array of teaching skills in juvenile policy, practice, and law; rehabilitation; judicial administration; public administration; organization theory; social science research; management information systems; and policy and decisional science.

Increasingly, all ICM juvenile justice seminars have expanded their focus to distinguish more from less serious juvenile justice offenders, and to develop alternative tracks for working with these different groups of youths. All workshops integrate a pre-seminar research assignment performed by participants in their local juvenile courts, seminar lectures and discussions, and an in-seminar planning exercise.

JUVENILE JUSTICE MANAGEMENT PROGRAMS*

DATES	PROGRAM/LOCATION	NUMBER OF PARTICIPANTS
May 16-19	Juvenile Court Intake Santa Fe, New Mexico	17
June 20-23	Serious & Repetitive Juvenile Offenders Snowmass, Colorado	22
August 8-13	Juvenile Justice Management Snowmass, Colorado	9
October 3-6	Serious & Repetitive Juvenile Offenders Newport, Rhode Island	27
December 5-10	Juvenile Justice Management Snowmass, Colorado	20
	TOTAL:	95

*Partial funding support for these programs was provided by the National Institute of Juvenile Justice and Delinquency Prevention and by Arthur D. Little, Inc., the latter organization utilizing Office of Juvenile Justice and Delinquency Prevention monies through a technical assistance subcontract with ICM.



H. Ted Rubin
Senior Associate for Juvenile and Criminal Justice

Research and Technical Assistance

During 1982, the Institute was engaged in research projects on a wide range of topics including appellate and trial court delay, the administration of fines, and the use of telephone conferencing. Concerning the appellate court research, ICM, in collaboration with the Institute of Judicial Administration, completed a study of problems confronting the Pennsylvania Superior Court, an intermediate court of appeal. Basically, the study offered a series of recommendations on how the Court could reduce its backlog and delay problems. On the basis of analysis of the Court's pending caseload and interviews with judges, court staff, and members of the bar, the final report suggests a sequence of steps to be followed in alleviating the size and age of the pending caseload. Prior to submission of the final report, a workshop was held in Philadelphia with members of the Court to discuss the report's conclusions and recommendations.

Work was also concluded on a New Jersey policy research project, funded in part by the Culpeper Foundation. The project involved a study of New Jersey's statewide trial court delay reduction effort and an exploration of problems in municipal court administration. The study was guided by Anthony J. Langdon, Assistant Under Secretary of State in charge of the Criminal Justice Department in the British Home Office, who was on leave of absence from that position during 1982 while he served as an ICM Visiting Senior Associate. Final project reports are to be submitted in early 1983.

In addition, the Institute completed a study of court operations for the Supreme Court of the Federated States of Micronesia. The Supreme Court of this emerging nation in the South Pacific, which is administered by the United States under a U.N. Trusteeship, also asked the Institute to conduct a court management training session for administrative personnel of the state court systems of Ponape, Truk, Kosrae and Yap. The project was conducted in August 1982 in Kolonia, the capital of the Federated States, on the island of Ponape. Harvey Solomon, ICM's Executive Director, was in charge of the training program while the court study was the responsibility of Maureen Solomon, a special consultant to ICM.

The Institute also finished its portion of a national-scope study of fines as a criminal sanction in the United States. Working with the Vera Institute of Justice, ICM staff, under the direction of Barry Mahoney, Assistant Director for Research and Programs, conducted a survey of court administrators in 126 jurisdictions across the country on the use, collection, and enforcement of fines. Although many courts did not use fines frequently for non-traffic offenses, the survey uncovered several courts that imposed fines extensively and managed to collect a high proportion of the amount imposed. Moreover, these jurisdictions were successful in enforcing fines in instances of initial non-payment. Preliminary results of the project were presented at the 1982 Law and Society Meeting in June by ICM and Vera Institute staff members. A final report will be submitted to the National Institute of Justice in early 1983.



Richard H. Benson, *Associate Justice, Supreme Court of the Federated States of Micronesia,* **Harvey Solomon, Edward C. King,** *Chief Justice, Supreme Court of the Federated States of Micronesia,* **Tosiwo Nakayama,** *President, Federated States of Micronesia.*

The field work for the joint ICM/ABA Action Commission to Reduce Court Costs and Delay telephone conferencing project in civil cases was completed in 1982. Roger Hanson, Senior Researcher, and Marlene Thornton, Research Assistant, of the Institute's staff organized the gathering of information which included interviews with over 1,200 attorneys, thirty judges, several law clerks, court reporters, and secretaries in three Colorado district courts (Denver, Boulder, and Alamosa) and the Atlantic Vicinage in New Jersey. The preliminary results are basically threefold:

- The litigant saves money when his attorney uses the telephone instead of appearing in person at the courthouse. The amount saved per hearing averages $100 with annual aggregate savings, if the pilot projects were implemented statewide, of $560,000 in Colorado and $1,300,000 in New Jersey.
- Most attorneys (80-85%) are satisfied with the new procedure. They see very little difference in their ability to participate in hearings by telephone.
- Judges do not see the innovation as impairing the quality of the proceedings. This is reflected by an effort of state officials in both Colorado and New Jersey to institutionalize the innovation and introduce it in other trial courts.





Research Assistant, **Marlene Thornton,** *Senior Researcher,* **Roger Hanson,** *and Secretary,* **Anne Kittredge**

A parallel project concerning criminal cases was also underway in 1982 in the same courts as the civil study. Although the scope of the criminal project is more limited than the civil one, the initial findings are strikingly similar.

Final reports on both projects are to be completed by mid-1983. The research concerning civil cases is being underwritten by a grant from the National Science Foundation with supplemental funding provided by the Piton Foundation in Denver and the Colorado Bar Foundation. A grant from the National Institute of Justice is supporting the criminal study.

Two of the main research projects at ICM — fine administration and telephone conferencing — have led to the formulation of new research proposals in related areas which we hope will receive funding in 1983.

Professor George Cole at the University of Connecticut, has collaborated with ICM in the development of these proposals.

In December 1982, ICM was awarded a contract to conduct a management audit of the Aurora (Colorado) Municipal Court. The Institute will address several issues concerning the cost and management of the Court, ranging from administrative work flow, to plea bargaining, to the possible use of electronic recording of court proceedings. A final report is due at the end of April, 1983. Roger Hanson will serve as the ICM project director.

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Warren E. Burger Award

Each year, to recognize significant contributions to the court administration field, the Institute's Board of Trustees presents the Warren E. Burger Award.

Glenn R. Winters, former Executive Director of the American Judicature Society, was the recipient of the 1982 Award. The Award was presented in August during the Annual Meeting of the American Bar Association in San Francisco. Mr. Earl F. Morris, Chairman of the Institute's Board of Trustees, presented the Award. His remarks and those of Mr. Winters follow.

Remarks of Earl F. Morris

"The Warren E. Burger Award is presented annually by ICM to an individual who has made a major contribution to the development of court administration. Today we make our ninth award to another person who completely satisfies the Award's criterion.

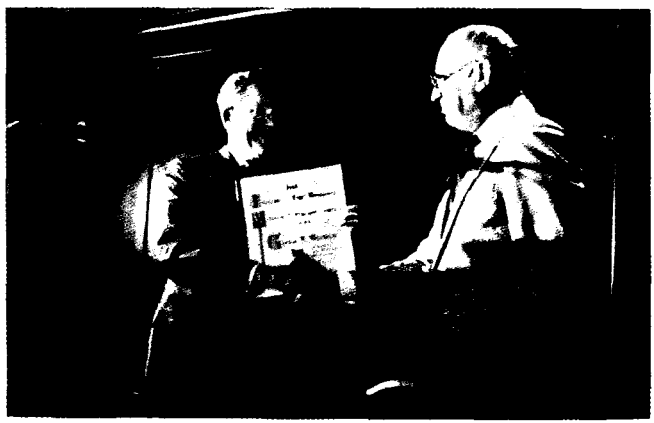
"Glenn R. Winters is to many of us Mr. American Judicature Society. For 34 years he served as Executive Director of that organization, and through it, left an indelible impact on judicial selection and court organization and management. He conducted Citizens Conferences in some forty states and these conferences were a major factor in the ultimate creation of the office of state court administrator in many of our states. His preeminence as a writer, lecturer and consultant on judicial reform topics and the administration of justice has earned him numerous awards and other forms of recognition from every type of professional organization throughout the United States.

"It is with a deep sense of satisfaction that I today add one more star to his crown as, on behalf of ICM, I present to him the Warren E. Burger Award."

Remarks of Glenn R. Winters

"After eight years of retirement it is wonderful to be remembered at all, and especially in this very splendid way. In this day of super-sophisticated technology it is difficult to realize that as recently as in the early years of my career the great majority of the people who managed the business of the courts were little more than what they all called themselves — clerks. I remember that in those years one of the actual crusades of the court improvement movement was **flat filing** — meaning to put legal documents in the filing cabinet flat instead of folded and tied with a ribbon!

"We have come a long way since then. One important reason for that progress has been the great work of the Institute for Court Management. Another is the brilliant leadership of the great Chief Justice for whom this award is named. I am so proud to be a recipient of it, and Earl, I thank the Institute, and you."



Earl Morris *(left) presenting 1982 Warren E. Burger Award to* **Glenn R. Winters** *(right)*

Past Recipients of the Warren E. Burger Award

1974 ERNEST C. FRIESEN
Dean, California Western Law School, first Dean, National College of State Trial Judges, and former Director, Administrative Office of the U.S. Courts and Executive Director, Institute for Court Management.

1975 EDWARD B. McCONNELL
Director, National Center for State Courts, and former Director, Administrative Office of the Courts of New Jersey.

1976 DELMAR KARLEN
former Director, Institute of Judicial Administration, and author of treatises on comparative judicial administration.

1977 LOUIS H. BURKE
Justice (Retired), California Supreme Court, and former Chairman, Commission on Standards of Judicial Administration, American Bar Association.

1978 RALPH N. KLEPS (deceased)
former Administrative Director of the California Courts, and past Chairman, National Conference of State Court Administrators.

1979 HERBERT BROWNELL
former Attorney General of the United States, and first Chairman, Board of Trustees, Institute for Court Management.

1980 FANNIE J. KLEIN
Senior Consultant, Institute of Judicial Administration and Associate Professor, Emerita, New York University School of Law.

1981 HARRY O. LAWSON
Director, Judicial Administration Program, University of Denver, College of Law, and former State Court Administrator of Colorado.

The Justice System Journal

Two issues of Volume 7 were published in 1982 with the third issue slated for release in early 1983. Volume 7/1, a special issue edited by Richard B. Hoffman, was devoted to the topic of "Court Finances in an Era of Scarcity," while Volume 7/2 contained a range of articles including two key essays on the role of court administrators. The last issue of Volume 7 will be organized around a dialogue between researchers and practitioners on fundamental issues in the courts — sentencing, plea bargaining, diversion, pace of civil litigation, court organization and alternatives to adjudication.

With the publication of Volume 7, Russell Wheeler of the Federal Judical Center will conclude his service as Editor-in-Chief. The Institute is grateful to him for his care and high standards in guiding the **Journal** over the past three years and we are fortunate that he has agreed to continue to remain as a member of the Editorial Board. Roger Hanson has been selected as the new Editor-in-Chief and Ephanie Blair of the Institute's staff will serve as Business Manager.

The West Publishing Company of St. Paul, Minnesota, prints the **Journal** for ICM as a public service.



Roger Hanson and Ephanie Blair

Financial Report

The audit of the Institute's financial statements for 1982 will not be completed until after the publication of this Annual Report. Therefore, the financial statements set forth below are based on unaudited financial information.

Financial Statements

BALANCE SHEETS, DECEMBER 31, 1982 AND 1981

	1982*	1981*
ASSETS		
Current Assets:		
Cash (including time deposits and certificates of deposit, 1982, $92,228; 1982, $187,238)	$ 96,754	$175,565
Accounts receivable	62,993	75,501
Prepaid expenses and other	8,024	7,466
Total	167,771	258,532
Property — At cost:		
Furniture and equipment	19,629	19,629
Leasehold improvements	914	914
Total	20,543	20,543
Less accumulated depreciation and amortization	17,961	17,729
Property - net	2,582	2,814
Equipment Under Capital Lease		
(less accumulated amortization of 1982, $4,514; 1981, $1,553)	5,836	8,797
Other Assets	2,344	2,344
TOTAL	$178,533	$272,487
LIABILITIES AND FUND BALANCES		
Current Liabilities:		
Accounts payable	$ 20,126	$ 12,322
Accrued liabilities	31,356	31,688
Deferred revenue	21,104	51,299
Current maturities of obligation under capital lease	2,483	2,013
Total	75,069	97,302
Obligation Under Capital Lease		
(less current maturities above)	3,103	5,564
UNRESTRICTED FUND BALANCE	100,361	169,621
TOTAL	$178,533	$272,487

*Unaudited

Statements Of Revenue, Expenses, And Changes In Fund Balances

FOR THE YEARS ENDED DECEMBER 31, 1982 AND 1981

	1982*			1981*		
	UNRESTRICTED FUND	RESTRICTED FUND	TOTAL	UNRESTRICTED FUND	RESTRICTED FUND	TOTAL
Revenues:						
Grants		$175,910	$175,910		$296,840	$296,840
Program revenue	$202,942	35,905	238,847	$140,493	38,550	179,043
Contracts and consulting fees	183,273	22,000	205,273	171,859	3,000	174,859
Contributions	70,561		70,561	58,440		58,440
Voluntary special service fee and other	34,719	4,784	39,503	40,773		40,773
Total	491,495	238,599	730,094	411,565	338,390	749,955
Expenses:						
Court Management Education Programs	200,378		200,378	176,826		176,826
Educational Programs for Court Personnel	65,535	25,797	91,332	7,465	101,076	108,541
Technical Assistance	185,761		185,761	96,163		96,163
Juvenile Justice Management		82,837	82,837	85,694		85,694
Telephone Motion Hearings Research		123,919	123,919		77,958	77,958
Juror Utilization and Management Training					43,757	43,757
Court Delay Regional Workshops					43,612	43,612
N.J. Court Delay Reduction Program		29,150	29,150		13,403	13,403
Graduate Renewal Seminars	3,666		3,666	2,954		2,954
Research, development and other	82,311		82,311	61,122	72,544	133,666
Total	537,651	261,703	799,354	430,224	352,350	782,574
Revenues Over (Under) Expenses	(46,156)	(23,104)	(69,260)	(18,659)	(13,960)	(32,619)
Other Changes In Fund Balances—						
Transfer between funds	(23,104)	23,104		(13,960)	13,960	
Fund Balances, Beginning Of Year	169,621		169,621	202,240		202,240
Fund Balances, End of Year	$100,361	$ -0-	$100,361	$169,621	$ -0-	$169,621

*Unaudited



Roger Aymami, *Accountant/Treasurer*

Percentage Of Revenue By Sources And Expenses By Programs — 1982

Revenues	
Federal and Private Foundation Grants	24%
Program Income	33
Contracts & Consulting Fees	28
Contributions	10
Voluntary Special Service Fees & Other	5
	100%
Expenses	
Court Management Education Programs	25%
Research, Development & Other	10
Education Programs for Court Personnel	11
Technical Assistance	23
Juvenile Justice Management	10
Telephone Motion Hearings Research	16
Other	5
	100%



Temar Goodrich, *Administrative Clerk*

1982 Contributors to the Institute

Corporations, Foundations, Law Firms and Bar Associations

Aetna Life & Casualty Foundation, Hartford, Connecticut
Alcoa Foundation, Pittsburgh, Pennsylvania
Allied Chemical Foundation, Morristown, New Jersey
Amoco Foundation, Inc., Chicago, Illinois
Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C.
ASARCO, Inc., New York, New York
Ashland Oil, Inc., Ashland, Kentucky
Atlantic Richfield Company, Los Angeles, California
Bankers Trust Company, New York, New York
Burlington Foundation, Greensboro, North Carolina
Corning Glass Works Foundation, Corning, New York
Dart & Kraft, Inc., Northbrook, Illinois
Eastman Kodak Company, Rochester, New York
Eli Lilly and Company, Indianapolis, Indiana
Exxon Company, U.S.A., Houston, Texas
Ford Motor Company Fund, Dearborn, Michigan
General Motors Foundation, Detroit, Michigan
General Signal, Stamford, Connecticut
Gulf Oil Corporation, Pittsburgh, Pennsylvania
Metropolitan Life Foundation, New York, New York
Michigan, State Bar of, Lansing, Michigan
Mobil Oil Corporation, New York, New York
Paccar Foundation, Bellevue, Washington
Patterson, Belknap, Webb & Tyler, New York, New York
Porter, Wright, Morris & Arthur, Columbus, Ohio
Radio Corporation of America, New York, New York
United Technologies, Hartford, Connecticut

ICM Board of Trustees and Staff

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Mary M. Brittain, Denver, Colorado
John J. Corson, McLean, Virginia
Edward C. Gallas, New York, New York
Joan B. Green, Denver, Colorado
Robert H. Hall, Atlanta, Georgia
Robert D. Lipscher, Trenton, New Jersey
Wade H. McCree, Jr., Ann Arbor, Michigan
Earl F. Morris, Columbus, Ohio

Visiting Faculty

Gary Albrecht, Glencoe, Illinois
James Jorgensen, Denver, Colorado
Ronald J. Stupak, Charlottesville, Virginia

Graduates of Court Executive Development Program

Jacque Alexander
Carl Baar
Richard Barrier
Jerry Beatty
Jo Ann Bennett
Arthur Bernardino
Carl Bianchi
John Bischoff
John Bodley
Einar Bohlin
William Bohn
Francis Bremson
Thomas Cameron
John Cariotto
Roger Carlquist
William Carpenter
Francis Cholko
John Clarke
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Dorothy Coy
Donald Cullen
John Diamond
Sue Dosal
Robert Doss
James Drach
Donald Dungan
Frank Dunlap
James Dunlap
John Fiske
Collins Fitzpatrick
Robert Frye
Geoff Gallas
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Don Sherburne
Merril Sobie
Harvey Solomon
Maureen Solomon
David Sontag
Dorothy Stefanik
Lewis Stephenson
Rita Stellick
Thomas Strubbe
Joseph Suozzi
Phyllis Taylor
James Thomas
Austin Van Buskirk
William Wallace
Clyde Webber
John Whitmyer
Wilbur Wilcox
Wayne Wolfe
John Wunsch

*Contribution of Services



Harvey Solomon *and* **Kristie Heronema**, *Secretary.*

ICM Staff

ROGER S. AYMAMI, Accountant and Treasurer, B.S., Business Administration, University of Denver, 1964; passed CPA exam, 1979. Roger joined the staff in 1976. Previous experience includes Auditor with the Defense Contract Audit Agency, Department of Defense, and Accounting Manager, General Accounting Department, Blue Cross/Blue Shield of Colorado.

MARY M. BRITTAIN, Staff Associate for Court Management Programs. B.A., English, University of Colorado, 1955. Mary joined the staff in 1972 and in 1973 became Program Coordinator for education/training activities of the Institute. Previous experience includes work/study program at the Ecumenical Institute of the World Council of Churches, Geneva, Switzerland; and Administrative Assistant to the Dean of the College of Business Administration, University of Denver. Mary was promoted to a Staff Associate position at the beginning of 1982.

GEOFF GALLAS, Senior Associate for Court Management Programs, B.A., Wesleyan University; Ed.M., Harvard University; M.P.A. and D.P.A. University of Southern California; Graduate, Institute for Court Management, 1970. Prior to his appointment as a permanent, part-time member of the ICM staff, Geoff was Assistant Executive Director and Educational Consultant at the Institute; General Counselor and Instructor of Psychology at the Corning Community College in New York; and a consultant to numerous public and private organizations. In addition to working for the Institute, he teaches at the University of Southern California where he is an Adjunct Professor.

JOAN BRAGINSKY GREEN, Program Coordinator. B.S., Child Development and Family Relations, University of Arizona, 1969. Joan has been with the Institute since 1974. Previously, she worked as Administrative Assistant to the president of Ellis Foods Corporation, Denver; Office Manager, Ming Enterprises, Chicago, Illinois; and Executive Secretary to the Regional Sales Managers, CF&I Steel Corporation, Denver. Joan was appointed Program Coordinator at the beginning of 1982 after serving as Assistant Program Coordinator for a number of years.

ROGER A. HANSON, Senior Researcher. B.A., Concordia College; M.A. and Ph.D. University of Minnesota. Roger joined the staff in December 1980, after serving as Research Director for the American Bar Association's Action Commission to Reduce Court Costs and Delay. He has conducted law and policy research on a variety of topics including sentencing and pretrial release in criminal cases and expedited appellate case processing



Anne Kiltredge *and* Barry Mahoney

procedures, pretrial discovery, and the mediation of prisoner complaints in civil cases. As a consultant, he has provided policy analyses for the National Institute of Corrections, American Bar Association, Denver Regional Council of Governments, and the Education Commission of the States.

ANTHONY LANGDON, Visiting Associate for Research. B.A., English, Christ's College, Cambridge University, 1958. From January to September 1982, Anthony was on leave from his position in the English government as Assistant Under-Secretary of State, Home Office in charge of the Criminal Justice Department. As a Visiting Research Associate, Anthony was in charge of the ICM study of New Jersey's trial court delay reduction program and the operation of that state's municipal courts.

BARRY MAHONEY, Assistant Director for Research and Programs. B.A., Dartmouth College, 1959; LL.B., Harvard Law School, 1962; Ph.D. in Political Science, Columbia University, 1976. Barry joined the Institute's staff in September 1979. From 1973 through 1978, Barry was with the National Center for State Courts, where he was the Associate Director responsible for all national scope research and technical assistance programs (1975-1978). Previous experience includes practicing as a lawyer specializing in appellate litigation (1962-1973) and teaching political science courses at Columbia University and the City University of New York. He is the author of several books and articles on law-related subjects. Barry began a one-year leave of absence on October 1, 1982. He has returned to England to again serve as Director of the London Office of the Vera Institute of Justice, a position he held in 1978-79.



Roger Hanson, Ephanie Blair, *and* Marlene Thornton

H. TED RUBIN, Senior Associate for Juvenile and Criminal Justice. B.A., Pennsylvania State University, 1948; M.S.S.A., School of Applied Social Sciences, Case Western Reserve University, 1950; J.D., DePaul University 1956. Ted is author of **The Courts: Fulcrum of the Justice System** (1976), **Juvenile Justice: Policy, Practice and Law** (1979); and editor of **Juveniles in Justice: A Book Readings** (1980). Ted was the reporter for the volume, **Court Organization and Administration** (1980), produced by the Institute of Judicial Administration — American Bar Association Joint Commission on Juvenile Justice Standards. Previous work experience includes serving as a Judge of the Denver Juvenile Court (1965-1971), and as a Colorado State Representative (1961-1965).

HARVEY E. SOLOMON, Executive Director. B.A., Columbia, 1955; LL.B., Harvard Law School, 1958; LL.M., Georgetown Law School, 1965; M.P.A., Kennedy School of Government, Harvard University, 1968; Graduate, Institute for Court Management, 1970. Harvey is an Adjunct Professor of Judicial Administration at the University of Denver, College of Law. Prior to his appointment as Executive Director in 1974, he served as Director of Court Studies for the Institute. Previous work experience includes Assistant to Director of Innovation and Systems Development, Federal Judicial Center (1970); Staff Consultant, Court Management Study, District of Columbia (1968-1970); Trial Attorney, Civil Aeronautics Board, Washington, D.C. (1961-1967); general practice of law, New York City (1960-1961).

MARLENE THORNTON, Research Assistant. B.A., Political Science, University of New Hampshire, 1971. Marlene was hired initially in 1980 as a project consultant and she was appointed a Research Assistant in February, 1981. Previous experience includes Assistant Survey Director of the National Opinion Research Center, New York (1979-80); field work for Mathematica Policy Research, Inc., Denver (1978-79); Secretary for New Hampshire Legal Assistance (1975-76).

Administrative Clerks/Secretarial Staff

Ephanie Blair
Temar Goodrich
Kristie Heronema
Anne Dey Kittredge
Janet Smoots



Ephanie Blair, Anne Kittredge *and* Kristie Heronema

1982 ICM Visiting Faculty

GARY ALBRECHT, Professor, School of Public Health, University of Illinois Medical Center, Chicago, Illinois

CARL BAAR, Associate Professor of Politics and Director, Judicial Administration Program, Brock University, St. Catharines, Ontario, Canada

PATRICK F. BRADLEY, Internal Auditor, Administrative Office of the Courts, Santa Fe, New Mexico

FRANCIS BREMSON, Executive Director, Alaska Judicial Council, Anchorage, Alaska

WINSLOW CHRISTIAN, Judge, California Court of Appeal, San Francisco, California

PETER CIOLINO, Assignment Judge, Superior Court, Paterson, New Jersey

STANLEY R. COLLIS, Executive Officer, Alameda Superior Court, Oakland, California

PAUL R. J. CONNOLLY, Assistant Staff Director, American Bar Association, Action Commission to Reduce Court Costs and Delay, Washington, D.C.

SAMUEL D. CONTI, Director, Northeastern Regional Office, National Center for State Courts, North Andover, Massachusetts

T. PATRICK CORBETT, Judge, Washington State Court of Appeals, Seattle, Washington

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THEODORE H. CURRY, II, Assistant Director, Personnel Management Program Service, Michigan State University, East Lansing, Michigan

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JUSTICE TOM C. CLARK, 1899-1977
Chairman of the Founders

December 14, 1983

The Honorable Robert W. Kastenmeier
United States House of Representatives
Chairman, Sub-Committee on Courts, Civil
Liberties and Administration of Justice
2137 Rayburn House Office Building
Washington, D. C. 20515

Re: HR. 4145 - State Justice Institute Act
First Session of 98th Congress

Dear Representative Kastenmeier:

The National Judicial College has enthusiastically supported the concept of the State Justice Institute since the inception of the idea several years ago. As recently as the meeting of the NJC Board of Directors in July of 1983, the Board expressed its support. The Board unanimously urged the enactment of the legislation and offered to do what it could to assist the adoption of the Bill by the Congress.

The National Judicial College, now celebrating its 20th year of service, enrolls between 1,200 to 1,500 judges each year for its resident sessions. Approximately 40 courses are offered with durations of 1-4 weeks of intensive classroom study and related discussion periods. Coming from every state, the Commonwealths and the Trust Territories, as well as from foreign nations, the judges and related court personnel study the art and science of judging. General, Graduate and Specialty courses are offered on topics ranging from Search & Seizure to Court Management to Family Law and Support Matters to Alcohol and Drugs.

Complementing state judicial training programs, The National Judicial College provides a nation-wide perspective for the judges so that an exchange of ideas and techniques can occur.

The National Judicial College works with the National Center for State Courts and the Institute for Court Management in improving the state court systems. The National Center is primarily involved in research, ICM with court management and the College with judicial education. With well over 90% of all court matters handled within the state systems, the need for strengthening state courts seems apparent. The three organizations, each urging the creation of the State Justice Institute envisioned in H.R. 4145, are pledged to continued cooperation in carrying out their specific functions.

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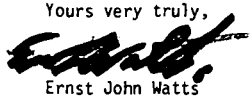
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As the entity with the mission of national education for the state judiciary, the College has issued more than 15,900 Certificates of Completion for its resident courses and has held extension courses within the states for an even greater number of judicial officers. It is involved with the training and education of general jurisdiction judges, special court judges, non-lawyer judges and also offers courses for state and federal administrative law judges.

The only limitations on the accomplishments of the College have been those imposed by financial constraints. The enthusiasm of the judges and the desire to improve their service remains high. The financial assistance that would be made possible through the enactment of the State Justice Institute Act, coupled with other funding, will permit the College to continue and expand its services.

Your interest in preserving and strengthening the state court system is extremely encouraging and we would ask that this letter of support for those efforts be made part of the Committee record in this matter.

Yours very truly,



Ernst John Watts
Dean

cc: Justice Robert F. Utter

National Center for State Courts
300 Newport Avenue
Williamsburg, Virginia 23185
(804) 253-2000

Edward B. McConnell
Executive Director

December 11, 1983

The Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts, Civil Liberties
and the Administration of Justice
2137 Rayburn House Office Building
Washington, D. C. 20515

Dear Mr. Chairman:

The Board of Directors of the National Center for State Courts has asked that I convey to you a statement of the Center's continuing support for the State Justice Institute Act, now H.R. 4145 as reported by your Subcommittee.

We are pleased that this act is pending for action by the full Judiciary Committee and trust that this committee will approve it soon for action by the House.

The National Center provided staff assistance to the Task Force of the Conference of Chief Justices and the Conference of State Court Administrators responsible for the initial drafting of the State Justice Institute Act and has worked with the two Conferences from the beginning in urging its enactment by the Congress. The bill continues to be a high priority and we are pleased and encouraged by the support it has received at the subcommittee level in both the House and Senate.

While the Center was not represented at your most recent hearings we have testified in the past and would appreciate it if this letter and the enclosed statements could be added to your hearing record. The statements, by Chief Judge Theodore R. Newman of the District of Columbia Court of Appeals, then president of the Center, and Edward B. McConnell, the Center's executive director, are as applicable to H.R. 4145 as they were to the earlier version of the bill they directly addressed. These statements make it clear that there is no conflict or overlap between the role of the Center and the role assigned the Institute by the legislation. Indeed, the Institute would, among other important goals, compliment and promote the efforts of the Center to improve the quality of justice administered by the states.

Therefore, we support the speedy enactment of H.R. 4145 and thank you and your subcommittee for your efforts in its behalf.

Sincerely yours,

Ralph J. Erickstad
President

United States Senate

Committee on the Judiciary

Subcommittee on

Jurisprudence and Governmental Relations

Hearings on

State Justice Institute Act of 1979

November 19, 1979

Statement of

Edward B. McConnell, Director

National Center for State Courts

300 Newport Avenue

Williamsburg, Va. 23185

25-622 O - 84 - 9

I am Edward B. McConnell, Director of the National Center for State Courts. I appreciate this opportunity to testify before the United States Senate, Committee on the Judiciary, Subcommittee on Jurisprudence and Governmental Relations, with reference to the proposed State Justice Institute Act of 1979.

Tersely stated, today in too many courts justice is too long delayed, costs too much, and is sometimes never concluded. Unfortunately this is often so even after the substantial progress that has been made in the last 10 years; much of it with the help of federal funds made available under the Law Enforcement Assistance Act. Much obviously remains to be done if courts are to be readily accessible to all persons at a reasonable cost; if they are to dispose of matters fairly and impartially yet expeditiously; and if the participants and the public are to understand the judicial process and have confidence in it.

Many today are inclined to be cynical, particularly about the capabilities of their government and its officials. Yet as one who has worked for and with state government for over 30 years, I have a high regard for public officials. Those that I've known, almost without exception, are conscientious and sincerely interested in providing the public with the service it deserves and demands, but often is unwilling to pay for. From my experience this is true of judges, court administrators, and other court personnel. The main problem is not their lack of desire to improve; the problem is that all too often they either do not know how to bring about improvement or, if they know, they do not have the resources to put their knowledge into practice. Generally speaking, the technical know-how and the money needed to bring about changes for the better have just not been there. And the flood of new laws, more lawyers, and more people in an increasingly complex, congested and litigious society constantly pressure to change things for the worse.

Aided by the expertise of the National Center for State Courts and other organizations and by supplemental federal funds for research, development and implementation, the state courts in recent years have made a good start: (1) in improving their administrative structure and organization; (2) in developing needed management systems and skills, including the use of modern technology; (3) in utilizing the social science disciplines to study court problems, to devise solutions, and to test out and evaluate those solutions; (4) in developing the information base, or statistics, on the courts, an essential if one is to know what is going on and to be able to do anything about it; and (5) in effectuating the political changes necessary to implement many court improvement programs.

Much remains to be done, but we can feel some confidence that the tools are now available to the courts for analyzing problems and ferreting out answers. Many old problems still need solutions, while known solutions still need to be implemented in the nation's courts. Moreover new problems are constantly arising to demand attention, most of them resulting from actions of those outside the courts and many of them by actions of the federal government itself.

The justification for the federal government providing finanacial assistance for the state courts is amply set forth in the May 1979 Report of the Conference of Chief Justices Task Force on a State Court Improvement Act, of which Chief Justice Robert F. Utter of the State of Washington was the chairman. The Task Force Report likewise demonstrates the need to have a vehicle which is consistent with the principles of federalism, the separation of powers and the integrity of the judicial branch of government, such as the proposed State Justice Institute, through which to channel federal funds for the improvement of state courts. I am sure that others who have already testified, or will testify before this Subcommittee will give ad quate attention to these important subjects. Accordingly, I should like to concentrate my testimony today on the role that the National Center for State Courts would play in carrying out the purposes of the proposed State Justice Institute Act.

The Federal Judicial Center was established by the Congress in 1967 and quickly demonstrated its value to the Federal court system as a resource for research, problem solving and technical advice. It was not surprising, therefore, that in 1971 at the first National Conference on the Judiciary it was proposed that a comparable center be created to serve the court systems of the 50 states. The proposal met with universal approval and in July 1971 the National Center for State Courts was incorporated as a non-profit organization by a committee of the Conference of Chief Justices, chaired by then Chief Justice James S. Holden of Vermont, now a Federal District Court judge.

The National Center is controlled by a Council of State Court Representatives, one representative being appointed by the highest court of each state. The Council in turn elects a Board of Directors, comprised of judges from all levels of the state judiciary, to establish policy for and direct the operations of the Center staff. That staff, possessing the wide range of skills and experience needed to address the problems of the state courts, is located at a headquarters office in Williamsburg, Virginia; at regional offices in Massachusetts, Georgia, Minnesota and California; and at project offices in Colorado and Washington, D.C.

In the eight years of its existence, the National Center, like its counterpart the Federal Judicial Center, has become an indispensible adjunct of the courts. That this is so is amply demonstrated by repeated action of the Conference of Chief Justices -- an organization, as its name indicates, composed of the highest judicial officer of each of the 50 states.

In a resolution adopted at its annual meeting in 1974, the Conference stated:

> "Whereas, the National Center for State Courts is a court assistance organization governed by the courts of the fifty states, and has rendered valuable assistance in court improvement to various

members of the Conference and to the state court systems which they represent; --- Be it resolved as follows:

1. The Law Enforcement Assistance Administration is urged to continue its funding support for the National Center for State Courts so that it can increase its assistance and service to state court systems; and

2. State judicial, legislative and executive branches are called upon to increase state financial support for the Center so that it can increase its assistance to state courts and can remain as an independent organization dedicated to service of state court systems.

3. The special Committee on Federal Funding [of the Conference of Chief Justices] is authorized to develop proposals for long-term federal funding support for the Center to supplement state judicial funding."

At its annual meeting in 1976, recognizing the increasingly important part the National Center had in efforts to assist state courts to bring about needed improvements, the Conference of Chief Justices designated the National Center as its Secretariat. Since then the National Center has been similarly designated by other groups, until today it serves as Secretariat for eight of the most significant national court organizations.

In 1977 at its annual meeting the Conference of Chief Justices adopted a report (with an implementing recommendation) which stated in part: "The National Center offers a key mechanism by which federal funds can appropriately be used to assist state courts, providing resources far beyond the means of any individual state or, under present court budgets, the state court systems collectively. We strongly favor a direct Congressional appropriation towards

the support of the National Center for State Courts similar to the support provided for the Federal Judicial Center." Attorney General Griffin B. Bell made just such a proposal in his address that year to the Conference.

And at its 1979 midyear meeting the Conference of Chief Justices adopted a resolution stating in part:

"Whereas, the National Center was created and is directed by the state courts, and is performing indispensible and continuing functions essential for much needed improvements in the state court systems, ...

"Now, therefore, be it resolved, that the Conference of Chief Justices hereby declares to the Congress and the Administration that the Conference's highest priority [the emphasis is included in the resolution] in the area of LEAA reauthorization and refunding is:

1) That the needs of the National Center especially for funding of its ongoing essential state court support services, and its national and state research and demonstration programs be recognized by the Congress;

2) That provision for their continuance be provided for by the Congress, and

3) That the Congress clearly express its endorsement of the unique role of the National Center in state court reform and of the need of the National Center to continue its vital role with adequate federal funding by LEAA or its successor agency at not less than the level it currently receives."

In keeping with the foregoing statements of the Conference of Chief Justices, the May 1979 Report of the Conference's Task Force on a State Court Improvement Act, which Report was approved by the Conference at its 1979 annual meeting, recommended the enactment by Congress of legislation establishing a State Justice Institute and specifically included in the draft legislation attached to the Report provision that the Institute "shall give priority to grants, cooperative agreements or contracts with: (i) state and local courts and their agencies, and (ii) national non-profit organizations controlled by, operating in conjunction with, and serving the judicial branches of state governments". The latter designation currently is applicable only to the National Center for State Courts. The legislation recommended in this Report serves as the basis for the State Justice Institute Act of 1979 which is the subject of today's hearing.

It should be pointed out that the states have indicated the value they place on the continued existence of the National Center not only by recommending its support with federal funds, but each of the 50 states have supported the Center with legislatively appropriated funds included as a part of their state judicial budgets. But just as the state court systems themselves have not always received appropriated funds sufficient for their purposes and are in need of federal funding assistance, so the state appropriations for the support of the National Center fall short of being sufficient to maintain its essential services. It is for these reasons that the Conference of Chief Justices has recommended federal funding assistance for the National Center as a priority under its proposed State Justice Institute Act.

In this regard, it is important to note that the National Center for State Courts is presently addressing, or has addressed, all of the requirements of

strong and effective state courts enumerated in the proposed Act, and has done work for and been of assistance to state courts in all of the subject-matter areas specified in the Act for which the proposed State Justice Institute would be authorized to award grants or to enter into cooperative agreements or contracts.

As previously mentioned, the National Center does not work exclusively for the Conference of Chief Justices nor for that matter only for appellate courts. It provides expert services and engages in court improvement projects for appellate and trial courts in every state; for courts at every level of state government (state, district, circuit, county and municipal); and for courts having all types of subject-matter jurisdiction (civil, criminal, family, juvenile, small claims, traffic, etc.).

National Center staff conduct research and demonstration projects and render expert advice on matters ranging from advanced technology, computers and automated information systems; to modern planning, financial and personnel management techniques; to effective means of caseflow or calendar management; to improved procedures for conducting trial and appellate litigation; to the structure, jurisdiction and constitutional authority of state court systems; and to the essential nature and outcomes of dispute resolving processes themselves. Moreover, the National Center, in addition to working directly with the Conference of Chief Justices and its committees, which represent the top judicial leadership of the state judiciaries, also is actively engaged in serving and carrying out significant court improvement projects with the Conference of State Court Administrators; with organizations of trial judges (i.e. the National Conference of Metropolitan Courts), trial court administrators, court clerks and court planners; as well as with groups such as the Committee on the Implementation of Standards of Judicial Administration of the American Bar Association's Judicial Administration Division.

I should emphasize here that although the Conference of Chief Justices has designated the National Center for State Courts as its "highest priority", and that such a priority is provided for in its proposed legislation, that legislation does not exclude any other organization working in the area of court improvement from receiving support from the State Justice Institute. Indeed, provision for such support, when the objectives of the Act can be better served thereby, are specifically provided for. Again, the National Center is in a position analagous to the Federal Judicial Center. The Federal Judicial Center is the prime agency for providing support for the Federal courts, but it is not the only organization which receives federal funds to carry out projects aimed at improvement of the Federal courts.

In summary, there are good reasons why the federal government should be interested in assisting financially in the improvement and maintainance of a high quality of justice as it is administered by the state courts which handle 98.8% of all court litigation. There are good reasons why the proposed State Justice Institute is the best possible vehicle for providing such federal funding assistance for state courts. And, as I have pointed out at some length, there are good reasons why the proposed State Justice Institute Act of 1979 specifically provides a funding priority for the National Center for State Courts -- the only organization created by, controlled by, and devoted exclusively to serving the courts of every state as they struggle to meet the challenges of providing justice in modern day America.

With the aid that an adequately funded State Justice Institute would provide for the improvement of state courts throughout the nation, there can be every expectation that the day will be materially accelerated when all persons in all states will have courts readily accessible to them and at costs they can afford; when their disputes will be finally resolved fairly and expeditiously; and when the courts will operate openly and be fully accountable to the public and it in turn will have renewed confidence in the administration of justice.

STATEMENT OF CHIEF JUDGE THEODORE R. NEWMAN, JR.

DISTRICT OF COLUMBIA COURT OF APPEALS

ON S. 2387

THE STATE JUSTICE INSTITUTE ACT OF 1980

BEFORE THE

SENATE JUDICIARY SUBCOMMITTEE ON

JURISPRUDENCE AND GOVERNMENTAL RELATIONS

MARCH 19, 1980

Mr. Chairman and Members of the Subcommittee:

I am pleased to be asked to present my views on the State Justice Institute Act of 1980 for I share the views of the distinguished judges and scholars who have preceeded me as witnesses in these hearings and who see the act as an important landmark in the history of our federal system and in our continuing quest for a more perfect system of justice.

The act proposes a reasoned and balanced approach to the important and complex issues involved in establishing an appropriate federal role in relation to state court systems. Most significantly, it will provide the means for focusing national attention, and the national expectations that implies, on one of our most neglected concerns as a great and diverse nation, the quality of justice administered at the state and local levels. These courts, which now include those in the District of Columbia, handle 98 per cent of the matters which bring our citizens into the judicial process and it is in these courts that the great mass of our citizens make their judgements on the quality of justice our society provides. They are, indeed, the people's courts, and if they are not perceived as providing justice the consequences are severe and endless and include heavy and unnecessary burdens on the federal justice system.

Second, the act strikes a delicate but proper balance between functions and responsibilities that are national in nature, and thus appropriately federal, and those which must

remain securely in state control. Thus, it is true to the principles of federalism but, equally important, it is true to the doctrine of separation of powers. These are not theoretical or philosophical issues of concern only to judges and legal scholars; they are at the heart of the problems that must be resolved if we are to develop and sustain the national resources and programs that can be the most effective in improving the judicial institutions and processes which necessarily function under greatly differing circumstances in thousands of locations.

The dimensions of our state judicial systems are vast from any perspective. It is axiomatic that decisions made by them are among the most important affecting the lives of our citizens, few if any of whom escape involvement with the courts at one or more critical points in their lives. Geographically the systems involve the District of Columbia along with 54 states and territories stretching from Puerto Rico and the Virgin Islands in the South Atlantic northward across the continent to Alaska and then to Guam and American Samoa in the Western Pacific. They include more than 17,000 trial and appellate courts with upwards of 25,000 judges and some 150,000 clerks, administrators and other support personnel. Their costs run into the hundreds of millions of dollars annually.

Yet as large and vital as the total system is, it is among the most neglected of government functions in many areas

and has been one of the last great enterprises, public or private, to adapt to the modern world. One aspect of the problem, as cited by Edward B. McConnell, director of the National Center for State Courts, is not that the courts have been badly managed or mis-managed, but that they have not been managed at all. Fortunately, this condition is changing, thanks to the work of the National Center, itself only nine years old, and other national organizations which have begun operation in recent years, notably the Institute for Court Management in Denver and the National Judicial College in Reno, Nevada. These highly regarded agencies are not only bringing national perspectives and expectations to bear on the problems of our state and local courts but are providing the absolutely essential national resources needed to help us solve them. I cannot emphasize too much the importance of national resources and perspectives if we are to deal with our problems in the most efficient and effective manner. You know from your own experience in modernizing the judicial system of Alabama, Mr. Chairman, how difficult and tenacious the problems can be, and the critical role that national resources can play in helping to correct them. We want our state courts to be free and independent, of course. We want them to reflect, as they must, what is special in their own historic development and the needs of the people they serve. But they also have much in common, including the underlying obligation to enforce the laws and the Constitution of the United States. This means that we have at bottom only one judicial system, despite 55 separate jurisdictions; 56 if we count the federal. There is then an overwhelming national interest in the quality

of justice administered by our state and local courts and, in my view, a national obligation to assist with the kinds of national programs that are needed, but are beyond the resources of individual state court systems, and for which, under our federal system, the national government is the only governmental authority competent to act.

I am happy to say it has been acting, although initially by accident and, therefore, in something less than the ideal manner. Congress, as you know, did not specifically include courts in the initial legislation creating the Law Enforcement Assistance Administration in 1969 but it quickly became apparent that the judiciary could not be ignored if there was to be an effective national effort to help state and local governments deal with crime and improve the criminal justice process. However it came about, federal funding through LEAA has been the major source of funds for innovative court reform efforts and for the national organizations sparking this reform at the state and local levels.

In the view of one knowledgeable student of court administration LEAA has been "the single most powerful impetus for improvement in state court systems" in the past 10 years. Other witnesses have described at length the many problems involved in the present LEAA program as it involves state courts and I will not repeat that discussion here. But I should note

that LEAA's discretionary program made it possible for leaders of the nation's judiciary to come together at Williamsburg, Va. in 1971 at the historic First National Conference on the Judiciary. It was this conference that issued the call for creation of a national center serving state courts and, of course, LEAA funding made it possible for the National Center to begin its work and has helped it progress to the important position it holds today as the primary research and technical assistance arm of the state court systems. It has become a truly national resource filling a vital national role. A brief discussion of only two of the many national scope projects now underway at the Center will illustrate the point.

As remarkable as it may seem, there has not been available to scholars, court administrators or government policy makers a single source of reliable data on the operation of state court systems. No one could say with accuracy how many cases were handled by the states as a whole, what has been the pattern of growth or change in the caseload, and no one could make reliable comparisons, for instance, as to the efficiency of one state system as compared to any other because the data, even when available, were incompatible. Indeed, data from different courts within the same state often have been collected in such a manner as to make impossible comparative analysis of individual court needs or performance.

Reliable data, of course, are the first requisite of effective management and essential to such rudimentary tasks

as accurate budget projections, assignment of judicial resources, and evaluation of their performance. Such statistics are available to federal courts and provide the basis for effective management by circuit councils and the Administrative Office of the United States Courts, and for research and evaluation by the Federal Judicial Center.

Now, thanks to long-range projects underway at the National Center for State Courts in cooperation with the Conference of State Court Administrators, the Center is developing the ongoing capability to gather, analyze, and disseminate reliable statistics on caseload, organization, and operation of state courts. To improve the accuracy and reliability of reported statistical information, the project publishes comprehensive annual reports on state court caseloads, which are based on existing state-produced reports, and has developed a State Court Model Annual Report and a State Court Model Statistical Dictionary. These recommend procedures to follow in developing consistent and useful annual reports and suggest a classification structure to use in reporting caseload data. The project also provides answers to information requests and on-site technical assistance to court administrators. Thus, it clearly fills an important national need while providing significant returns in terms of improved management and policy making at the state and local levels.

A related National scope effort being conducted in cooperation with the Conference of State Court Administrators

is the State Judicial Information Systems project which is developing operational statewide information systems to provide court administrators with timely, accurate, and complete court caseload and resource information. Together with the statistics project this effort will for the first time provide the basis for a uniform system of data that will make it possible for scholars and court administrators and policy makers to analyze the data on a national basis and make accurate comparisons between systems. It will help tell us what works and what doesn't work.

During the past year five documents were released including a state-of-the art report on existing or planned information systems in the courts of all 50 states, the District of Columbia and the four territories. A cost-benefit methodology for evaluating information systems, and a long-range plan to guide future development and implementation also were published. In addition, documents were released on the adaptability of related information systems to the needs of judicial information. These included the software of the PROMIS computer system for prosecutors and the Offender-Based Transaction Statistics and Computerized Criminal History data-collections programs. The project also began work on identifying and documenting information on automated systems, subsystems, or modules that may be transferable from one state to another. This project, which also provides on-site technical assistance and an annual national educational program, will lead to the creation at the Center of a central clearinghouse of technical assistance and information to ensure the long term development and improvement of

information systems in all state courts. It too is filling an important national need that benefits courts throughout the nation. Other examples could be cited at length. There are, for instance, comparable national scope projects dealing with the structure and operation of juvenile courts, state court financing, trial court delay, uses of technology to speed court proceedings and reduce costs, improved jury utilization and management, sentencing guidelines, and alternatives to incarceration.

It is clear that the national scope projects are important and are making a major contribution to work essential to improvement of state court systems. But it is the on-site work of the Center's five regional offices that provides the critical nexus that makes it possible to effectively define the problems in need of national attention and to bring national resources to bear on them in the operations of the courts themselves. They provide the day-to-day contacts and practical experience that make the Center what it was designed to be, an extension of,and a national resource of, state and local courts.

In addition, the Center provides secretariat support to eight (soon to be 10) court organizations including the Conference of Chief Justices and the Conference of State Court Administrators. Its specialized library, research and information service, and publications program provide a unique national resource serving all courts and court-related institutions.

The National Center, which I am proud to serve as vice-president, is then developing the skills and knowledge

necessary to do for the vast and complex system of state courts what the Federal Judicial Center is doing for the 11 circuit and 92 district courts of the federal system. And it is working to bring the same margin of excellence to these systems that is the general rule for the federal courts. The FJC, of course, can deal with problems of the federal courts on a multi-jurisdictional basis that is beyond the capacity of individual circuit or district courts. Its national resources and perspective have proven their value even though the federal courts are part of a single and fully integrated judicial system. The much larger and more complex state court systems obviously require this kind of assistance and coordination and they likewise require it on a continuing basis.

In summary the National Center works under the direction of state court systems to act as a focal point for judicial reform. It serves as a catalyst for setting and implementing standards of fair and expeditious judicial administration and help to determine and disseminate solutions to the problems of state judicial systems. It provides the means for reinvesting in all states and profits gained from judicial advance in any state.

It is essential, Mr. Chairman, that the National Center, like the FJC, have secure sources of funding that will permit it to plan and function on a long-term basis and maintain a professional staff of the highest quality.

In this regard, we are pleased to report that the Center is continuing to develop funding from private and state court sources to implement its program. In 1979, for example, funds from federal sources accounted for only 55.7 per cent of total revenues of $7,153,338. This compares to a federal share of 62.7 per cent in 1978 when revenues totaled $5,662,497.

In closing I will note that the National Center for State Courts was established as a non-profit organization because that is the only structure suited to its role as a national organization of the state court systems. It is in the nature of our federal system that such an agency could be neither state nor federal. Yet it is obvious that the Center serves both state and national needs. As presently organized, the Center's administration and policy are firmly under control of officials of the state judiciaries. That is essential if it is to be an agency serving state judicial needs. But it is equally clear that the Center serves vital national purposes that merit and require national support. Many of its present national efforts are threatened by uncertain funding from LEAA and are made far less effective because of the short-term annual grant basis on which they are planned and funded. So its work, Mr. Chairman, best illustrates the kinds of programs the State Justice Institute can be expected to promote under a rational, long-term program reflecting national objectives subject to Congressional input and oversight as well as the needs of the courts as perceived by state and local judiciaries.

The State Justice Institute will not only provide a constitutionally correct mechanism for providing federal assistance to state judicial systems but it will do so in a far more efficient and effective manner than the present hodge-podge of uncoordinated programs. I recommend its creation to you as the single most important step the Congress can take to improve the quality of justice in our land.

That concludes my prepared remarks. I will be happy to respond to any questions you might have.

Conference of State Court Administrators

December 10, 1983

President
Richard V. Peay
Court Administrator
State of Utah
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Secretariat
National Center for State Courts
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The Hon. Robert W. Kastermeier
Chairman, Subcommittee on Courts, Civil
Liberties and the Administration of Justice
2137 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman:

This is to provide a current expression of support by the Conference of State Court Administrators for the State Justice Institute Act, H.R. 4145, as reported by your subcommittee in the first session of the 98th Congress.

As you will recall, the Conference was the co-sponsor, along with the Conference of Chief Justices, of the Task Force whose studies and report led to the drafting of the legislation.

The Act has been at the top of our federal legislative agenda since its inception when we had the honor of testifying in its support in both the House and Senate. We continue to think it the single most helpful step the Congress could take to improve the administration of justice nationally and greatly appreciate the efforts your subcommittee has made to bring it to the attention of the House.

Because we did not have an opportunity to testify at your most recent hearings on it we would appreciate it if this current expression of our support, and the enclosed resolution, could be included in the hearing record.

Yours very truly,

Richard V. Peay
President

RVP/bl

RESOLUTION IV

STATE JUSTICE INSTITUTE

WHEREAS, the State Justice Institute bill (S. 2387 and H.R. 670 in the 96th Congress) was reintroduced in the 97th Congress as S. 537 and H.R. 2407; and

WHEREAS, the legislation remains the Conference's first federal legislative priority and the key to its long-range plans for improvement of the administration of justice in the states and to the future relationship between state and federal judicial systems; and

WHEREAS, the end of federal funding through the Law Enforcement Assistance Administration has made it necessary to end or severely limit both state and national programs critical to the success of state court improvement efforts and the movement for court reform; and

WHEREAS, the State Justice Institute Act was passed by the Senate without dissent in the 96th Congress and was favorably reported (6-0) by the House Judicial Subcommittee on Courts, Civil Liberties and the Administration of Justice.

NOW, THEREFORE, BE IT RESOLVED that the Conference of State Court Administrators urges the Congress of the United States to again give favorable consideration to the Act and quickly complete action on it.

Adopted at the 27th Annual Meeting in Boca Raton, Florida on August 5, 1981.

APPENDIX

ADDITIONAL MATERIALS PROVIDED BY THE CONFERENCE OF CHIEF JUSTICES

REPORT OF THE TASK FORCE ON A STATE COURT IMPROVEMENT ACT—A JOINT COMMITTEE OF THE CONFERENCE OF CHIEF JUSTICES AND CONFERENCE OF STATE COURT ADMINISTRATORS, MAY 1979

MEMBERS OF THE TASK FORCE

Chief Justices

Robert F. Utter, Washington, Chairman
Albert W. Barney, Vermont
Bruce F. Beilfuss, Wisconsin
James Duke Cameron, Arizona
Arno H. Denecke, Oregon
Joe R. Greenhill, Texas
John B. McManus, Jr., New Mexico
Robert C. Murphy, Maryland
Neville Patterson, Mississippi
William S. Richardson, Hawaii
Robert J. Sheran, Minnesota

State Court Administrators

William H. Adkins,II, Maryland
Roy O. Gulley, Illinois
Walter J. Kane, Rhode Island
Arthur J. Simpson, Jr., New Jersey

American Bar Association

C. A. Carson,III, Esquire
John S. Clark, Esquire

Advisors to the Task Force

Professor Frank J. Remington
Mr. Ralph N. Kleps
Professor Maurice Rosenberg

REPORT TO THE CONFERENCE OF CHIEF JUSTICES

from the

TASK FORCE ON A STATE COURT IMPROVEMENT ACT

I.

Background of Report

The work of this Task Force derives from a resolution adopted by the Conference of Chief Justices at its August 1978 meeting. The committee's charge is to recommend innovative changes in the relations between state courts and the federal government and find ways to improve the administration of justice in the several states without sacrifice of the independence of state judicial systems.

The authorizing resolution also referred to the need for a study of the allocation of jurisdiction between state and federal courts, and it was accompanied by two other resolutions that commented on the basic principles that should guide Congress in any federal effort to improve the administration of justice in the states and on the then-pending legislation designed to

reorganize the Law Enforcement Assistance Administration.[1]

These resolutions, together with one adopted at the same time by the Conference of State Court Administrators,[2] reflect a long-standing concern of state court systems about federal judicial assistance programs, particularly as they are administered by the executive agencies of federal and state governments. That concern developed not only from the experience of other segments of society with the conditions and restrictions that accompany federal assistance, but from the history of the judicial assistance programs of the Law Enforcement Assistance Administration since 1968.[3] State courts were concerned, as well, with their ability to meet the expectation of all citizens that justice be available to everyone.

This report is designed to state the views of the Task Force on the fundamental issues involved, and it is submitted for the consideration of the Conference of Chief Justices and that of others concerned with state court systems. The report does not

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[1]See, Statement of Chief Justice James Duke Cameron, Chairman of the Conference of Chief Justices, before the Senate Judiciary Committee's Subcommittee on Criminal Laws and Procedure, August 23, 1978. (Attached as Exhibit 1 to this report.)

[2]Resolution attached as Exhibit 2.

[3]That history is summarized in Klcps, "Survey Report on Federalism and Assistance to State Courts - 1969 to 1978," U.S. Department of Justice, Office for Improvements in the Administration of Justice (1978); Haynes, "Judicial Planning: The Special Study Team Report Two Years Later," American University (1977); Haynes, Lawson, Lehner, Richards and Short, "Analysis of LEAA Block Grants," American University (1976); and Irving, Haynes and Pennington, "Report of Special Study Team," American Univ. (1975).

deal with the 1979 legislation that will be needed to reauthorize LEAA's operations. That assignment is the specific responsibility of the Conference's Committee on Federal-State Relations under the chairmanship of Chief Justice Robert J. Sheran of Minnesota, who is also a member of this Task Force. If any of the principles recommended in his report can be adapted by this committee for use in the 1979 reauthorization discussions affecting LEAA, that would be desirable but this Task Force report is intended to serve a far broader, long-range purpose. It is hoped that the report will lead to a "State Court Improvement Act of 1979" that will be introduced in the next Congress and will furnish a sound basis for the continuing relationships between the federal government and the state court systems.

The Task Force has held five meetings since the August resolutions of the Conference of Chief Justices, an organizing meeting in Minneapolis and work sessions in Denver, Chicago, Kansas City, and Washington, D.C. Its work has been supported by a generous grant from West Publishing Company, by donated time from knowledgeable experts in the field and by staff assistance from the National Center for State Courts.[4] Chief Justice James Duke Cameron of Arizona, the Chairman of the Conference, has served as a member of the committee and has testified concerning its work before a

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[4] West Publishing Company made a grant of $20,000 in aid of the Task Force's work. Time was volunteered in an advisory capacity by Professor Frank J. Remington of the University of Wisconsin Law School and by Ralph N. Kleps, Counselor on Law and Court Management (former Administrative Director of the California Courts).

subcommittee of the U.S. Senate's Judiciary Committee. Finally, discussions have been had with congressional committee staff concerning the history and background of Congress' prior considerations of the issues involved in this report.

II.

The Federal Interest in the Quality of Justice in the State Courts.

The federal government, and the Congress in particular, has a very direct interest in the quality of justice in state courts. This is because:

(1) There is at least as much federal interest in the quality of justice as there is, for example, in the quality of health care and in the quality of the educational system. Indeed, the achievement of fair and equal as well as effective justice has always been thought of as an essential characteristic of American society. Whether a high quality of justice is made available to the American people depends largely upon the state courts which handle over 96 percent of the cases filed in any given year in this country.[5]

(2) A high degree of coordination is needed between federal and state courts in the administration of justice because state courts share with federal courts, under the Constitution,

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[5] A memorandum from Nora Blair of the National Center for State Courts to Francis J. Taillefer, Project Director, and National Courts Statistics Project (dated April 16, 1979 on file at National Center for State Courts) indicates that 98.8 percent of current cases are handled in state courts. See also Sheran and Isaacman, State Cases Belong in State Courts, 12 Creighton L. Rev. 1 (1978); and Meador, The Federal Government and the State Courts, Robert H. Jackson Lecture, National College of the State Judiciary (Oct. 14, 1977): "Our system is still structured on the basic premise that the state courts are the primary forums for deciding the controversies which arise in the great mass of day-to-day dealings among citizens."

the obligation to enforce the Constitution of the United States and the laws made in pursuance thereof.

(3) The achievement of important congressional policy objectives is dependent, to a significant extent, upon the ability of state courts to effectively implement the legislation enacted by the Congress. An increasing amount of regulatory legislation, such as the 55-mile-an-hour speed limit, is left to state administrative and judicial implementation.

(4) The effort to maintain high quality justice in the federal courts has led to an increasing effort to limit the case load of the federal courts by giving increased responsibility to the state courts.

(5) The congressional desire to achieve prompt justice in the federal courts through the implementation of the Speedy Trial Act of 1974 has resulted in a reduction of the number of criminal and civil cases disposed of in federal court, with a consequent increased criminal and civil case load in the state courts.

(6) The decisions of the United States Supreme Court very greatly increased the procedural due process protections which must be afforded in both criminal and civil cases, thus making it increasingly important that state judiciaries are equipped to implement those decisions if the important United States constitutional interests are to be achieved.

(1) The Quality of Justice in the Nation is Largely Determined by the Quality of Justice in State Courts.

The federal government has an interest in the quality of justice rendered not only by the federal judiciary, but also by

the state judiciary. In applying the fourteenth amendment of the United States Constitution to the states, the objective has been to preserve those principles "of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[6] Certainly the quality of "justice" concerns the federal government at least as much as does the quality of education and the quality of health care, both of which have received very substantial financial support from the federal government.[7] State educational systems have received support for special programs and in the form of block grants (revenue sharing).[8] State health

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[6] From the opinion of Mr. Justice Cardozo in Palko v. Connecticut, 320 U.S. 319, 58 S. Ct. 149 (1937). Recent decisions of the United States Supreme Court have held that the federal guarantee against being deprived of one's "liberty" without "due process of law" is, in many instances, dependent upon whether state law recognizes that its citizens have a liberty interest. Thus whether a citizen has a liberty interest in not being transferred from one correctional or mental health institution to another is dependent upon whether the state recognizes a right not to be transferred without reason. See Meachum v. Fano, 427 U.S. 215 (1976); Montagne v. Haymes, 427 U.S. 236 (1976). Thus the "liberty" which Americans cherish so much is increasingly dependent upon the states, especially the state courts.

[7] See Kastenmeier and Remington, Court Reform and Access to Justice--A Legislative Perspective (to be published in the Harvard Journal on Legislation in June, 1979) in which it is asserted: "The overall federal interest in fair and equal justice at the State level is analogous to Federal interest in quality health care at the State level."

[8] There is very substantial federal contribution to the cost of education. For an illustration of the federal interest, see 20 U.S.C. § 1221e creating the National Institute of Education:

> (a)(1) The Congress hereby declares it to be the policy of the United States to provide to every person an equal opportunity to receive an education of high quality regardless of his race, color, religion, sex, national origin, or social class. Although the American educational system has pursued this objective, it has

care systems have received massive federal support for research (National Institutes of Health, Communicable Diseases Center) and for building or improving local hospitals and other facilities.[9]

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not yet attained that objective. Inequalities of opportunity to receive high quality education remain pronounced. To achieve quality will require far more dependable knowledge about the processes of learning and education than now exists or can be expected from present research and experimentation in this field. While the direction of the education system remains primarily the responsibility of State and local governments, the Federal Government has a clear responsibility to provide leadership in the conduct and support of scientific inquiry into the educational process.

See also 34 U.S.C. § 1501 and 20 U.S.C. § 351:

§ 1501.

The Congress hereby affirms that library and information services adequate to meet the needs of the people of the United States are essential to achieve national goals and to utilize most effectively the Nation's educational resources and that the Federal Government will cooperate with State and local governments and public and private agencies in assuring optimum provision of such services.

§ 351. Declaration of policy

(a) It is the purpose of this chapter to assist the States in the extension and improvement of public library services in areas of the States which are without such services or in which such services are inadequate, and with public library construction, and in the improvement of such other State library services as library services for physically handicapped, institutionalized, and disadvantaged persons, in strengthening State library administrative agencies, and in promoting interlibrary cooperation among all types of libraries.

(b) Nothing in this chapter shall be construed to interfere with State and local initiative and responsibility in the conduct of library services. The administration of libraries, the selection of personnel and library books and materials, and, insofar as consistent with the purposes of this chapter, the determination of the best uses of the funds provided under this chapter shall be reserved to the States and their local subdivisions.

9 There is, for example, substantial federal contribution to heart and lung research, dental research, child health, arthritis research, eye research, mental health, aging, and cancer research. See generally title 42 of the United States Code.

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The fact that the courts in this country are set up as two separate systems--state and federal--does not mean that federal interest is lacking in the quality of justice delivered by state courts, any more than local control of medicine and education indicates a lack of federal interest in their quality. The United States Constitution does not require that there be any federal courts other than the Supreme Court. This reflects a belief by the framers of the Constitution that state courts could adequately handle all cases, whether the issues were of primary concern to the states or to the federal government.[10]

Federal financial contribution (even though modest in comparison with the basic financial support given state courts by state legislatures) can provide a "margin of excellence" and thus improve significantly the quality of justice received by citizens who are affected by state courts.[11]

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[10] Redish and Muench, "Adjudication of Federal Causes of Action in State Court," 75 Mich. L. Rev. 311 n.3 (1976): "[T]he Madisonian Compromise of article III . . . permitted but did not require the congressional creation of lower federal courts. In reaching this result, the framers assumed that if Congress chose not to create lower federal courts, the state courts could serve as trial forums in federal cases."

[11] See memorandum from Harry Swegle to the Task Force on State-Federal Relations (October 4, 1978; copy on file at National Center for State Courts) at 12-13: "The Task Force concept of legislative objectives could be contained in perhaps six to ten statements on the principal needs of state courts. Whatever the substantive content of these statements, they should reflect:

"primary emphasis on the ends of justice (many current reforms are viewed as ends, when they are, in fact, means);

"preservation of the continuing efforts to strengthen the internal operations of courts;

"more flexibility and innovation in handling the various types of disputes which comprise the business of courts;

(2) State Courts Share the General Responsibility of Enforcing the Requirements of the United States Constitution and Laws of the United States Made in Pursuance Thereof.

The supremacy clause of the United States Constitution provides:

> This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby; any thing in the constitution or laws of any state to the contrary notwithstanding.[12]

The supremacy clause requires a state judge to consider whether a state statute or regulation is in conflict with the United States Constitution or with a federal statute or regulation which preempts

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"an increased emphasis on programs which make courts more responsive to the citizenry."

See Yankelovich, Skelly, and White, "The Public Image of Courts: Highlights of a National Survey of the General Public, Judges, Lawyers, and Community Leaders," reprinted in State Courts: Blueprint for the Future 5-69 (1978), in which it is said that efficiency in courts is equal, in the public view, to the problem of pollution and the ability of schools to provide a good education and that two-thirds of the public is willing to commit tax dollars to improvement. See also address of Warren E. Burger to the Second National Conference on the Judiciary (March 19, 1978) Williamsburg, Virginia, reprinted in State Courts: Blueprint for the Future 284 (1978), in which the Chief Justice asserts that state courts are closer to the people and can be more innovative than federal courts can be. See also Kastenmeier and Remington, supra, n.7, urging "creation of a national program of assistance to state courts, possibly along the lines of an independent legal services corporation."

[12] United States Constitution Art. VI. See H. Friendly, Federal Jurisdiction: A General View 90 (1973): "[W]e also have state courts, whose judges, like those of the federal courts, must take an oath to support the Constitution and were intended to play an important role."

state law. As a result, the federal government has an interest in ensuring that state judges are able adequately to apply the United States Constitution and congressional enactments when called on to do so.

Except in habeas corpus cases,[13] lower federal courts do not generally have the power to review the actions of state courts. The only way to review a state court's decision involving a pre-emption question or involving a federal constitutionality question

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[13] Lower federal courts may review the validity, under the Constitution and laws of the United States, of a state criminal conviction, but only if the person convicted is "in custody." 28 U.S.C. § 2254. However, the Supreme Court has limited review in Fourth Amendment (search and seizure) cases to the question of whether the state court gave the defendant an opportunity for a full and fair hearing on the constitutional issue. Stone v. Powell, 428 U.S. 465 (1976). In such a situation, the federal court is not permitted to look into the question of whether the state court reached the correct result, and the only possible review of the result is by the United States Supreme Court.

Stone v. *Powell* may represent a judicial trend in the Supreme Court toward restriction of the inquiry in all habeas corpus cases to the sufficiency of process rather than to the correctness of the result reached by a state court. Even if the Supreme Court does not move further in this direction, Congress might. The Department of Justice has drafted and may present to Congress a proposal for reform of habeas corpus: "By replacing the traditional habeas corpus remedy and focusing federal review on the adequacy of the state hearing rather than correction of the state's determination, this proposal would increase the respect accorded state courts, ease the tension between sovereignties generated by current practice, reintroduce the notion of finality into criminal litigation and avoid the duplicative expenditure of resources which characterize the present system." Memorandum on "Federal Court Review of State Court Convictions and Sentences," dated December 7, 1978, United States Department of Justice, Office for Improvements in the Administration of Justice.

If this trend does continue, whether by judicial or congressional action, it will mean that the federal government will be as dependent on state courts to decide constitutional questions in criminal cases as it already is in civil cases. [See discussion in text.]

is by appeal or certiorari to the United States Supreme Court.[14] If certiorari is denied, as it is in the vast majority of cases, there is no federal review. And review by appeal is in practice very little different from certiorari.[15] Thus, in the vast majority of civil cases decided by state courts involving a federal constitutional question or one of federal preemption, there is no meaningful review by any federal court, and the federal government is therefore completely dependent upon state judges to implement fundamental federal policies.[16]

State courts have an obligation to apply federal law in situations which do not involve state law at all. This is true with respect to congressional legislation whenever there is concurrent

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[14] 28 U.S.C. § 1257 allows appeal to the Supreme Court if a state court upholds a state statute under constitutional challenge. If the state court invalidates a state statute on federal constitutional grounds, on the other hand, review by the Supreme Court is discretionary (by writ of certiorari).

[15] See Comment, "The Precedential Effect of Summary Affirmances and Dismissals for Want of a Substantial Federal Question by the Supreme Court after Hicks v. Miranda and Mandel v. Bradley," 64 Va. L. Rev. 117 (1978).

[16] In a preemption or constitutionality case, a federal court would have jurisdiction to decide the narrow question of whether the state statute was valid if there was over $10,000 in controversy or if the statute dealt with commerce or some other subject for which the $10,000 minimum does not apply. 28 U.S.C. §§ 1337, et seq. The federal court would probably be able to issue only a declaratory judgment, not an injunction. 28 U.S.C. § 1341 and § 2283 (Anti-Injunction Statute). Furthermore, in criminal and "quasi-criminal" cases, a federal court is required to abstain from taking jurisdiction if a state case is pending. Younger v. Harris, 401 U.S. 37 (1971); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). The dissenters in the latter case felt that the decision was "obviously only the first step toward extending to state civil proceedings generally the holdings of Younger v. Harris. . . ." 420 U.S. at 613. In any case, even a declaratory judgment cannot be considered a "review" of a state court decision.

state and federal jurisdiction:[17]

> [I]f exclusive jurisdiction be neither express nor implied, the state courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it.

Claflin v. Houseman, 93 U.S. 130, 136 (1876).

There are some categories of federal legislation as to which there is exclusive federal jurisdiction.[18] These include bankruptcy,[19] patent and copyright cases, federal criminal cases,[20] Securities

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[17] That state courts could decide strictly federal cases was decided in 1876 in Claflin v. Houseman, 93 U.S. 130 (1876). In two later cases, the Supreme Court held that state courts have an obligation to decide such cases, even if the federal statute is "penal." Mondou v. New York, N.H. & H.R.R., 223 U.S. 1 (1912); Testa v. Katt, 330 U.S. 386 (1947). However, the Court left open the question of whether the state had an obligation to take jurisdiction where the federal policy expressed in the statute was in conflict with state policy:

> It is conceded that this same type of claim arising under Rhode Island law would be enforced by that State's courts. . . . Thus the Rhode Island courts have jurisdiction adequate and appropriate under established local law to adjudicate this action. Under these circumstances the State courts are not free to refuse enforcement of petitioners' claim.
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> 330 U.S. at 394.

And a state court may be relieved of this obligation if its state legislature withdraws jurisdiction from it for a class of cases which includes federal cases, as long as the jurisdictional statute does not discriminate against federal causes of action or against non-citizens of the state. Douglas v. New York, N.H. & H.R.R., 279 U.S. 377 (1929).

[18] See Redish and Muench, Adjudication of Federal Causes of Action in State Court, 75 Mich. L. Rev. 311 (1976); Wright, Law of Federal Courts 26 (1976).

[19] Even in patent cases, there can be an involvement of a state court. If the purported holder of a patent brings an action for the agreed upon price under a contractual agreement and the defendant raises the defense of the invalidity of the patent, the issue must be decided by the state court judge.

[20] But the federal criminal justice system has increasingly left to states the burden of litigation in areas where there is concurrent jurisdiction. Twenty years ago all interstate transportation of stolen automobile cases were prosecuted by the federal govenment. Today, with rare exceptions, the federal prosecuting officials refuse to bring prosecutions under the Dyer Act, preferring to leave the responsibility in the hands of the states.

Exchange Act and Natural Gas Act cases, and antitrust[21] cases.[22]

A committee of the House of Representatives has recommended that federal courts concentrate on:

> Adjudicating disputes in traditional federal subject matter areas such as copyright, patent, trademarks, commerce, bankruptcy, antitrust and admiralty; rendering speedy criminal justice for those accused of crimes; protecting the basic civil and constitutional liberties of all citizens; and resolving vital and often recently identified rights (and sometimes rights not yet identified by the legislative branch) which relate to welfare, occupational safety, the environment, consumerism, and privacy.[23]

Even in situations where federal courts have traditionally been thought to have exclusive jurisdiction, there are efforts to shift part of the burden of litigation to the state courts, either directly or indirectly.[24]

With respect to most congressional enactments, federal and state courts have concurrent jurisdiction.[25] As a consequence, the

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[21] But see 42 U.S.C. § 3739, Pub. L. 94-503, Title I, § 116 (Oct. 15, 1976), appropriating 10 million dollars annually for distribution to state attorneys general "to improve the antitrust capabilities of such state." 42 U.S.C. § 3739(a). Of the $10,000,000 for prosecution, only $76,000 has been allocated for purposes of assisting the judiciary in adjudication as compared with the balance appropriated for improvement of prosecution. The growth of state antitrust litigation has been substantial. The apparent federal policy is to enable the Department of Justice to concentrate on major mergers or consolidations and leave to the states matters such as a claimed price fixing practice by a group such as real estate agents.

[22] 28 U.S.C. § 1334 (bankruptcy), 28 U.S.C. § 1338 (patent and copyright), 18 U.S.C. § 3231 (criminal cases).

[23] H.R. Rep. No. 893, 95th Cong. 2d Sess. (1978).

[24] See notes 16 through 18, supra.

[25] See Hart and Wechsler, The Federal Courts and the Federal System 434-438 (2d ed. 1973).

plaintiff's decision of whether to bring a case in state or federal court is probably based on factors such as the perceived "liberal" or "conservative" tendency of particular state or federal judges, the location of the two courts, the amount of delay in each of the two courts,[26] and the relative cost of federal or state litigation.

If a case is brought in state court and the time limit for removal of a concurrent jurisdiction case to federal court has passed, a state court is as free from supervision or interference by the federal courts in a concurrent jurisdiction case as in the supremacy clause cases already discussed. In other words, the only review is by appeal or certiorari to the Supreme Court. Even the guidance of a federal court declaratory judgment is not available in this situation. Thus many cases which involve rights under

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[26] See Note, Exclusive Jurisdiction of the Federal Courts in Private Civil Actions, 70 Harv. L. Rev. 509, 517 (1957): "[E]ven though concurrent jurisdiction enables the plaintiff to choose the court with the least crowded calendar, there tends to be no significant difference in the extent of congestion between federal and state courts in most areas." Although that may have been true in 1957, today most federal district courts have a much longer delay than does the state court which has concurrent jurisdiction.

There is an important question also of the relative cost of litigation in federal and state courts. This is an issue now being studied by the United States Department of Justice. In 1957 it could be said that "expense will probably be roughly equivalent in federal and state courts." 70 Harv. L. Rev. 509, 517 (1957).

See Aldisert, Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload, 1973 Law and Social Order 557, in which Judge Aldisert attributes preference for federal courts to the influence of academics and the media, both of which have assumed that the federal judiciary is superior to the state judiciary, a conclusion which Aldisert asserts not to be the case. In any event there seems in the year 1979 to be a definite trend toward state litigation as preferable to litigation in federal court.

federal law are decided by state courts with no guidance or review by any federal court. The federal government has, therefore, an interest in having these cases decided by state judges who are familiar with the law they are applying in such cases and able to apply it correctly.

(3) In the Federal-State Partnership in the Delivery of Justice, the Participation of the State Courts Has Been Increased by Recently Enacted Congressional Legislation.

Congress frequently imposes conditions on federal spending as an inducement for states to pass legislation or to adopt administrative rules which will further congressional policy objectives. An early example was a federal credit of 90 percent on an employer's federal unemployment tax if the state created and the employer used a federally approved unemployment insurance plan.[27] Also, under the Clean Air Act:

> Within nine months after the federal standards were promulgated, each state was required to submit a State Implementation Plan to the agency. The administrator then had four months to approve or disapprove each state plan according to eight criteria set forth in the Act. . . . If a state's plan was

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[27] See Steward Machine Co. v. Davis, 301 U.S. 548 (1937). Recently, Congress changed the requirements for approval of an unemployment insurance plan. Now state and local public employees must be covered. By using the spending power instead of the commerce power to achieve this goal, Congress has apparently sidestepped the rule of National League of Cities v. Usery, 426 U.S. 833 (1976). See "Federal Conditions and Federalism Concerns: Constitutionality of the Unemployment Compensation Amendments of 1976," 58 Boston U. L. Rev. 275 (1978).

> found to be in some respect deficient, the administrator had two more months in which to promulgate regulations for that state.[28]

Thus, any clean air legislation passed by the states is undoubtedly heavily influenced by the federal criteria; and litigation arising from state clean air legislation, while not "federal question" litigation, clearly implicates important federal concerns. These cases will be primarily decided by state courts.

There are many other examples of federally induced state legislation: the 55 m.p.h. speed limit (induced by a condition on the spending of highway money),[29] eligibility standards for aid to families with dependent children (AFDC or welfare), nuclear power plant siting,[30] and school lunch programs. In fact, virtually every federal aid program is subject to some condition, and the condition frequently is that a state pass and enforce legislation or regulations of a type prescribed by Congress or by a federal administrative

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[28] 42 U.S.C. §§ 1857-1858a (1970). Comment, "The Clean Air Act: 'Taking a Stick to the States,'" 25 Cleve. State L. Rev. 371, 374 (1976)

[29] The federal interest in the enforcement of the 55 mile per hour speed limit reflects an increasing concern with the national energy problem. To increase the effectiveness of the enforcement program, the federal government has made substantial grants to state enforcement agencies. Inevitably these lead to increased burdens on the state judicial system, but no appropriations are made to cover these costs or to increase the capacity of the state judiciary to implement the federal policy objective.

[30] See Lupu, "Welfare and Federalism: AFDC Eligibility Policies and the Scope of State Discretion," 57 Boston U. L. Rev. 1 (1977); "Nuclear Power Plant Siting: Additional Reductions in State Authority?" 28 Gertrude Brick L. Rev. 439 (1975); "The National School Lunch Act: Statutory Difficulties and the Need for Mandatory Gradual Expansion of State Programs," 125 U. Pa. L. Rev. 415 (1976).

agency. Some litigation usually follows, and state courts thus become involved in the achievement of the federal policy which is involved.

A federal aid program which has a very direct impact on state courts is the AFDC program, which requires the states to determine the paternity of any child on welfare, usually through paternity litigation, and to attempt to make the father pay support, usually by a state contempt of court action or a criminal nonsupport prosecution. The failure to do so results in a loss by the state of federal AFDC money.[31]

(4) The Maintenance of a High Quality of Justice in Federal Courts Has Led to Increasing Efforts to Divert Cases to State Courts.

The high quality of the federal court system must be preserved. It has been long evident that this can be done only by giving state courts major responsibility for the enforcement of a great deal of the federal constitutional, statutory, and administrative law. In 1928 Frankfurter and Landis urged:

> Liquor violations, illicit dealings in narcotics, thefts of interstate freight and automobiles, schemes to defraud essentially local in their operation but involving a minor use of the mails, these and like offenses have brought to the federal courts a volume of business which, to no small degree, endanger their capacity to dispose of distinctively federal litigation and to maintain the quality which has heretofore characterized the United States courts. The burden of vindicating the interests behind this body of recent

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[31] Rinn and Schulman, "Child Support and the New Federal Legislation," Journal of the Kansas Bar Association 105 (Summer 1977).

> litigation should, on the whole, be assumed by the states. At the least, the expedient of entrusting state courts with the enforcement of federal laws of this nature, like state enforcement of the Federal Employers' Liability Act, deserves to be thoroughly canvassed.[32]

More recently, a report on "The Needs of the Federal Courts" said

> The federal courts, however, now face a crisis of overload, a crisis so serious that it threatens the capacity of the federal system to function as it should. This is not a crisis for the courts alone. It is a crisis for litigants who seek justice, for claims of human rights, for the rule of law, and it is therefore a crisis for the nation.[33]

In his address to the 1979 midwinter meeting of the Conference of State Court Chief Justices, Attorney General Bell said that he has instructed United States Attorneys to meet with state prosecutors to see if states will assume additional responsibility for the prosecution of some criminal conduct now prosecuted in federal court. The Attorney General used as an illustration bank robbery, which he urged be handled by the states as they now do other robberies, thus making it possible for the United States Department of Justice to concentrate on matters such as large-scale white-collar crime which, according to the Attorney General, ought to be given high priority by the federal government. The Attorney General

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[32] Frankfurter and Landis, The Business of the Supreme Court 293 (1928). See also The Needs of the Federal Courts, Report of the Department of Justice Committee on Revision of the Federal Judicial System (January, 1977) at 7: "Moreover, a powerful judiciary, as Justice Felix Frankfurter once observed, is necessarily a small judiciary." See also Hearings on the State of the Judiciary and Access to Justice before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, 95th Cong., 1st Sess. (1977), statement of Judge Shirley Hufstedler at p. 149.

[33] The Needs of the Federal Courts, supra, n.32.

added that he believed it appropriate for the federal government to share the increased financial burden which will be imposed on the states as a result of this latest policy by the Department of Justice.

In Stone v. Powell,[34] the Supreme Court of the United States decided that Fourth Amendment issues cannot be raised by federal habeas corpus if the individual involved has had a full and fair hearing in state court. With respect to the resulting increased state court responsibility, Judge Carl McGowan has recently said:

> The recent judicially created limitations on the circumstances in which that remedy (habeas corpus) may be invoked contemplates that, with few exceptions, state courts are willing and able to afford full protection for these federal rights. . . . To some degree, these developments may contain a self-justifying element: to the extent that they create incentives in the improvement of quality of state court processes of decision, the need for federal supervision should decrease.[35]

Thus the federal government has, now more than ever, an interest in ensuring that state courts are able to apply the Fourth Amendment in a way which constitutes a "full and fair hearing" and thus avoids the necessity of relitigating the Fourth Amendment question in the federal courts.[36]

There are other illustrations of the trend toward greater reliance on state courts.

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[34] 428 U.S. 465 (1976).

[35] McGowan, "Federal Jurisdiction: Legislative and Judicial Change," 28 Case Western Reserve L. Rev. 517, 537 (1978).

[36] See also Younger v. Harris, 401 U.S. 37 (1971); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), limiting the authority of the federal courts to intervene in pending criminal or civil cases in state courts.

One illustration is Gertz v. Robert Welch, Inc.,[37] a defamation case which is said to "shift the focal point of one aspect of this struggle (between the law of defamation and the first amendment) from the federal to the state courts."[38]

Also illustrative are Meachum and Montagne,[39] holding that the protections afforded by the federal due process clause are often available only if there is a liberty interest involved which has been created by state law.

During the last session of the Congress, a bill passed the House of Representatives which would require an exhaustion of state administrative remedies before bringing a civil rights action under 42 U.S.C. § 1983 raising a conditions-of-confinement issue. The bill, which has again been approved by the House Judiciary Committee in the current session of the Congress,[40] is designed to give major responsibility to the states to dispose of a maximum number of issues rather than relying, initially at least, on the federal courts.[41]

Federal jurisdiction in civil diversity cases, probably the most important type of concurrent jurisdiction case, has been severely criticized and may be abolished or limited in the near future,

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[37] 418 U.S. 323 (1974).

[38] Collins and Drushal, "The Reaction of the State Courts to Gertz v. Robert Welch, Inc.," 28 Case Western Reserve L. Rev. 306, 343 (1978).

[39] Meachum v. Fano, 427 U.S. 215 (1976); Montagne v. Haymes, 427 U.S. 236 (1976).

[40] H.R. 10, approved by a Judiciary Committee vote of 26 to 2 in March, 1979,

[41] See The Needs of the Federal Courts, supra, n.29 at 15-16.

leaving these cases to the state courts.[42]

In some instances the trend toward greater reliance upon state courts reflects a judgment that the responsibility is properly one for state courts because the interests involved are state rather than federal in nature. This is true of the effort to eliminate federal diversity jurisdiction.[43] In other situations, however, the issues have heretofore been thought of as federal in nature. This is true, for example, of questions of the meaning of the fourth amendment to the United States Constitution and also of the meaning of the "liberty" protected by the federal due process clause. The consequence is a greatly increased federal interest in the quality and quantity of the work of the state courts as a consequence of the increased responsibility of state courts to safeguard fundamental constitutional rights and liberties of the citizens of this country.

(5) The Federal Speedy Trial Act Has Diverted Criminal and Civil Cases to State Courts.

The total impact of the new federal Speedy Trial Act[44] will

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[42] See The Needs of the Federal Courts, supra, n.29 at 13-15. A bill to abolish diversity jurisdiction passed the House but failed in the Senate during the past session. It is almost certain that the same proposal will be reintroduced in both the House and Senate during the current session. See Statement of Robert J. Sheran, Chief Justice of the Supreme Court of Minnesota, Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice on Diversity Jurisdiction and Related Problems (March 1, 1969). See also Sheran and Isaacman, "State Cases Belong in State Courts," 12 Creighton L. Rev. 1 (1978).

[43] See Sheran and Isaacman, "State Cases Belong in State Courts," 12 Creighton L. Rev. 1 (1978).

[44] 18 U.S.C. 3161 et seq.

not be known until it is fully implemented on July 1, 1979. However, already reliable indications are that the existence of the Speedy Trial Act will contribute to the trend toward greater reliance on the state courts for the adjudication of criminal cases and also, in all likelihood, civil cases.

With respect to criminal cases, the number filed in federal courts has decreased since the passage of the Speedy Trial Act.[45] Whether this results from the Speedy Trial Act or from a change in prosecution policy is less clear. Both the Attorney General of the United States and the Director of the Federal Bureau of Investigation have indicated a purpose to concentrate on white collar crime, interstate crime, organized crime, and domestic surveillance of foreign activities, leaving the prosecution of crimes such as bank robbery to the states.[46]

The Attorney General has stated that he believes that the Speedy Trial Act will jeopardize 5,000 pending criminal cases when the act goes into effect on July 1, 1979. To the extent that this is accurate, it will inevitably put additional pressure on federal

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[45] See Report, Speedy Trial Act of 1974 (Administrative Office, U.S. Courts, September 30, 1978).

[46] See Report to the Congress, Comptroller General of the U.S., U.S. Attorneys Do Not Prosecute Many Suspected Violators of Federal Laws (February 27, 1978). The report indicates that 7 of 11 complaints are declined for prosecution and of the declinations 28% which could have been prosecuted federally are referred to the states for prosecution or to a federal agency for administrative action. (See p. 7.) As an illustration of the change in federal priorities, there were 4,888 federal Dyer Act prosecutions in 1967 and only 1,591 in 1975, a reduction of 67.5%. (See p. 15.)

prosecutors to rely increasingly upon state prosecution in order to alleviate the pressure on the federal prosecution and judicial systems.

The effort to comply with the requirements of the Speedy Trial Act also results in an inability of federal courts to give prompt attention to pending civil cases. In some federal districts, all of the time of all of the judges has been devoted to reducing the backlog of criminal cases. This will inevitably produce an incentive to bring the civil cases in state rather than federal court. A member of the Florida Supreme Court, in an address to the midwinter Conference of State Court Chief Justices, said that the backlog in the federal district courts in Florida has resulted in all federal wage and hour litigation being brought in the Florida state courts.

(6) An Increased Responsibility Has Been Placed on State Court Procedures by the United States Supreme Court.

During the past several decades, decisions of the United States Supreme Court have greatly increased the procedural due process protections guaranteed to citizens in criminal,[47] civil,[48]

[47] The impact of federal procedural due process requirements on state criminal procedures has been very substantial. For example, the requirements for taking a valid guilty plea have increased greatly, making it important that state courts develop adequate guilty plea procedures and that state court judges be better informed than formerly was necessary with respect to the procedural requirements for taking a valid guilty plea.

[48] There are increased procedural requirements in the field of civil litigation. For example, in Fuentes v. Florida, 407 U.S. 67 (1972), the Court held that where state law creates a property interest the citizen cannot be deprived of that property interest without notice, a hearing, and the other procedural safeguards of the federal due process clause. And in Goldberg v. Kelly, 397 U.S. 254 (1970), the Court held that state welfare benefits cannot be cancelled without a hearing and other protections afforded by federal due process.

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Juvenile,[49] and mental health[50] proceedings. The consequence has been to increase the procedural complexity of state court litigation requiring the development of new, more adequate, and more efficient procedures and requiring also a much more intensive program of continuing education for members of the state court judiciary.[51]

Indicative of the tremendous impact of decisions of the Supreme Court is the following statement of Mr. Justice Brennan:

> In recent years, however, another variety of federal law--that fundamental law protecting all of us from the use of governmental powers in ways inconsistent with American conceptions of human liberty--has dramatically altered the grist of the state courts. Over the past two decades, decisions of the Supreme Court of the United States have returned to the fundamental promises wrought by the blood of those who fought our War between the States, promises which were thereafter embodied in our fourteenth amendment--that the citizens of all our states are also and no less citizens of our United States, that this birthright guarantees our federal constitutional liberties against encroachment by governmental action at any level of our federal system, and that each of us is entitled to due

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[49] The leading such case in the juvenile field is In re Gault, 387 U.S. 1 (1967).

[50] Illustrative is Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972); remand 379 F. Supp. 1376 (E.D. Wis. 1974); remand 413 F. Supp. 1318 (E.D. Wis. 1976). The Lessard case held that the State of Wisconsin must, in order to civilly commit a person as mentally ill: give notice of the factual basis for commitment; hold a hearing within forty-eight hours of initial detention and a later full commitment hearing; base commitment on a finding, beyond a reasonable doubt, of danger to self or others; afford counsel, the privilege against self-incrimination, and other procedural safeguards required in criminal proceedings. As a result, there is increased need for carefully worked out state commitment procedures and improved judicial education to ensure adequate implementation of the new, more complex procedures.

[51] Some of these have been mandated within the past several years by the highest courts of the state. See, e.g., Vermont Rules of Criminal Procedure. See also the registration statistics for the National Judicial College and other such organizations.

process of law and the equal protection of the laws from our state governments no less than from our national one. Although courts do not today substitute their personal economic beliefs for the judgments of our democratically elected legislatures, Supreme Court decisions under the fourteenth amendment have significantly affected virtually every other area, civil and criminal, of state action. And while these decisions have been accompanied by the enforcement of federal rights by federal courts, they have significantly altered the work of state court judges as well. This is both necessary and desirable under our federal system--state courts no less than federal are and ought to be the guardians of our liberties. . . .

Every believer in our concept of federalism, and I am a devout believer, must salute this development in our state courts. . . .

. . . [T]he very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach. With the federal locus of our double protections weakened, our liberties cannot survive if the states betray the trust the Court has put in them. And if that trust is, for the Court, strong enough to override the risk that some states may not live up to it, how much more strongly should we trust state courts whose manifest purpose is to expand constitutional protections. With federal scrutiny diminished, state courts must respond by increasing their own.[52]

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[52] Brennan, "State Constitutions and the Protection of Individual Rights," 90 Harv. L. Rev. 489, 490-91, 502-03 (1977).

III.

Fundamental Principles in Designing Federal Support for State Judicial Systems

The development of federal financial support for state court systems is a phenomenon of the past decade. The origin of the concept that federal funding should be provided to aid state courts can be traced to the 1967 Report of the President's Commission on Law Enforcement and Administration of Justice.[53] In that report, it will be noted, the overwhelming emphasis is on the nation's crime problem and on the inability of the states to discharge their obligations to society in a field that the report conceded to be local in nature. Although the Commission envisioned a federal support program for the states "on which several hundred million dollars annually could be profitably spent over the next decade," the only specific court programs that were highlighted dealt with the education and training of judges, court administrators and other support personnel. The basic recommendations affecting court systems dealt with the need for the states themselves to reorganize their judicial systems and to upgrade their procedures.[54]

The 1967 Report's primary emphasis on federal assistance to the states was in the areas of law enforcement and corrections,

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[53] "The Challenge of Crime in a Free Society," Report by the President's Commission on Law Enforcement and Administration of Justice, Washington, D.C. (1967).

[54] Id., pp. 284-286, 296-297.

and the administration of the program was therefore to be placed in the United States Department of Justice. It is worth noting in this regard that the Federal courts had long since extricated themselves from the administrative services of the Department of Justice on the principle that the independence of the federal judicial system demanded it.[55] This emphasis on police and correctional problems was carried over into the congressional deliberations that resulted in the 1968 Omnibus Crime Control and Safe Streets Act, the statute under which the Law Enforcement Assistance Administration (LEAA) has provided some $6.6 billion in assistance to the states over the period from 1969 to 1978.[56] Court programs were not specifically provided for in the original LEAA enactment at all, despite the obvious fact that courts play an essential role in the operation of any criminal justice system.

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[55] Chandler, H. P., "Some Major Advances in the Federal Judicial System, 1922 - 1947," 31 Federal Rules Decisions 307, 517. The principle of judicial independence was a cornerstone for the 1939 act creating the Administrative Office of the U.S. Courts.

[56] See, "Federal Law Enforcement Assistance: Alternative Approaches," Congressional Budget Office (April, 1978), p. 34. Other federal sources of assistance to state courts are outlined in "Alternative Sources for Financial and Technical Assistance for State Court Systems," National Center for State Courts (Northeastern Reg. Off. 1977). They include: traffic court grants from the National Highway Safety Administration, grants under the Department of Labor's CETA program, capital improvement grants under the Department of Commerce's Economic Development Administration, grants under the Department of HEW's National Institutes, personnel development grants under the Intergovernmental Personnel Act (U.S. Civil Service Commission), research grants from the National Science Foundation, etc.

By administrative interpretation, and later by congressional enactment, the role of state courts was finally recognized in the program of federal support for improved administration of criminal justice in the states. Judicial programs have remained a minor part of the federal effort, however, and the figure generally agreed upon is that about 5 percent of the LEAA funds have been used for the improvement of state court systems.[57] Notwithstanding the limited nature of federal financial assistance to state courts over the decade, this LEAA experience has been characterized as a "most radical and novel development" that raises fundamental issues concerning the on-going relationship between the federal and state governments insofar as the nation's judicial systems are concerned.[58] Those issues include: The effect of federal funding on the independence of state judiciaries; the possibility of federal restrictions, conditions and standards being applied to state courts; the designing of acceptable means for providing funds to national organizations that support state judicial systems; and the problems arising out of a bureaucratic federal administration of the program through the U. S. Department of Justice.

Given the persuasive reasons that have been stated for

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[57] This figure is limited to court programs specifically, excluding programs designed for prosecutors, defenders and general law reform. See, Haynes, et al., supra note 3 at pp. 20-26; Kleps, supra note 3 at p. 4 and at pp. 88-89.

[58] Meador, "Are we Heading for a Merger of Federal and State Courts," Judges' Journal (Vol. 17, No. 2) Amer. Bar Assn., Chicago (1978) pp. 9, 48-49.

federal financial support to state court systems, how can state goals best be achieved in such a program? The LEAA experience to date has led some states to conclude that the price of federal support is too great, that the results achieved through federal grants do not justify the effort required to obtain them. Others would rewrite the LEAA program entirely in order to establish a wholly new scheme for the delivery of federal dollars to the state judiciaries. Most states, however, would support building on the LEAA experience to fashion a more workable program that can accommodate both state needs and national commitments, a program that will create a balance of state goals and federal funding. The past decade of state court experience with LEAA, of course, is the principal basis upon which such a future program should be designed.

It has been pointed out that no serious thought was given to the inclusion of state courts in the original authorizing legislation for LEAA. More than that, the bureaucratic system designed for implementation of the LEAA program would disturb even those who are the least concerned about judicial independence. Whether viewed in terms of the block grant programs administered through the states or the discretionary grant program run from Washington, the need for judicial competition with executive agencies in the LEAA programs has created practical and policy problems of immense proportions.[59]

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[59] See, Irving, et al., supra note 3 at p. 11: "Concern about the erosion of the independent and equal status of the judiciary as an equal branch of government under the present LEAA administrative structure is reaching crisis proportions."

The LEAA program for block grants to the states was required to be administered by state planning agencies designated or established by the Governors of the states. Insofar as state courts are concerned, the successes and failures of this program are often traceable directly to the degree of cooperation from, or the representation of judicial agencies on, these executive branch state planning agencies. Reports from those states having strong judicial representation on the state planning agencies reflect general satisfaction with the quality of the funding support accorded judicial projects. Other states experienced paper representation rather than having a real voice in the program, and still others had no voice at all. The availability of federal dollars for state court improvement often became more promise than reality and the price of competition, compromise and concensus has become too great for some. Indeed, even in those states where the judicial leadership has exercised its power effectively, there arose a growing concern about the propriety of an executive branch agency dictating the goals to be attained by a state's judicial agencies. The lumping together of "police, courts and corrections" into one large mix called a "criminal justice system" was disturbing to most judges, court administrators and others having responsibility for judicial administration.

At the same time, the LEAA funding of the past decade took place during the emergence of strong organizational and administrative activity aimed at state court system improvement. The simplification of trial and appellate court structures and procedures,

the creation of supporting policy and administrative agencies within the judiciary and the employment of professional court executive officers were phenomena of the years preceding and during the LEAA period. These reform activities were often impaired by executive rules and regulations emanating from Washington and from state houses across the country. Concern has been expressed that the federal controls inherent in the LEAA program could seriously jeopardize not only judicial independence within states but independent state action as well. The experience of the states with the LEAA-sponsored "standards and goals" project was but one example giving rise to such concern.[60]

Aside from the problems generated by federal executive activity, the day-to-day interaction of judges and court administrators with others in the criminal justice community gave additional cause for concern. The ambiguity surrounding LEAA's purposes and the focusing of its attention on increasing expenditures at the local level tended to undermine state court administration despite the many laudable advances made in state court systems with federal funds. Judicial input in the planning and

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[60] National Advisory Commission on Criminal Justice Standards and Goals, Washington, D.C. (1973). The commission published seven volumes, including the one on "Courts."

See, Meador, supra note 26 at p. 49: "Only a modest imagination is needed to foresee the development of federal standards for state courts in order for them to be eligible for federal appropriations. . . It would be strange indeed for the state judiciaries to be subject to greater federal authority than are the federal courts. Yet that prospect is not far-fetched and may indeed already be happening under present funding arrangements."

use of federal funds at both state and local levels tended to be minimal. Not until the provision for state judicial planning committees in the 1976 LEAA reauthorization legislation was clear congressional recognition given to the role of state court systems in the planning of LEAA programs. But even the emergence of this recognition was accompanied by confusion and controversy surrounding the inclusion of prosecutors and defenders in the LEAA concept of state judicial planning committees.[61] Nevertheless, with the development of such committees, and with their power to pass judgment on judicial funding decisions at both state and local levels, there appeared for the first time some hope for an informed and coordinated approach to LEAA expenditures for judicial system improvement.

Cutting a wide swath across the state block grant programs, the LEAA discretionary grant program administered from Washington tended to undercut any coordinated programs at the state and local levels under the block grants. A local court unable to fund its program with either local or state funds under the block grant

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[61] See Opinion of LEAA General Counsel (July 24, 1978), reprinted in the 1978 Annual Report of the California Judicial Planning Committee, Attachment S. p.3. This opinion, and similar opinions to other states, finally accepted the definition of "court projects" as excluding prosecutorial and defense services, thus ending a long controversy on the point.

This problem carried over from the LEAA decision to include with "courts" the functions of prosecutors, defenders and law reform. The problems arising from this classification decision have been noted in many of the reports that have analyzed court problems in connection with the present LEAA structure. See Haynes, et al., supra, n.3 at pages 3, 14-15 and 20-26; Irving, et al., supra, n.3 at pages 15-16, 126-131 and Appendix E ("Implications of 'Courts' Definition for LEAA Funding").

funding system could by-pass state guidelines by obtaining direct federal funding from Washington. This kind of activity was often known only after the fact by those most responsible for state judicial system management. There was, in fact, virtually no state judicial system input in the use of discretionary funds administered from Washington. This condition often tended to destroy the effectiveness of a state's judicial planning process and it was sometimes counterproductive to the attainment of priority goals sought to be achieved by state judicial systems.

The LEAA funding programs have also been used to implement federal policies unconnected with the mandate and purpose of the LEAA program. The ability of federal executive officers to attach conditions to the receipt of federal monies has sometimes been used to achieve goals not specifically set forth in the LEAA statute. The "standards and goals" project has already been mentioned, and other examples exist. One is found in the LEAA regulations governing computerized criminal history information systems in the states. The operating requirements and the security and privacy regulations are specifically tied to the acceptance of federal grants for information systems.[62]

Despite all of LEAA's operating and policy problems, it is

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[62] LEAA Regulations Governing Criminal Justice Information Systems (40 Fed. Reg. 22114 (1975); 28 Code of Fed. Regs. Sec. 20.20 (a)). The regulations purported to apply retrospectively, to jurisdictions that had previously accepted federal grants for information systems. In its comprehensive report on LEAA the 20th Century Fund noted that both the standards and goals project and the computerized crime information system project were spontaneously generated from Washington by LEAA officials. See 20th Century Fund, "Law Enforcement: The Federal Role," New York (1976), pp. 67, 73-85.

abundantly clear that substantial benefits have been experienced by many state court systems through the use of federal funds. Structural and organizational changes have taken place in a number of states as a result of funding by LEAA, and demonstration grants have been successful in many instances. Educational programs, including the establishment of judicial colleges in several states, have been widely praised throughout the country as have a number of technical assistance and research grants.[63] One commentator has concluded that "any review of the past 10 years must conclude that LEAA has been the single most powerful impetus for improvement in state court systems."

From this decade of LEAA experience certain elements can be identified as essential in the development of any future program for support to state court systems. Foremost among them is the need for a clear congressional statute recognizing the separation of powers principle in the functioning of state governments and the independence of state judiciaries in the exercise of their judicial powers. This action alone would create a more favorable climate for the exercise of the judiciaries' proper role in planning for expenditures in state court systems amidst the competing executive branch interests. Federal recognition of the

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[63] For a professional criticism of LEAA's research programs, see, National Academy of Sciences, "Understanding Crime: An Evaluation of the National Institute of Law Enforcement and Criminal Justice," Washington, D.C. (1977).

Kleps, supra note 3 at pages 91-92.

separate and independent nature of state judicial systems would do much to allay fears of executive branch control at federal, state and local levels of government. Whether associated with the block grant program or the discretionary funding program, recognition of this independence seems to be absolutely essential for any really successful program of future federal assistance to state court systems.[64]

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[64] An example of the kind of legislative finding that recognizes judicial independence as a fundamental consideration in this field is found in the California Legislature's creation of a judicial planning committee in 1973. (Stats. 1973, Ch. 1047.)

> §13830. Membership Appointed by Judicial Council---Legislature's Findings.
>
> There is hereby created in state government a Judicial Criminal Justice Planning Committee of seven members. The Judicial Council shall appoint the members of the committee who shall hold office at its pleasure. In this respect the Legislature finds as follows:
>
> (a) The California court system has a constitutionally established independence under the judicial and separation of power classes of the State Constitution.
>
> (b) The California court system has a statewide structure created under the Constitution, state statutes and state court rules, and the Judicial Council of California is the constitutionally established state agency having responsibility for the operation of that structure.
>
> (c) The California court system will be directly affected by the criminal justice planning that will be done under this title and by the federal grants that will be made to implement that planning.
>
> (d) For effective planning and implementation of court projects it is essential that the executive Office of Criminal Justice Planning have the advice and assistance of a state judicial system planning committee.

A second essential ingredient in future federal programs should build upon the favorable experience of state judicial planning committees under the existing LEAA statute. A logical next step in designing a successful federal funding program would be the creation and staffing of a national institution whose members, or at least a substantial majority of whose members, can represent state court systems. The delegation of responsibility to such a body for the planning of federal expenditures to support state court improvement could be achieved with minimal disruption to the established concepts of federal-state relations, and it would have the maximum support from the state judicial systems which LEAA has never enjoyed. Such a knowledgeable and representative group should be charged with responsibility for establishing priorities and policies for the distribution of federal funds to state court systems based upon their established judicial needs and priorities rather than upon assumed needs as perceived by federal or state executive agencies.

The establishment of this agency would command the respect of both federal authorities and state recipients. A clearly identified national responsibility for such an agency would avoid duplicative and overlapping efforts by the various federal funding sources and would provide a clear route of access for state court planners. Coordination of the agency's efforts with existing judicial planning committees in the states would afford a maximum opportunity for judicial input and, most importantly, would create judicial responsibility for the effectivemess and success of any

state court improvement programs supported by federal funds.

A third principle which should be incorporated into any future program of federal assistance to state courts is that the nationwide organizations that support state judicial systems should be principal recipients for the continuing allocation of the federal funds that are awarded on a discretionary basis directly from Washington. The national organizations mentioned hereafter are only illustrative of the kind of national effort that could well be supported by the continuing allocation of federal funds. The educational programs that are represented by the National Judicial College at Reno and by the Institute for Court Management at Denver represent a category that is extremely important to state judicial systems and that has proved to be of great value. The general support activities of the National Center for State Courts, with its regional offices, technical assistance teams and research programs, illustrate the kind of professional assistance that is desperately needed by many states. Similarly, the technical assistance programs of the American University in Washington have proved to be very helpful in a number of instances. Finally, the research activities of the Institute for Judicial Administration in New York, of the American Judicature Society in Chicago and of a number of academic institutions that have worked in the judicial field deserve continuing support.

The discretionary federal funds that are available for the purposes outlined are administered at the present time by a

variety of bureaus and subdivisions of the federal government. Funds are allocated for priorities that are separately established by these federal agencies, thus making a coordinated approach on a high priority basis almost impossible. The national judicial planning agency referred to above could easily be given the responsibility for establishing priorities in the use of the available funds and for approving the national programs that are organized by federal funding agencies to aid state judicial systems. If this principle were incorporated into future federal programs for assistance to state courts, increased coordination in the application of federal funds would follow, proven programs would be spread to more and more states and a more effective use of federal funds would result.

The Challenge for the Future for State and Local Court Systems

The challenge to state and local courts is to do justice and maintain the confidence and respect of the public. To achieve these goals requires continuing improvement and growth. Attention must be given to the role of courts in the community as well as the internal organization and procedures of the courts.

I. Courts and the Community

Historically, a vast gulf has been perceived by observers between courts and the communities they serve. To bridge this gulf, many legitimate community concerns need to be addressed, without sacrificing the values of equity and efficiency that have guided twentieth century judicial reforms. Effective access to adjudicative forums is essential for all disputants. The provision of adequate representation for all is necessary to insure that courts are not used as instruments of oppression. The existence of language, geographic, psychological, and procedural barriers to justice must be recognized and alleviated. Courts must be sensitive to the problem of compelling members of the public to submit matters to courts which do not involve real disputes requiring exercise of judicial discretion. Less expensive and complex processes must be provided to maintain the availability of courts for their fundamental dispute resolution functions.

Courts should insure that community service as a witness is comprehensible and convenient. The judiciary should insure that victims, especially the elderly, the very young, and those subjected to violence are treated with special care and concern throughout the process. Jury service should be spread widely among

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community members and burdens of such service minimized as much as possible.

The justice system should experiment extensively, where appropriate, with the use of lay community members as dispute resolvers in mediation, arbitration and adjudication and with other forms of dispute resolution. The present court system should evolve into a comprehensive justice system by incorporating non-judicial modes of dispute resolution as they prove successful.

Our system of government relies upon independent judges free to render decisions in accord with their own hearing of the facts and reading of the law. On the other hand, the judiciary recognizes that the lay community has a proper role in issues such as personnel selection, courthouse location, and judicial demeanor. To accomplish the delicate balancing between the needs for judicial independence and community involvement, courts may increase the areas where community input is sought without allowing intrusion on the judicial decision-making process. Citizen participation in selection and discipline of judges is appropriate. Citizen input should be received on judicial councils, court advisory committees and other policy making and administrative organs of the court system. The justice system should have effective programs for detecting and responding to citizen grievances and community perceptions about its performance and policy-making authority. Administrative control should be delegated to lay community representatives for at least some nonprofessional dispute resolution forums.

II. Internal Organization and Procedures of the Courts

Courts are complex institutions which vary in size and scope from a single judge sitting without staff to a conglomerate of judges operating in specialized divisions supported by thousands of employees. Internal organization of courts includes everything from the relationship of the courtroom clerk and the trial judge to the budgetary processes through which a state or national court system presents its need to various appropriating authorities. Internal procedures include those which affect the final disposition of cases and those which only support the litigative function. There a number of challenges to state courts to achieve the most effective internal organization and procedures. Administrative structures of state court systems need to be examined to find the most effective way of providing leadership, administrative assistance, and responsiveness.

Judicial selection, training, motivation and discipline are critical subjects for effective court operation. Processes must be devised whereby the best personnel can be selected for the judicial system. Continuing judicial education is essential for judges at all levels. All personnel benefit from a strong training program, not just in sharpening technical skills and sensitivity but in building motivation and reducing a sense of isolation.

Management of trial courts is particularly important for the control of pace and flow of cases through the system. Early management of cases is helpful so that disposition is prompt and efforts to settle are sincere. In criminal matters speedy trial

rules require courts to establish an effective information system and to monitor each case effectively. In order to meet requirements of efficiency in both civil and criminal fields, courts must adhere to some performance standards set at either a local or statewide level and use goals and objectives as well as measurement tools to meet these performance expectations. Judges must maintain effective communication with the bar. The effective processing of cases requires an effective level of communication with lawyers who represent the litigants.

In the final analysis, the judiciary must recognize it is their responsibility to establish and maintain effective organization and procedures. If courts accept this responsibility and have the resources to carry out the responsibility, the respect for and integrity of the judiciary can be maintained.

These are but a few of the challenges facing the state judiciary if they are to remain an effective instrument for the delivery of justice to the American people. State courts can serve a unique role as the incubator for ideas and innovations for the entire justice system. The independence of these courts insures a large measure of diversity and there is both pride and strength in that diversity.

To maintain the independence and diversity of state courts there are limitations on uses to which federal funds would be put by state and local courts. Funds made available to state courts under this act would be used to supplement the basic court systems of the several states. They would not be used to support basic

court services. They would provide for a measure of excellence by supporting research, technical assistance, test and demonstration of new techniques, education and training, and dissemination of new knowledge to the state courts. Funds would not be used to employ more judges or to fund essential, on-going judicial functions. Funds would not be used for construction of court facilities, except to the extent of remodeling existing facilities to demonstrate a new architectural or technological technique, or to provide temporary facilities for new personnel involved in demonstration or experimental programs. Funds would also not be used for payment of judicial salaries. These limitations are required by considerations of federalism and separation of powers as well as considerations of most cost effective uses to which limited federal funds should be put to bring about improvement in, rather than maintenance of, state court functions.

V

State Justice System Improvement Act

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "State Justice Institute Act of 1979". It is the declared policy of the Congress to aid state and local governments in strengthening and improving their judicial systems in a manner consistent with the doctrine of separation of powers and federalism.

Sec. 101 (a) Definitions.--As used in this title, the term--

(1) 'Board' means the Board of Directors of the State Justice Institute;

(2) 'Institute' means the Corporation for the State Justice Institute established under this title;

(3) 'Director' means the Executive Director of the Institute;

(4) 'Governor' means the Chief Executive Officer of a State;

(5) 'Recipient' means any grantee, contractee, or recipient of financial assistance;

(6) 'State' means any State or Commonwealth of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States;

(7) 'Supreme Court' means highest appellate court and administrative authority within a State unless legislatively established judicial council supersedes that authority.

Sec. 102(a) There is hereby established in the District of Columbia a private nonprofit corporation, which shall be known as the State Justice Institute, whose purpose it shall be to further the development and adoption of improved judicial administration in the State

Courts of the United States.

(b) Findings.--The Congress finds and declares that--

(1) the quality of justice in the nation is largely determined by the quality of justice in state courts;

(2) state courts share with the federal courts the general responsibility for enforcing the requirements of the constitution and laws of the United States;

(3) in the federal-state partnership in the delivery of justice, the participation of the state courts has been increased by recently enacted federal legislation;

(4) the maintenance of a high quality of justice in federal courts has led to increasing efforts to divert cases to state courts;

(5) the federal Speedy Trial Act has diverted criminal and civil cases to state courts;

(6) an increased responsibility has been placed on state court procedures by the Supreme Court of the United States;

(7) consequently, there is a significant federal interest in maintaining strong and effective state courts; and

(8) it is appropriate for the federal government to provide financial and technical support to the state courts to insure that they remain strong and effective in a time when their workloads are increasing as a result of federal government decisions and policies; and

(9) strong and effective state courts are those which produce understandable, accessible, efficient and equal justice, which requires

(a) qualified judges and other court personnel;

(b) high quality education and training programs for judges and other court personnel;

(c) appropriate use of qualified nonjudicial personnel to assist in court decision-making;

(d) structures and procedures which promote communication and coordination among courts and judges and maximize the efficient use of judges and court facilities;

(e) resource planning and budgeting which allocate current resources in the most efficient manner and forecast accurately the future demands for judicial services;

(f) sound management systems which take advantage of modern business technology including records management procedures, data processing, comprehensive personnel systems, efficient juror utilization and management techniques, and advanced means for recording and transcribing court proceedings;

(g) uniform statistics on caseloads, dispositions, and other court-related processes on which to base day-to-day management decisions and long-range planning;

(h) sound procedures for managing caseloads and individual cases to assure the speediest possible resolution of litigation;

(i) programs which encourage the highest performance of judges and courts, to improve their functioning, to insure their accountability to the public, and to facilitate the removal of personnel who are unable to perform satisfactorily;

(j) rules and procedures which reconcile the requirements of due process with the need for speedy and certain justice;

(k) responsiveness to the need for citizen involvement in court activities, through educating citizens to the role and functions of courts, and improving the treatment of witnesses, victims,

and jurors;

(l) innovative programs for increasing access to justice by reducing the cost of litigation and by developing alternative mechanisms and techniques for resolving disputes.

(c) Purpose.--It is the purpose of the Congress in this Act to assist the state courts, and organizations which support them, to attain the above requirements for strong and effective courts, through a funding mechanism consistent with the doctrines of separation of powers and federalism, and thereby to improve the quality of justice available to the American people. To achieve this purpose the Institute shall

(1) direct a national program of assistance designed to assure each person ready access to a fair and effective system of justice by providing funds to

(A) State courts; and

(B) National organizations which support and are supported by State courts.

(2) The Institute should not duplicate functions adequately performed by existing organizations and should promote on the part of agencies of state judicial administration, responsibility for success and effectiveness of state courts improvement programs supported by federal funding;

(3) foster coordination and cooperation with the federal judiciary in areas of mutual concern;

(4) make recommendations concerning the proper allocation of responsibility between the state and federal court systems;

(5) promote recognition of the importance of the separation of powers doctrine to an independent judiciary; and

(6) encourage education for the judiciary through national and state organizations, including universities.

(d) The Institute shall maintain its principal offices in the District of Columbia and shall maintain therein a designated agent to accept services for the Institute. Notice to or service upon the agent shall be deemed notice to or service upon the Institute.

(e) The Institute, and any program assisted by the Institute, shall be eligible to be treated as an organization described in section 170(c)(2)(B) of Internal Revenue Code of 1954 and as an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 which is exempt from taxation under section 501(a) of such Code. If such treatments are conferred in accordance with the provisions of such Code, the Institute, and programs assisted by the Institute, shall be subject to all provisions of such Code relevant to the conduct of organizations exempt from taxation.

GOVERNING BODY

Sec. 103(a) The Institute shall be supervised by a Board of Directors (hereinafter referred to in this title as the "Board") consisting of twelve voting members which shall be appointed by the President, by and with the advice and consent of the Senate. From an initial list of candidates submitted to the President (twelve by the Conference of Chief Justices; nine from the Conference of State Court Administrators, named by the Conference of Chief Justices; and three from the public sector), the Board is hereby to be composed of:

(1) Six judges and three court administrators.

(2) Three public members no more than two of whom shall be of the same political party.

(b)(1) The term of office of each voting member of the Board shall be three years, Provided, however, that part (b)(2) of this section shall govern the terms of office of the first members appointed to the Board; and provided further that a member appointed to serve for an unexpired term arising by virtue of the death, disability, retirement, or resignation of a member shall be appointed only for such unexpired term, but shall be eligible for reappointment consistent with (b)(2) of this title.

(b)(2) The term of initial members shall commence from the date of the first meeting of the Board, and the term of each member other than initial members shall commence from the date of termination of the preceding term. Five of the members first appointed, as designated by the President at the time of appointment, shall serve for a term of two years. Each member of the Board shall continue to serve until the successor to such member has been appointed and qualified.

(c) No member shall be reappointed to more than two consecutive terms immediately following such member's initial term.

(d) Members of the Board shall serve without compensation, but shall be reimbursed for actual and necessary expenses incurred in the performance of their official duties.

(e) The members of the Board shall not, by reason of such membership, be deemed officers or employees of the United States.

(f) The Board shall select from among the voting members of the Board a chairman, who shall serve for a term of three years. Thereafter, the Board shall annually elect a chairman from among its voting members.

(g) A member of the Board may be removed by a vote of seven members for malfeasance in office or for persistent neglect of or inability to discharge duties, or for offenses involving moral turpitude, and for no other cause.

(h) Regular meetings of the Board shall be held quarterly. Special meetings shall be held from time to time upon the call of the chairman, acting at his own discretion or pursuant to the petition of any seven members.

(i) All meetings of the Board, of any executive committee of the Board, and of any council established in connection with this title shall be open and subject to the requirements and provisions of section 552 b of Title 5, United States Code (relating to open meetings).

(j) Each member of the Board shall hereby be entitled to one vote. A simple majority of the membership shall constitute a quorum for the conduct of business. The Board shall act upon the concurrence of a simple majority of the membership present and voting.

(k)(1) In its direction and supervision of the activities of the Institute, the Board shall

(A) Establish such policies and develop such programs for the Institute as will further achievement of its purpose and performance of its functions;

(B) Establish policy and funding priorities;

(C) Appoint and fix the duties of the Executive Director (hereinafter referred to in this title as the "Director") of the Institute, who shall serve at the pleasure of the Board and shall be a nonvoting ex-officio member of such Board;

(D) Present to other government departments, agencies, and instrumentalities whose programs or activities relate to the administration of justice in the state judiciaries of the United States, the recommendations of the Institute for the improvement of such programs or activities; and

(E) Consider and recommend to both public and private agencies aspects of the operation of the state courts of the United States deemed worthy of special study.

OFFICERS AND EMPLOYEES

Sec. 104(a)(1) The Director, subject to general policies established by the Board, shall supervise the activities of persons employed by the Institute and may appoint and remove such employees as he determines necessary to carry out the purposes of the Institute.

(2) No political test or political qualification shall be used in selecting, appointing, promoting, or taking any other personnel action with respect to any officer, agent, or employee of the Institute, or in selecting or monitoring any grantee, contractor, or person or entity receiving financial assistance under this title.

(b) Officers and employees of the Institute shall be compensated at rates determined by the Board, but not in excess of the rate of level V of the Executive Schedule specified in Section 5316 of Title 5, United States Code.

(c)(1) Except as otherwise specifically provided in the Title, officers or employees, and the Institute shall not be considered a department, agency, or instrumentality of the Federal Government.

(2) Nothing in this title shall be construed as limiting the authority of the Office of Management and Budget to review and submit comments upon the Institute's annual budget request at the time it is transmitted to the Congress.

(d) Officers and employees of the Institute shall be considered officers and employees of the Federal Government for purposes of the following provisions of Title 5, United States Code: Subchapter I of Chapter 81 (relating to compensation for work injuries); chapter 83 (relating to civil service retirement); chapter 87 (relating to life insurance); and chapter 89 (relating to health insurance). The Institute shall make contributions at the same rates applicable to agencies of the Federal Government under the provisions referred to in this subsection.

(e) The Institute and its officers and employees shall be subject to the provisions of section 552 of Title 5, United States Code (relating to freedom of information).

POWERS, DUTIES, AND LIMITATIONS

Sec. 105(a) To the extent consistent with the provisions of this title, the Institute shall exercise the power conferred upon a nonprofit corporation by the District of Columbia Nonprofit Corporation Act (except for section 1005(a) of title 29 of the District of Columbia Code). The Institute is authorized to award grants and enter into contracts or cooperative agreements in a manner consistent with

section 105(b) of this title in order to

(1) conduct research, demonstrations, or special projects pertaining to the purposes described in this title, and provide technical assistance and training in support of tests, demonstrations, and special projects;

(2) ensure the Director of the Institute the authority to make grants and enter into contracts under this title;

(3) serve as a clearinghouse and information center where not otherwise adequately provided, for the preparation, publication, and dissemination of all information regarding state judicial systems;

(4) participate in joint projects with other agencies, and including the Federal Judicial Center with respect to the purposes of this title;

(5) evaluate, where appropriate, the programs and projects carried out under this title to determine their impact upon the quality of criminal, civil, and juvenile justice and the extent to which they have met or failed to meet the purposes and policies of this title;

(6) to encourage and assist in the furtherance of judicial education;

(7) to encourage, assist, and serve in a consulting capacity to state and local justice system agencies in the development, maintenance, and coordination of criminal, civil, and juvenile justice programs, and services; and

(8) to be responsible for the certification of national programs that are intended to aid and improve state judicial systems.

Sec. 105(b) To carry out these objectives, the Institute is empowered to award grants or enter into cooperative agreements or contracts as follows:

(1) It shall give priority to grants, cooperative agreements or contracts with:

(i) state and local courts and their agencies, and

(ii) national non-profit organizations controlled by, operating in conjunction with,and serving the judicial branches of state governments.

(2) It may, if the objective can better be served thereby, award grants or enter into cooperative agreements or contracts with:

(i) other non-profit organizations with expertise in judicial administration;

(ii) institutions of higher education; and

(iii) other individuals, partnerships, firms, or corporations.

(3) Upon application by an appropriate federal, state or local agency or institution, if the arrangements to be made by such agency or institution will provide services which could not be provided adequately through nongovernmental arrangements, it may award a grant or enter into a cooperative agreement or contract with a unit of federal, state or local government other than a court.

(4) Other private agencies with expertise in judicial administration.

(c) The Institute shall not itself -

(1) participate in litigation unless the Institute or a recipient of the Institute is a party, and shall not participate on behalf of any client other than itself, or

(2) undertake to influence the passage or defeat of any legislation by the Congress of the United States or by any State or local legislative bodies, except that personnel of the Institute may testify or make other appropriate communication

(A) when formally requested to do so by a legislative body, a committee, or a member thereof, or

(B) in connection with legislation or appropriations directly affecting the activities of the Institute.

(d)(1) The Institute shall have no power to issue any shares of stock, or to declare or pay any dividends.

(2) No part of the income or assets of the Institute shall inure to the benefit of any director, officer, or employee except as reasonable compensation for services or reimbursement for expenses.

(3) Neither the Institute nor any recipient shall contribute or make available Institute funds or program personnel or equipment to any political party or association, or the campaign of any candidate for public or party office.

(4) The Institute shall not contribute or make available Institute funds or program personnel or equipment for use in advocating or opposing any ballot measures, initiatives, or referendums, except those dealing with improvement of the state judiciary consistent with the purposes of this act.

(e) Employees of the Institute or of recipients shall not at any time intentionally identify the Institute or the recipient with any partisan or nonpartisan political activity associated with a political party or association, or the campaign of any candidate for public or party office.

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Sec. 105(f) Use of funds.--

(1) Funds available under this section may be used for the following purposes:

(a) to assist state and local court systems in establishing appropriate procedures for the selection and removal of judges and other court personnel and in determining appropriate levels of compensation.

(b) to support education and training programs for judges and other court personnel, for the performance of their general duties and for specialized functions, and to support national and regional conferences and seminars for the dissemination of information on new developments and innovative techniques;

(c) to conduct research on alternative means for using non-judicial personnel in court decision-making activities, to implement demonstration programs to test innovative approaches, and to conduct evaluations of their effectiveness;

(d) to assist state and local courts in meeting requirements of federal law applicable to recipients of federal funds.

(e) to support studies of the appropriateness and efficacy of court organizations and financing structures in particular states, and to enable states to implement plans for improved court organization and finance;

(f) to support state court planning and budgeting staffs and to provide technical assistance in resource allocation and service

forecasting techniques;

(g) to support studies of the adequacy of court management systems in state and local courts and to implement and evaluate innovative responses to problems of record management, data processing, court personnel management, reporting and transcription of court proceedings, and juror utilization and management;

(h) to collect and compile statistical data and other information on the work of the courts and on the work of other agencies which relate to and effect the work of courts;

(i) to conduct studies of the causes of trial and appellate court delay in resolving cases, and to establish and evaluate experimental programs for reducing case processing time;

(j) to develop and test methods for measuring the performance of judges and courts and to conduct experiments in the use of such measures to improve their functioning;

(k) to support studies of court rules and procedures, discovery devices and evidentiary standards, to identify problems with their operation, to devise alternative approaches to better reconcile the requirements of due process with the needs for swift and certain justice, and to test their utility;

(l) to support studies of the outcomes of cases in selected subject matter areas to identify instances in which the substance of justice meted out by the courts diverges from public expectations of fairness, consistency, or equity, to propose alternative approaches to the resolving of cases in problem areas, and to test and evaluate those alternatives;

(m) to support programs to increase court responsiveness to the needs of citizens, through citizen education, improvement of court treatment of witnesses, victims, and jurors, and development of procedures for obtaining and using measures of public satisfaction with court processes to improve court performance;

(n) to test and evaluate experimental approaches to providing increased citizen access to justice, including processes which reduce the cost of litigating common grievances and alternative techniques and mechanisms for resolving disputes between citizens; and

(o) to carry out such other programs, consistent with the purposes of this legislation, as may be deemed appropriate by the Institute.

(2) To insure that funds made available under this Act are used to supplement and improve the operation of state courts, rather than to support basic court services, funds shall not be used for the following purposes:

(a) to supplant state or local funds currently supporting a program or activity;

(b) to construct court facilities or structures, except to remodel existing facilities to demonstrate new architectural or technological techniques, or to provide temporary facilities for new personnel or for personnel involved in a demonstration or experimental program; or

(c) to pay judicial salaries.

GRANTS AND CONTRACTS

Sec. 106(a) with respect to grants or contracts in connection with provisions of this title, the Institute shall

(1) insure that no funds made available to recipients by the Institute shall be used at any time, directly or indirectly, to influence the issuance, amendment, or revocation of any executive order or similar promulgation by any federal, state, or local agency, or to undertake to influence the passage or defeat of any legislation by the Congress of the United States, or by any State or local legislative bodies, or State proposals by initiative petition, except where

(A) a governmental agency, legislative body, a committee, or a member thereof -

(i) requests personnel of the recipients to testify, draft, or review measures or to make representations to such agency, body, committee, or member, or

(ii) is considering a measure directly affecting the activities under this title of the recipient or the Institute.

(2) insure all personnel engaged in grant or contract assistance activities supported in whole or part by the Institute refrain, while so engaged, from -

(A) any partisan political activity.

(3) insure that every grantee, contractor, or person or entity receiving financial assistance under this title which files with the Institute a timely application for refunding is provided interim funding necessary to maintain its current level of activities until

(A) the application for refunding has been approved and funds pursuant thereto received, or

(B) the application for refunding has been finally denied in accordance with section 1010 of this Act.

(b) No funds made available by the Institute under this title, either by grant or contract, may be used

(1) for any of the political activities prohibited in paragraph (2) of subsection (a) of this section;

(2) to support or conduct training programs for the purpose of advocating particular nonjudicial public policies or encouraging nonjudicial political activities.

(c) The Institute shall monitor and evaluate and provide for independent evaluations of programs supported in whole or in part under this title to insure that the provisions of this title and the bylaws of the Institute and applicable rules, regulations, and guidelines promulgated pursuant to this title are carried out.

(d) The Institute shall provide for independent study of the existing financial and technical assistance programs under this Act.

RECORDS AND REPORTS

Sec. 107(a) The Institute is authorized to require such reports as it deems necessary from any grantee, contractor, or person or entity receiving financial assistance under this title regarding activities carried out pursuant to this title.

(b) The Institute is authorized to prescribe the keeping of records with respect to funds provided by grant or contract and shall have access to such records at all reasonable times for the purpose of insuring compliance with the grant or contract or the terms and conditions upon which financial assistance was provided.

(c) Copies of all reports pertinent to the evaluation, inspection, or monitoring of any grantee, contractor, or person or entity receiving financial assistance under this Title shall be submitted on a timely basis to such grantee, contractor, or person or entity, and shall be maintained in the principal office of the Institute for a period of at least five years subsequent to such evaluation, inspection or monitoring. Such reports shall be available for public inspection during regular business hours, and copies shall be furnished, upon request, to interested parties upon payment of such reasonable fees as the Institute may establish.

(d) The Institute shall afford notice and reasonable opportunity for comment to interested parties prior to issuing rules, regulations, and guidelines, and it shall publish in the Federal Register at least 30 days prior to their effective date all its rules, regulations, guidelines, and instructions.

AUDITS

Sec. 108(a)(1) The accounts of the Institute shall be audited annually. Such audits shall be conducted in accordance with generally accepted auditing standards by independent certified public accountants who are certified by a regulatory authority of the jurisdiction in which the audit is undertaken.

(2) The audits shall be conducted at the place or places where the accounts of the Institute are normally kept. All books, accounts, financial records, reports, files, and other papers or property belonging to or in use by the Institute and necessary to facilitate the audits shall be made available to the person or

persons conducting the audits; and full facilities for verifying transactions with the balances and securities held by depositories, fiscal agents, and custodians shall be afforded to any such person.

(3) The report of the annual audit shall be filed with the General Accounting Office and shall be available for public inspection during business hours at the principal office of the Institute.

(b)(1) In addition to the annual audit, the financial transactions of the Institute for any fiscal year during which federal funds are available to finance any portion of its operations may be audited by the General Accounting Office in accordance with such rules and regulations as may be prescribed by the Comptroller General of the United States.

(2) Any such audit shall be conducted at the place or places where accounts of the Institute are normally kept. The representatives of the General Accounting Office shall have access to all books, accounts, financial records, reports, files and other papers or property belonging to or in use by the Institute and necessary to facilitate the audit; and full facilities for verifying transactions with the balances and securities held by depositories, fiscal agents, and custodians shall be afforded to such representatives. All such books, accounts, financial records, reports, files, and other papers, or property of the Institute shall remain in the possession and custody of the Institute throughout the period beginning on the date such possession or custody commences and ending three years after such date, but the General Accounting Office may require the retention of such books, accounts, financial records,

reports, files, papers, or property for a longer period under section 117(b) of the Accounting and Auditing Act of 1950 (31 U.S.C. 67(b)).

(3) A report of such audit shall be made by the Comptroller General to the Congress and to the Attorney General, together with such recommendations with respect thereto as he shall deem advisable.

(c)(1) The Institute shall conduct, or require each grantee, contractor, or person or entity receiving financial assistance under this title to provide for an annual fiscal audit. The report of each such audit shall be maintained for a period of at least five years at the principal office of the Institute.

(2) The Institute shall submit to the Comptroller General of the United States copies of such reports, and the Comptroller General may, in addition, inspect the books, accounts, financial records, files, and other papers or property belonging to or in use by such grantee, contractor, or person or entity, which relate to the disposition or use of funds received from the Institute. Such audit reports shall be available for public inspection, during regular business hours, at the principal office of the Institute.

FINANCING

Sec. 109(a) There are authorized to be appropriated for the purpose of carrying out the activities of the Institute $_____ for fiscal year 1980, $_____ for fiscal year 1981, and such sums as may be necessary for fiscal year 1982. There are authorized to be appropriated for the purpose of carrying out the activities of the Institute $_____ for fiscal year 1983, and such sums as may be necessary for each of the two succeeding fiscal years. The first appropriation may be made available to the

Institute at any time after seven or more members of the Board have been appointed and qualified. Appropriations for that purpose shall be made for not more than two fiscal years, and shall be paid to the Institute in annual installments at the beginning of each fiscal year in such amounts as may be specified in Acts of Congress making appropriations.

(b) Funds appropriated pursuant to this section shall remain available until expended.

(c) Non-federal funds received by the Institute, and funds received for projects funded in part by the Institute or by any recipient from a source other than the Institute, shall be accounted for and reported as receipts and disbursements separate and distinct from federal funds.

(d) It is hereby established that the State's highest court or its designated agency or council will receive, administer, and be accountable for all funds awarded by the Institute for projects conducted by the courts of the States.

SPECIAL LIMITATIONS

Sec. 1010. The Institute shall prescribe procedures to insure that -

(1) financial assistance under this title shall not be suspended unless the grantee, contractor, or person, or entity receiving financial assistance under this title has been given reasonable notice and opportunity to show cause why such actions should not be taken; and

(2) financial assistance under this title shall not be terminated, an application for refunding shall not be denied, and a

suspension of financial assistance shall not be continued for longer than thirty days, unless the grantee, contractor, or person or entity receiving financial assistance under this title has been afforded reasonable notice and opportunity for a timely, full, and fair hearing, and, when requested, such hearing shall be conducted by an independent hearing examiner. Such hearing shall be held prior to any final decision by the Institute to terminate financial assistance or suspend or deny funding. Hearing examiners shall be appointed by the Institute in accordance with procedures established in regulations promulgated by the Institute.

COORDINATION

Sec. 1011. The President may direct that appropriate support functions of the Federal Government may be made available to the Institute in carrying out its activities under this title, to the extent not inconsistent with other applicable law.

RIGHT TO REPEAL, ALTER, OR AMEND

Sec. 1012. The right to repeal, alter, or amend this Title at any time is expressly reserved.

SHORT TITLE

Sec. 1013. This Title may be cited as the 'State Justice System Improvement Act.'

INDEPENDENCE OF STATE JUSTICE INSTITUTE

Sec. 1014. Nothing in this Act, except Title _____, and no references to this Act unless such references refer to Title _____ shall be construed to affect the powers and activities of the State Justice Institute.

REPORT OF THE EXECUTIVE COUNCIL OF THE CONFERENCE OF CHIEF JUSTICES IN RESPONSE TO THE DEPARTMENT OF JUSTICE STUDY GROUP REPORT ON THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION—AUGUST 1977

The Conference of Chief Justices appreciates the opportunity to comment on the Report to the Attorney General of the Department of Justice Study Group on Restructuring the Justice Department's Program of Assistance to State and Local Governments for Crime Control and Criminal Justice System Improvement.

We understand that Congressional proposals are still in the planning stage and anticipate the opportunity to study and comment on such proposals as they are submitted in draft form, as well as subsequent proposals from the Department of Justice.

We support the thrust of the major recommendations in the present Study Group report and in particular applaud (1) the new focus on improving and strengthening the elements of the criminal justice system rather than on "reducing crime"; (2) the emphasis on improved management and coordination functions; and (3) the call for assured minimum funding of court programs.

Long-term needs

Our principal concern is that the report, with its focus on criminal justice, does not address the long-term needs of our nation's total justice system. From the judiciary's point-of-view, criminal and civil justice are inextricable. A broader focus is needed if state courts are to play their fundamental role in improving the administration of justice, including the criminal and juvenile components, and assume a major share of the burden now carried by the federal courts.

We do not feel that the Study Group has adequately addressed the need for a basic national policy on improvement of the total justice system and creation of the appropriate national institutions and procedures by which this policy could be implemented in keeping with the constitutional principles of federalism and the separation of powers.

There is a proper federal role in improving the justice system but it must be performed in a manner that respects the identity and independence of state courts. Federal funding must be looked upon as a means of adding strength to state judicial systems and not as a method of extending federal authority to areas better managed on a state or local basis. The Department of Justice should not be in a position, through funding decisions or otherwise, to set policies for the independent judiciaries of the states.

Discretionary funds

The Conference of Chief Justices also is concerned that the Study Group report does not provide for continuation of national discretionary funds to provide basic support for the National Center for State Courts, the research and development arm of the state judiciaries, and for other court support organizations such as the National College of the State Judiciary. In our view, these institutions are essential to implementation of national policy for improving the administration of justice. The National Center offers a key mechanism by which federal funds can appropriately be used to assist state courts, providing resources far beyond the means of any individual state or, under present court budgets, the state court system collectively. We strongly favor a direct Congressional appropriation towards the support of the National Center for State Courts similar to the support provided for the Federal Judicial Center.[1]

2. The National Center for State Courts, as previously indicated, should receive a direct Congressional appropriation toward its support similar to the financial support provided for the Federal Judicial Center.

3. The highest court or judicial council should have state-wide authority for initiating, administering, and disbursing funds for programs improving the state-wide justice system. All of the Study Group's arguments against fragmentation and for coordination support this approach as do all recent studies which point to the state-level approach as providing the highest potential for demonstrable improvements in state judicial systems.

4. Federal funds should not be limited to programs for criminal and juvenile justice in such a manner as to prevent needed improvement in the overall judicial system. This will be even more true if state courts are to assume a larger share of the caseload relative to the federal judicial system.

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[1] Such a suggestion was made by Attorney General Griffin Bell in his address to the Conference of Chief Justices on August 2, 1977, at their annual meeting in Minneapolis, Minnesota.

5. Provision should be made for a national discretionary fund to help support national institutions of the state court systems that cannot be adequately funded through state judicial budgets.

6. Further action should be taken to enunciate a federal policy for improvement of the nation's total justice system and plan for creation of an appropriate agency to direct and fund programs to implement that policy.

Specific comments on study group report

In light of these recommendations the Conference of Chief Justices has these comments on the general and specific recommendations of the Study Group:

General policy recommendations

1. We support the refocusing of the national research and development role with the understanding that this role, as it applies to the courts, not be limited to the criminal justice system but address the needs of each state's total justice system.

2. We support the shift to direct formula grants with the understanding that the judiciary receive approximately 30 percent of each state's allocation; that the judiciary's funds be administered at the state level, and that state courts themselves, rather than the Department of Justice, determine which programs best suit their individual needs.

3. We agree that there should be a "Federal government response to the problems of crime and the inefficient administration of justice." Federal funding under LEAA has been essential to the development of effective national institutions of the state judiciaries as well as major programs for improvement of individual state court systems. Funds for these programs would not have been provided by state or local legislative bodies which traditionally have kept the judiciary on limited budgets. Nor is their reason to believe that such funds will be made available in the future from state and local sources.

4. We agree that the two major strategic components of the federal role should involve (1) development of national priorities and program strategies and (2) the provision of financial assistance to state and local governments. But we believe these statements should be amended to recognize the unique position of the judicial branch in the criminal justice system, i.e., to recognize the courts as a separate branch of government and not a "component" of the criminal justice system. Implicit in this recognition would be other elements of the CCJ positions stated above, i.e., the need for involvement of non-federal organizations such as the National Center for State Courts in formulating and implementing national policy for improvement of the entire justice system; the need for allocating a specific percentage of funds to the judicial branch; and the need for state level direction of court program development and funding.

5. We concur in general with the Study Group's basic conclusions on the unwieldiness of present LEAA administrative procedures. However, we support state-wide planning for the judicial branch of goverment which, as noted above, differs significantly in its administrative and rule-making structure from executive branch criminal justice agencies. The problems encountered by the present executive branch state planning agencies develop principally out of factors involving differing state and local responsibilities for the criminal justice system and the separation of powers. These considerations either do not apply or do not apply with equal force in comprehensive planning for the judicial branch alone which can and should plan for all judicial branch programs, not just those financed by federal funds.

Specific recommendations

1. We approve recommendation No. 1 as conditioned by the CCJ policy statements above, i.e., principally to ask that the refocused national research and development role recognize the needs of the total justice system, not just criminal justice, and that state court systems and their national organization play a major role in initiating programs for the judicial branch.

2. We qualifiedly approve Recommendation No. 2 provided the demonstration programs for the judicial branch are not limited to those initiated or developed at the federal level which could amount to federally established priorities for the needs of individual states court systems. (We qualifiedly approve the Study Group's second general recommendation (page 14) on direct assistance to state nd local governments provided, as previously indicated, that the assistance include an appropriate share for judicial systems, administered at the state level, and that national program models are not limited to those developed by the federal funding agency.)

3. We approve Recommendation No. 3 but with the understanding that federal financial assistance to the judicial branch not be limited to criminal justice programs but support improvement of the entire state court system.

4. We qualifiedly approve Resolution No. 1, provided an equitable percentage of the funds is received by the state court systems.

5. We qualifiedly approve Resolution No. 5 provided Federal funding assistance, for reasons previously entitled, is not limited to nationally developed programs or even to locally developed programs warranting national implementation. Many locally developed programs may not warrant national implementation but offer excellent solutions to local problems, since all states are not alike, nor even are all courts within a state alike and amendable to only national solutions.

6. We strongly approve Recommendation No. 6. The courts must have an identified or minimum level of support that adequately recognizes their needs, their key role in the state justice system, and the fact that they are generally inadequately funded by the states.

7. We approve Recommendation No. 7 with the understanding that the responsible judicial authorities provide coordination with the judicial branch and between the judicial branch and executive branch criminal justice agencies.

8. We qualifiedly approve Recommendation No. 8 because we perceive difficulties in arriving at an effective definition of what constitutes an "improvement" and how the provision is to be monitored or enforced. Such procedures could make this option satisfactory or undesirable. Certainly the judicial branch, rather than the general government, should be responsible for determining what constitutes an "improvement" in programs of the judicial branch.

CONCLUSION

We believe the Study Group should give further consideration to the formulation of a federal policy on improvement of the total justice system and to the structuring of federal programs that can achieve national goals for the delivery of justice while being true to the constitutional principles of federalism and the separation of powers.

The preservation and the independence of state judicial systems are the imperatives which must undergird all joint efforts to deal with problems relating to the effective administration of justice and access to the courts.

Respectfully submitted,

C. William O'Neill, Ohio, Chairman; James Duke Cameron, Arizona, Vice-Chairman; Lawrence W. I'Anson, Virginia, Sr. Vice Chairman; Jay A. Rabinowitz, Alaska, Deputy Chairman; Ralph J. Erickstad, North Dakota; Harold Fatzer, Kansas; William H. D. Fones, Tennessee; Daniel L. Herrmann, Delaware; Charles S. House, Connecticut; Joe W. Sanders, Louisiana; Robert J. Sherman, Minnesota.

ANNUAL MEETING—AUGUST 1977

RESOLUTION 1

Be it resolved That the Conference of Chief Justices approve the recommendations of the Committee of Federal-State Relations concerning the following principles:

(1) Every citizen should have access to our court system as the ultimate forum for the resolution of unavoidable disputes and the protector of his constitutional rights.

(2) The demand for access to our court systems in this country can be expected to increase significantly in the years ahead—a demand which will be implemented by plans for prepaid legal insurance and other methods of making legal services more generally available.

(3) Efforts to divert, where appropriate, the processes of dispute resolution from the federal and state court systems through devices such as arbitration are to be encouraged and accelerated, but such diversion is only a partial answer to the problem.

(4) Notwithstanding reasonable expectations of dispute diversion, it can be anticipated that our federal court system will continue to be overburdened unless increased recognition is given to the role of state courts.

(5) Our state court systems are able and willing to provide needed relief to the federal court system in such areas as:

(A) adaquate review of state court criminal proceedings to assure that federally defined constitutional rights have been fully protected;

(B) increased participation in the resolution of federal question cases;

(C) the assumption of all or part of the diversity jurisdiction presently exercised by the federal courts.

(6) National funding to the states should include procedures and allocations to assure that the state court systems receive an equitable share of the funds without prejudice to the independence of the judiciary.

(7) Increased communication between congressional committees considering legislation affecting state courts and such entities as the Conference of Chief Justices will be useful.

RESOLUTIONS OF CONFERENCE OF CHIEF JUSTICES (FROM ANNUAL MEETING—AUGUST 1978)

RESOLUTION II

Be it resolved by the Conference of Chief Justices of the United States, at the 30th Annual Meeting held in Burlington, Vermont, on August 2 1978, that the following principles should be applied in any efforts to study, analyze, and achieve policies and mechanisms for federal funding of projects for the improvement of justice in the several States:

(1) The amount of federal funds to be allocated for improvement of state judicial systems should be fixed by the United States Congress itself.

(2) The Congress itself should specify the national-interest purposes and objectives for which the federal funds should be expended. These congressionally defined purposes and objectives should be sufficiently broad to permit each of the states to fund programs for judicial improvement suited specifically to the unique requirements of the particular state.

(3) An autonomous federal agency should be designated by the Congress to administer the programs, with significant representation from state court systems included.

(4) The federal funds appropriated for the improvement of the administration of state court systems should be allocated for this purpose in each of the states by that entity responsible under state law for the administration of the course.

(5) The use of federal funds for the improvement of state judicial administration should not be directed exclusively at criminal justice or juvenile justice; should not be limited by the requirement of matching funds; and should not be conditioned upon state agreements of assurances for future financial support. However, tight limitations upon expenditures for "administrative overhead" would be appropriate.

(6) The Congress should specify that some part of the funds appropriated for the improvement of state court systems should be used to support research, service, and education by an institution or institutions functioning nationally as a resource available to the courts of all of the states, for example, the NCSC. In this connection, careful consideration must be given to the desirability of separating policy decisions with respect to long-range research from the immediacies of action programs.

(7) Safeguards must be provided to assure that the national objectives justifying the use of federal funds for the improvement of state court systems will be adviced without less of state responsibility for, and authority over state courts.

RESOLUTION III

Be it resolved by the Conference of Chief Justices of the United States, at the 30th Annual Meeting held in Burlington, Vermont on the 2nd day of August 1978 as follows:

That a national task force, commissioned to study the relation between the Federal Government and the Governments of the several States in providing forums for dispute resolution, is needed; and

That such a task force should be authorized to study and analyze the problems of allocation of jurisdiction as between States and Federal Courts in order to avoid duplication and intrusion; and

That such task force should study and analyze methods by which federal funding of efforts to improve the administration of justice in the several States can be accomplished without sacrifice of the independence of State judicial systems; and

That the Conference of Chief Justices is ready and willing to cooperate in the development and implementation of such a task force; and

That the Executive Council of the Conference of Chief Justices is therefore authorized and directed to take such measures as may be necessary to bring about the creation of such a task force to carry out the research, study, and analysis hereto-

fore outlined and to make recommendations for future action on the part of this Conference and other affected entities.

RESOLUTION IV

Whereas, the President and Attorney General of the United States have recommended to the Congress of the United States the enactment of legislation for restructuring the Law Enforcement Assistance Administration in an effort to achieve economy in administration without loss of the effective employment of federal funds in a national effort to control crime; and

Whereas S. 3270 and its companion, H.R. 13397, have been submitted to the United States Congress for its consideration; and

Whereas these bills embrace the principle that the improvement of state court systems, both civil and criminal, is a necessary part of the process of crime control; and

Whereas the proposed legislation recognizes that the ultimate responsibility for the allocation of federal funds for the improvement of state court systems should be shared by that legal entity in each of the several States which is charged with the responsibility and supervision of such court systems;

Whereas the proposed legislation as introduced would appear to limit to three years federal funding of basic costs of the national research and service organizations of the state courts, the National Center for State Courts, and thereby severely curtail the effectiveness of the Center and its court service role,

Whereas Statewide unification and state assumption of funding are reforms central to improvement of state court systems;

Whereas the long-term resolution of problems involving the availability of federal funds for the improvement of the administration of justice in the States required further study and analysis: Now, therefore, be it

Resolved, That the Conference of Chief Justices of the United States, at the Annual Meeting held in Burlington, Vermont on August 2, 1978, does, with the exceptions noted below, hereby endorse and approve those provisions of the proposed legislation which pertain to federal assistance of state court systems as an acceptable method of dealing with these problems until such time as permanent policies and mechanisms for federal assistance of state court systems are established.

Exception 1: The legislation should provide for continued federal funding of basic costs of the National Center for State Courts.

Exception 2: The legislation should not impede the desirable movement toward court unification and state funding by including provisions which might be construed to permit local units of government to expend funds for court programs which do not meet statewide priorities set by the highest court of each state or its designee.

Adopted at the Thirtieth Annual Meeting held in Burlington, Vermont, August 2, 1978.

RESOLUTIONS OF CONFERENCE OF CHIEF JUSTICES (FROM MID-YEAR MEETING—FEBRUARY 1978)

RESOLUTION 2—CITIZEN DISPUTE RESOLUTION ACT

Whereas the Conference of Chief Justices recognizes the need for additional dispute resolution programs and resources if each citizen is to be provided a just remedy within the law for all legitimate grievances, and,

Whereas the just resolution of many grievances can be accomplished through improved mediation and arbitration procedures; and,

Whereas S. 957 as amended (No. 1623) would create a national resource center and provide funds to assist courts, states, localities and non-governmental organizations in developing new mechanisms for the "effective, fair, inexpensive and expeditious resolutions of dispute."

Now, therefore, be it

Resolved, That the Conference of Chief Justices endorses the principle of federally funded technical assistance and demonstration programs designed to improve dispute resolution mechanisms, but with the understanding that such federally financed programs recognize the constitutional responsibilities of the judicial branch of state government in the resolution of citizen disputes; and that federally financed programs, at the national, state and local levels, be conducted in keeping with the doctrines of separation of powers and state sovereignty.

Adopted in New Orleans on February 10, 1978.

Whereas the Conference of Chief Justices is informed of proposed changes in federal legislation effecting the funding of programs for the improvement of state court systems.

Be it resolved, That the following principles should be respected in this process:

(1) State judicial systems are and should be a separate and co-equal branch of state government the independence and integrity of which must be preserved.

(2) The federal entity given responsibility for establishing policies relating to the funding of state court systems should include significant representation from such systems.

(3) The cohesion of criminal and civil proceedings in judicial systems and the necessity of state wide rather than local judicial policy formulation be recognized.

(4) National institutions serving state courts such as the National Center for State Courts must be assured of adequate financial support.

Adopted in New Orleans on February 10, 1978.

25-622 O - 84 - 15

Supreme Court

STATE OF IOWA

DES MOINES

STATEMENT

OF

CHIEF JUSTICE W. WARD REYNOLDSON

SUPREME COURT OF IOWA

BEFORE

THE BROOKINGS INSTITUTION

FIFTH SEMINAR ON THE ADMINISTRATION OF JUSTICE

COLONIAL WILLIAMSBURG

JANUARY 31, 1982

THE WILLINGNESS OF THIS DISTINGUISHED GROUP TO HEAR FROM A STATE COURT JUSTICE IS A THOUGHTFUL AND CONSIDERATE GESTURE. I MUST CONFESS, HOWEVER, TO SOME APPREHENSION--NOT RELATED TO MY FIFTEEN-MINUTE SPEAKING ALLOTMENT, BUT TO MR. CIKIN'S WARNING THERE WOULD BE A SUBSEQUENT QUESTION AND ANSWER PERIOD. MY REACTION, BASED ON MANY YEARS' EXPERIENCE AS A TRIAL LAWYER BEFORE JOINING THE JUDICIARY, IS TO TAKE THE OFFENSIVE AND RAISE THE QUESTIONS, CONFIDENT THAT MY LISTENERS HAVE THE ABILITY TO PROVIDE THE ULTIMATE LEGISLATIVE AND EXECUTIVE DEPARTMENT ANSWERS TO THE TROUBLING ASPECTS OF FEDERAL-STATE JUDICIAL RELATIONS.

IOWA IS A TYPICAL STATE IN THE HEARTLAND OF AMERICA, ITS ECONOMIC FOUNDATION BRACED IN BOTH AGRICULTURE AND MANUFACTURING. ITS POPULATION IS MORE URBAN THAN RURAL AND IS ETHNICALLY, ECONOMICALLY, AND RACIALLY DIVERSE - IN OUR PECULIARLY AMERICAN FASHION. THEREFORE, IN MANY WAYS, THE INTERFACE OF ITS FEDERAL AND STATE LITIGATION IS A MICROCOSM OF NATIONAL JUDICIAL STRENGTHS AND FRAILTIES. FROM MY PERSPECTIVE AND EXPERIENCE I HAVE GRAVE CONCERNS ABOUT PRESENT FEDERAL STATUTES IN THE AREAS OF HABEAS CORPUS[1] AND

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[1]28 U.S.C. SECTIONS 2241-54 (1976 & SUPP. III 1979).

DIVERSITY JURISDICTIONS,[2] AND SECTION 1983 REMEDIES.[3] MOREOVER, I QUESTION WHETHER THE RATIONALE UNDERLYING THE ALLOCATION OF FEDERAL VIS-A-VIS STATE JURISDICTION IN SOME OF THOSE ENACTMENTS IS STILL VIABLE, AND WHETHER THE COMBINED FEDERAL AND STATE JUDICIAL DEPARTMENTS CAN BEAR THE PRESENT BURDENS OF THE JUDICIALLY EXPANDED SECTION 1983. I AM ALSO CONCERNED ABOUT THE PROPOSED LEGISLATION THAT WOULD DENY FEDERAL COURT JURISDICTION IN CERTAIN CONTROVERSIAL AREAS.

I FOOTNOTE THE CAVEAT THAT UNLESS SPECIFIED OTHERWISE, THE VIEWS I EXPRESS ARE MY OWN.

THE FIRST QUESTION I POSE ASKS WHY, IN AN ERA OF CRUSHING FEDERAL CASE LOADS, LIMITED FEDERAL FUNDS, AND THE WELCOMED RESURRECTION OF FEDERALISM, THERE IS A CONTINUED DUPLICATION OF JUDICIAL EFFORTS AND AN UNRELENTING OVERSIGHT OF STATE JUDICIAL OPERATIONS. ON THE STATE LEVEL, OUR PROSECUTORIAL RESOURCES ARE BEING SQUANDERED, OUR JUDGES FRUSTRATED, AND OUR CITIZENS DISILLUSIONED BY THE LACK OF FINALITY IN CRIMINAL CONVICTIONS. THE REDUNDANCY OF COLLATERAL FEDERAL HABEAS CORPUS

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[2] 28 U.S.C. SECTION 1332 (1976).

[3] 42 U.S.C. SECTION 1983 (SUPP. III 1979). THE ENTIRE SECTION IS AS FOLLOWS:

> EVERY PERSON WHO, UNDER COLOR OF ANY STATUTE, ORDINANCE, REGULATION, CUSTOM OR USAGE, OF ANY STATE OR TERRITORY OR THE DISTRICT OF COLUMBIA, SUBJECTS, OR CAUSES TO BE SUBJECTED, ANY CITIZEN OF THE UNITED STATES OR OTHER PERSON WITHIN THE JURISDICTION THEREOF TO THE DEPRIVATION OF ANY RIGHTS, PRIVILEGES, OR IMMUNITIES SECURED BY THE CONSTITUTION AND LAWS, SHALL BE LIABLE TO THE PARTY INJURED IN AN ACTION AT LAW, SUIT IN EQUITY, OR OTHER PROPER PROCEEDING FOR REDRESS. FOR THE PURPOSES OF THIS SECTION, ANY ACT OF CONGRESS APPLICABLE EXCLUSIVELY TO THE DISTRICT OF COLUMBIA SHALL BE CONSIDERED TO BE A STATUTE OF THE DISTRICT OF COLUMBIA.

ATTACKS ON STATE JUDGMENTS[4] AND THE SPECTRE OF STATE SUPREME COURT DECISIONS, CAREFULLY RESEARCHED AND REASONED TO PROVIDE DEFENDANTS THE FULL PANOPLY OF FEDERAL CONSTITUTIONAL RIGHTS, BEING SET ASIDE BY THE RULING OF A SINGLE FEDERAL DISTRICT JUDGE[5] ARE SHACKLING OUR CRIMINAL LAW. CHIEF JUSTICE BURGER ADDRESSED THESE PROBLEMS IN HIS 1981 YEAR-END REPORT ON THE JUDICIARY WHEN HE WROTE:

> I HOPE CONGRESS WILL PROMPTLY CONSIDER LIMITING FEDERAL COLLATERAL REVIEW OF STATE COURT CONVICTIONS TO CLAIMS OF MANIFEST MISCARRIAGES OF JUSTICE. THE ADMINISTRATION OF JUSTICE IN THIS COUNTRY IS PLAGUED AND BOGGED DOWN WITH LACK OF REASONABLE FINALITY OF JUDGMENTS IN CRIMINAL CASES.

EXPLORE WITH ME FOR A MOMENT THE ANATOMY OF A 1977 IOWA MURDER TRIAL, STATE V. MOORE. MOORE, WHO HAD ASSAULTED AND

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[4]THIS PROBLEM IS DISCUSSED IN REFORM OF HABEAS CORPUS PROCEDURES, 1981: HEARING ON S. 653 BEFORE THE SUBCOMM. ON COURTS OF THE SENATE COMM. ON THE JUDICIARY, 97TH CONG., 1ST SESS. (NOV. 13, 1981)(STATEMENT OF JONATHAN C. ROSE, ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF JUSTICE)(MIMEO)("[T]HE CAUSE OF JUSTICE IS NOT ADVANCED BY A PROCRUSTEAN INSISTENCE ON REPEATED JUDICIAL EXAMINATION OF CLOSE OR UNSETTLED QUESTIONS OF A LEGAL OR MIXED LEGAL-FACTUAL CHARACTER THAT FREQUENTLY YIELD DIVERGENT DECISIONS EVEN AMONG THE FEDERAL COURTS.")

THE SCOPE OF THESE COLLATERAL ATTACKS IS SUMMARIZED IN L. YACKLE, POSTCONVICTION REMEDIES 366-70 (1981).

[5]MORE DISTURBING IS THE MAJOR ROLE OF FEDERAL MAGISTRATES AND LAW CLERKS IN THESE DECISIONS. IN 1981 THERE WERE 7,790 STATE PRISONER HABEAS DISPOSITIONS. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1981 ANNUAL REPORT OF THE DIRECTOR 63 (PRE. ED. 1981). OF THESE, MAGISTRATES DISPOSED OF 5,270. ID. AT A-152. THE NECESSARY EXPANDING RELIANCE ON FEDERAL LAW CLERKS, MOST OF WHOM NEVER HAVE HELD A RESPONSIBLE POSITION IN THE TRIAL OF A CASE, HAS BECOME A SUBJECT OF CONCERN. SEE CANNON & CIKINS, INTERBRANCH COOPERATION IN IMPROVING THE ADMINISTRATION OF JUSTICE: A MAJOR INNOVATION, 58 WASH. & LEE L. REV. 1, 16 (1981); MCCREE, BUREAUCRATIC JUSTICE: AN EARLY WARNING, 129 U. PA. L. REV. 777, 785-87 (1981); RUBIN, BUREAUCRATIZATION OF THE FEDERAL COURTS: THE TENSION BETWEEN JUSTICE AND EFFICIENCY, 55 NOTRE DAME LAW. 648, 652-53 (1980).

INJURED A JAILER AT A RECESS, IN THE COURSE OF TRIAL BADGERED A WITNESS, USED VULGAR LANGUAGE, AND PERSISTED IN PROFANE AND DISRESPECTFUL STATEMENTS TO THE COURT. AFTER CALLING ANOTHER RECESS AND SUBSEQUENTLY WARNING HIM, TRIAL COURT ULTIMATELY HAD MOORE REMOVED FROM THE COURTROOM DURING TWENTY-FIVE MINUTES OF AN EXPERT'S TESTIMONY. IN A 1979 DECISION, THE IOWA SUPREME COURT RULED MOORE HAD WAIVED HIS SIXTH AMENDMENT RIGHT TO CONFRONT THE ADVERSE WITNESS AND UPHELD HIS CONVICTION.[6] OUR OPINION QUOTED THE RELEVANT PORTION OF THE TRANSCRIPT AND APPLIED AS CONTROLLING THE SUPREME COURT'S STANDARDS LAID DOWN IN ILLINOIS V. ALLEN.[7] IN 1980 A FEDERAL TRIAL JUDGE, RULING ON MOORE'S APPLICATION FOR WRIT OF HABEAS CORPUS, SET OUT THE SAME PORTION OF THE TRANSCRIPT, FOUND ILLINOIS V. ALLEN TO BE CONTROLLING, BUT ISSUED THE WRIT.[8] IN 1981, FOLLOWING THE STATE'S APPEAL, THE EIGHTH CIRCUIT, AGAIN QUOTING THE THEN-FAMILIAR PORTION OF THE TRANSCRIPT AND FOR THE THIRD TIME APPLYING ILLINOIS V. ALLEN STANDARDS, AGREED WITH THE IOWA SUPREME COURT AND REVERSED THE FEDERAL DISTRICT COURT.[9]

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[6]STATE V. MOORE, 276 N.W.2D 437 (IOWA 1979).

[7]397 U.S. 337 (1970).

[8]MOORE V. SCURR, 484 F. SUPP. 1042 (S.D. IOWA 1980), REV'D, 647 F.2D 854 (8TH CIR. 1981).

[9]SCURR V. MOORE, 647 F.2D 854 (8TH CIR. 1981).

THUS MOORE WAS PERMITTED TO COLLATERALLY ATTACK HIS CONVICTION IN TWO FEDERAL COURTS EVEN THOUGH THE IDENTICAL ISSUE WAS FAIRLY AND FULLY CONSIDERED AND DECIDED IN HIS STATE COURT DIRECT APPEAL. THIS PROCESS INJECTED OVER TWO YEARS OF UNCERTAINTY INTO HIS CASE AFTER HIS STATE APPEAL WAS CONCLUDED, COST IOWA SUBSTANTIAL RESOURCES TO DEFEND THE JUDGMENT IT HAD SECURED IN ONE STATE COURT AND RETAINED IN ANOTHER, AND RISKED TENSIONS BETWEEN THE STATE AND FEDERAL COURTS IN IOWA.

NO ONE SUGGESTS FEDERAL OVERSIGHT OF STATE DECISIONS INVOLVING FEDERAL CONSTITUTIONAL RIGHTS SHOULD BE ELIMINATED. ADOPTION OF LEGISLATION LIKE PROPOSALS S. 653 AND H.R. 3416, HOWEVER, WOULD AVOID MANY UNFORTUNATE AND WASTEFUL PROCEEDINGS.[10]

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[10] GENERALLY, THESE BILLS WOULD 1) PROHIBIT A FEDERAL MAGISTRATE FROM CONDUCTING EVIDENTIARY HEARINGS IN HABEAS CORPUS CASES INSTITUTED BY STATE PRISONERS WITHOUT CONSENT OF THE PARTIES, 2) CODIFY THE WAINWRIGHT V. SYKES, 433 U.S. 72 (1977), HOLDING THAT BARS LITIGATION OF ISSUES NOT PROPERLY PASSED IN STATE COURT UNLESS "CAUSE AND PREJUDICE" IS SHOWN FOR FAILING TO COMPLY WITH STATE COURT PROCEDURES, 3) IMPOSE A STATUTE OF LIMITATIONS FOR FEDERAL HABEAS CORPUS PROCEEDINGS, AND 4) PREVENT FEDERAL DISTRICT COURTS FROM HOLDING EVIDENTIARY HEARINGS IF THE FACTS WERE FULLY EXPANDED AND DETERMINED IN THE STATE COURT PROCEEDING. ALL EXCEPT THE FIRST OBJECTIVE ARE AMONG THE RECOMMENDATIONS OF THE ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME. SEE ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, FINAL REPORT 58-60 (1981). SEE ALSO SUMNER V. MATA, 449 U.S. 539 (1981).

PERHAPS THE TIME ALSO HAS ARRIVED TO CONSIDER THE PROPOSALS THAT THE PRISONER, FOLLOWING EXHAUSTION OF APPELLATE REVIEW, CONFINE ALL SUBSEQUENT JUDICIAL REVIEW TO CLAIMS OF MISCARRIAGE OF JUSTICE, BERGER, ANNUAL REPORT TO THE AMERICAN BAR ASSOCIATION, 67 A.B.A. J. 290, 293 (1981), OR, "WITH A FEW IMPORTANT EXCEPTIONS," PERMIT COLLATERAL ATTACK "ONLY WHEN THE PRISONER SUPPLEMENTS HIS CONSTITUTIONAL PLEA WITH A COLORABLE CLAIM OF INNOCENSE," FRIENDLY, IS INNOCENSE IRRELEVANT? COLLATERAL ATTACK ON CRIMINAL JUDGMENTS, 38 U. CHI. L. REV. 142, 142 (1970). FOR ADDITIONAL DISCUSSION SEE SCHAEFER, IS THE ADVERSARY SYSTEM WORKING IN OPTIONAL FASHION? IN THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 171, 182 (A. LEVIN & R. WHEELER ED. 1979).

THE GENERAL PRINCIPLES INCORPORATED IN THOSE PROPOSED LEGISLATIVE AMENDMENTS WERE ENDORSED, AND THEIR ENACTMENT INTO LAW RECOMMENDED, BY A RESOLUTION OF THE CONFERENCE OF CHIEF JUSTICES ADOPTED AT ITS THIRTY-THIRD ANNUAL MEETING LAST SUMMER. IT IS MY VIEW, SHARED BY MANY STATE JUSTICES, THAT THE SAME PURPOSES WOULD BE SERVED IF THE BILL TO ESTABLISH A NATIONAL COURT OF APPEALS, S. 1529, WERE TO BE MODIFIED TO CREATE A NATIONAL COURT OF STATE APPEALS, UNDER THE SUPREME COURT, TO ASSUME DISCRETIONARY JURISDICTION OF ALL APPEALS FROM, AND ALL COLLATERAL ATTACKS ON, STATE COURT DECISIONS INVOLVING FEDERAL QUESTIONS.[11]

MY SECOND QUESTION RAISES THE ISSUE WHETHER THE ANTIQUATED FEDERAL ENACTMENTS GRANTING DIVERSITY JURISDICTION TO THE FEDERAL COURTS FINALLY SHOULD BE INTERRED. IN HIS FAMOUS 1906 ADDRESS, "THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE," ROSCOE POUND DESCRIBED THIS SYSTEM AS "ARCHAIC."[12] SEVENTY YEARS LATER, AT THE HISTORIC POUND CONFERENCE OF LEADING LAWYERS AND JURISTS AT ST. PAUL,

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[11] SEE CAMERON, FEDERAL REVIEW, FINALITY OF STATE COURT DECISIONS, AND A PROPOSAL FOR A NATIONAL COURT OF APPEALS--A STATE JUDGE'S SOLUTION TO A CONTINUING PROBLEM, 1981 B.Y.U. L. REV. 545, 558-74.

[12] POUND, THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE, REPRINTED IN THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 337, 347 (A. LEVIN & R. WHEELER ED. 1979).

JUDGE MURRY GURFEIN OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT REPORTED IT WAS THE UNANIMOUS VIEW OF HIS DISCUSSION GROUP THAT DIVERSITY JURISDICTION SHOULD BE TAKEN OUT OF THE FEDERAL COURTS.[13]

DIVERSITY CASES IN FEDERAL COURTS ORDINARILY INVOLVE PERSONAL INJURY DAMAGE ACTIONS AND CONTRACT DISPUTES, ALL INVOLVING STATE LAW INTERPRETATIONS.[14] THIS IS ROUTINE GRIST FOR STATE COURT JUDICIAL MILLS, AND NOT AN AREA OF FEDERAL JUDGE EXPERTISE. IN IOWA THE UNIFORM CERTIFICATION OF QUESTIONS OF LAW ACT BECAME EFFECTIVE IN 1980.[15] A NUMBER OF QUESTIONS CERTIFIED BY THE FEDERAL DISTRICT COURT TO THE IOWA SUPREME COURT HAVE BEEN DECIDED. OTHERS ARE IN OUR PIPELINE, ESSENTIALLY TO BE TREATED AS ANY APPEAL FROM A STATE COURT. TYPICAL OF THE CERTIFIED QUESTION IS THIS: CAN ONE WHO LEAVES KEYS IN A CAR BE HELD LIABLE FOR THE CAR THIEF'S NEGLIGENT DRIVING?[16] OBVIOUSLY, THAT FEDERAL COURT WAS IMMERSED IN LITIGATION INVOLVING NEITHER A FEDERAL

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[13] THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 140-41 (A. LEVIN & R. WHEELER ED. 1979).

[14] OF THE 45,444 DIVERSITY CASES FILED DURING THE 12-MONTH PERIOD ENDING JUNE 30, 1981, 21,736 WERE CONTRACT ACTIONS AND 19,780 WERE PERSONAL INJURY ACTIONS. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR A-16 (PRE. ED. 1981).

[15] IOWA CODE CH. 684A (1981).

[16] SEE ROADWAY EXPRESS, INC. V. PIEKENBROCK, 306 N.W.2D 784, 784 (IOWA 1981).

QUESTION NOR FEDERAL COURT EXPERTISE. FEDERAL COURT LITIGANTS IN THESE CASES CONSUME THE RESOURCES OF BOTH THE STATE AND FEDERAL COURTS IN DUPLICITOUS EXAMINATIONS OF RELATED ISSUES: FIRST, A FEDERAL SEARCH AND DETERMINATION THERE ARE NO CONTROLLING STATE STATUTES OR PRECEDENTS; AND SECOND, A STATE RESOLUTION OF A QUESTION WE LIKELY WOULD NOT ACCEPT IF PRESENTED AS A GROUND FOR AN INTERLOCUTORY APPEAL FROM A STATE COURT.

FEW TODAY SERIOUSLY CONTEND THE NONRESIDENT PARTY SUFFERS FROM LOCAL PREJUDICE SIMPLY BECAUSE OF NONRESIDENCE. AN UNDERLYING BUT SELDOM DISCUSSED REASON DIVERSITY JURISDICTION SURVIVES IS THE ENCRUSTED CONCEPT THAT STATE COURT JUDGES ARE INFERIOR IN SOME WAY, A SUBJECT I SHALL ADDRESS SHORTLY.

MY THIRD QUESTION INQUIRES WHETHER THE COMBINED EFFORTS OF FEDERAL AND STATE COURTS AS PRESENTLY FINANCED CAN BEAR FOR LONG THE BURDEN OF JUDICIALLY EXPANDED SECTION 1983. THIS 1871 ENACTMENT, DESIGNED TO NULLIFY THE SINISTER INFLUENCE OF THE KU KLUX KLAN ON THE LAW ENFORCEMENT OFFICERS AND COURTS OF THE SOUTHERN STATES IN THE POST CIVIL WAR PERIOD,[17] SERVED A LIMITED PURPOSE UNTIL 1961. THEN MONROE V. PAPE RELEASED THE LITIGATION FLOODGATES BY HOLDING THAT EVEN THOUGH THERE MIGHT EXIST A STATE REMEDY TO WHICH AN INJURED PARTY COULD LOOK FOR RELIEF, THE FEDERAL REMEDY "IS SUPPLEMENTARY TO THE STATE REMEDY, AND THE LATTER NEED NOT

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[17] SEE MONROE V. PAPE, 365 U.S. 167, 174 (1961), REV'D ON OTHER GROUNDS, MONELL V. DEPARTMENT OF SOCIAL SERVS., U.S. 658, 663 (1978).

BE FIRST SOUGHT AND REFUSED BEFORE THE FEDERAL ONE IS INVOKED."[18] SUBSEQUENT SUPREME COURT DECISIONS HAVE HELD THAT LOCAL GOVERNMENTAL UNITS COULD BE SUED DIRECTLY UNDER SECTION 1983 FOR DAMAGES, DECLARATORY JUDGMENTS, OR INJUNCTIVE RELIEF;[19] THAT A MUNICIPALITY SUED UNDER SECTION 1983 MAY NOT ASSERT THE GOOD FAITH OF ITS OFFICERS OR AGENTS AS A DEFENSE;[20] AND THAT SECTION 1983 ACTIONS NO LONGER WOULD BE LIMITED TO ALLEGED CONSTITUTIONAL VIOLATIONS, BUT COULD INCLUDE ALLEGED VIOLATIONS OF ANY FEDERAL LAW.[21]

ALTHOUGH BETWEEN 1871 AND 1920 ONLY 21 SECTION 1983 CASES WERE BROUGHT IN FEDERAL COURT,[22] THERE WERE 218 STATE PRISONER PETITIONS IN 1966, AND 12,580 IN 1980.[23] IN 1981 OVER FORTY PERCENT OF THE "PRIVATE" FEDERAL QUESTION CASES, THAT IS, NOT AGAINST THE UNITED STATES AND ITS OFFICERS,

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[18] ID. AT 183; SEE FAIR ASSESSMENT IN REAL ESTATE ASS'N V. MCNARY, 50 U.S.L.W. 4017 (U.S. DEC. 1, 1981)(No. 80-427).

[19] MONELL V. DEPARTMENT OF SOCIAL SERVS., 436 U.S. 658, 690 (1978).

[20] OWEN V. CITY OF INDEPENDENCE, 445 U.S. 622, 638, REH'G DENIED, 446 U.S. 993 (1980).

[21] MAINE V. THIBOUTOT, 448 U.S. 1, 4-8 (1980). BECAUSE THIBOUTOT DID NOT DISTURB CHAPMAN V. HOUSTON WELFARE RIGHTS ORG. 441 U.S. 600 (1979)(HOLDING THE FEDERAL JURISDICTIONAL COUNTERPART OF SECTION 1983, 28 U.S.C. SECTION 1343, DOES NOT CONFER JURISDICTION UPON A FEDERAL DISTRICT COURT TO HEAR CLAIMS BASED ON THE SOCIAL SECURITY ACT), IT MAY BE ANTICIPATED THAT THIBOUTOT TYPE CASES WILL ORIGINATE IN STATE COURTS.

[22] COMMENT, THE CIVIL RIGHTS ACT: EMERGENCE OF AN ADEQUATE FEDERAL CIVIL REMEDY? 26 IND. L.J. 361, 363 (1951).

[23] PARRATT V. TAYLOR, 68 L. ED. 2D 420, 440 N. 13 (1981).

WERE CIVIL RIGHTS SUITS AGAINST STATE AND LOCAL OFFICIALS.[24] OF THESE, 15,639 WERE BROUGHT BY STATE PRISONERS, A 155 PERCENT INCREASE FROM 1975.[25] OF COURSE, SECTION 1983 AS INTERPRETED BY THE SUPREME COURT IS BEING ENFORCED IN THE STATE COURTS.[26] WE HAVE NO COUNT OF THE NUMBER OF 1983 CASES IN STATE COURTS, BUT WE DO KNOW THEY ARE NUMEROUS AND THAT THEY ARE SURFACING AT THE APPELLATE LEVEL.[27] SOME INSIGHT INTO THE EPIC PROPORTIONS OF THIS BURDEN IS GAINED FROM THE REPORTS OF ONLY 169 MUNICIPALITIES THAT DISCLOSE PENDING CIVIL RIGHTS CLAIMS TOTALING MORE THAN FOUR BILLION DOLLARS.[28]

JUST AS TOCQUEVILLE 150 YEARS AGO NOTED THAT SCARCELY A POLITICAL QUESTION ARISES IN THE UNITED STATES THAT CANNOT BE RESOLVED, SOONER OR LATER, INTO A JUDICIAL QUESTION,[29] WE

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[24] See Administrative Office of the United States Courts, 1981 Annual Report of the Director A-16-17 (pre. ed. 1981).

[25] Id. at 63, A-17.

[26] See Martinez v. California, 444 U.S. 277, 283-84 n. 7 (1980).

[27] See, e.g., Maine v. Thiboutot, 448 U.S. 1 (1980) (Supreme Court granted certiorari to Supreme Judicial Court of Maine); Blessum v. Howard County, 295 N.W.2d 836, 844-47 (Iowa 1980).

[28] Colella, The Mandate, The Mayor, and the Menance of Liability, 7 Intergovernmental Persp. Fall 1981, at 18-19.

[29] A. Tocqueville, Democracy in America 280 (Knoff 1956).

NOW OBSERVE THAT SCARCELY AN UNFORTUNATE INCIDENT OCCURS THAT ENTERPRISING COUNSEL CANNOT TRANSLATE INTO AN ALLEGED VIOLATION OF THE UNITED STATES CONSTITUTION OR FEDERAL LAWS. WITNESS, FOR EXAMPLE, THE DEBATE OF THE UNITED STATES SUPREME COURT IN PARRATT V. TAYLOR,[30] EXTENDING EIGHTEEN PAGES IN THE UNITED STATES SUPREME COURT REPORTS LAWYERS' EDITION AND RELATING TO THE NEGLIGENCE OF NEBRASKA PRISON PERSONNEL IN LOSING $23.50 WORTH OF HOBBY MATERIALS ORDERED BY A PRISONER. THIS IS THE KIND OF CLAIM THAT IN IOWA WOULD BE THE PROPER SUBJECT OF AN ACTION IN A MAGISTRATE'S SMALL CLAIMS COURT. THE INQUIRY HERE IS WHETHER OTHER BRANCHES OF GOVERNMENT HAVE PROVIDED THE RESOURCES FOR FEDERAL AND STATE GENERAL JURISDICTION AND APPELLATE COURTS TO DO PERFECT JUSTICE IN EVERY MISHAP--TO TRACE THE FALLEN SPARROW--OR WHETHER THIS AREA WOULD BE AN APPROPRIATE ONE FOR THE STUDY OF THE PROPOSED FEDERAL JURISDICTION REVIEW AND REVISION COMMISSION, S. 675, INTRODUCED BY SENATOR THURMOND AND OTHERS AND ENDORSED BY CHIEF JUSTICE BURGER IN HIS YEAR-END MESSAGE.[31]

FINALLY, I AND MANY STATE APPELLATE JUDGES QUESTION THE WISDOM, WITHOUT REGARD TO THE CONSTITUTIONAL ISSUES, OF THOSE BILLS IN CONGRESS THAT WOULD STRIP THE FEDERAL COURTS, INCLUDING THE SUPREME COURT, OF SUBSTANTIVE JURISDICTION IN

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[30]68 L. ED. 2D 420 (1981).

[31]BURGER, YEAR-END REPORT ON THE JUDICIARY 21-22 (DEC. 28, 1981)(UNPUBLISHED MANUSCRIPT).

CERTAIN AREAS INVOLVING SCHOOL PRAYER, ABORTION, BUSING, AND SEX DISCRIMINATION IN THE ARMED SERVICES.[32] FIRST, IF THIS LEGISLATION BECOMES LAW AND WHEN STATE COURT JUDGES HONOR THEIR ARTICLE VI OATHS,[33] THE HOLDINGS OF THE SUPREME COURT DECISIONS TARGETED BY THIS LEGISLATION WILL BE CAST IN STONE, BEYOND THE REACH OF THE SUPREME COURT TO ALTER OR OVERRULE.

SECOND, IT MUST BE RECOGNIZED THAT STATE COURT LITIGATION CONSTANTLY PRESENTS NEW SITUATIONS TESTING THE BOUNDARIES OF FEDERAL CONSTITUTIONAL RIGHTS AND REQUIRING JUDGMENT CALLS ON THE APPLICABILITY OF FEDERAL CONSTITUTIONAL PRINCIPLES. WITHOUT THE UNIFYING FUNCTION OF SUPREME COURT REVIEW, THE UNITED STATES CONSTITUTION COULD MEAN SOMETHING DIFFERENT IN EACH OF THE FIFTY STATES. ASIDE FROM THE OBVIOUS EFFECT OF THIS ANOMALY ON THE NATION'S CITIZENS, THE RESULTING INCONSISTENCIES IN LEGAL PRECEDENT AND THE MORE FREQUENT JURISDICTIONAL DISPUTES WOULD FURTHER OVERLOAD STATE COURTS.

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[32] SEE, E.G., H.R. 326, 97TH CONG., 1ST SESS. (1981). ("[T]HE SUPREME COURT SHALL NOT HAVE JURISDICTION TO REVIEW, BY APPEAL, WRIT OF CERTIORARI, OR OTHERWISE, ANY CASE ARISING OUT OF ANY STATE STATUTE, ORDINANCE, RULE, REGULATION OR ANY PART THEREOF, OR ARISING OUT OF ANY ACT INTERPRETING, APPLYING, OR ENFORCING A STATE STATUTE, ORDINANCE, RULE OR REGULATION, WHICH RELATES TO VOLUNTARY PRAYERS IN PUBLIC SCHOOLS AND PUBLIC BUILDINGS."); TAYLOR, LIMITING FEDERAL COURT JURISDICTION: THE UNCONSTITUTIONALITY OF CURRENT LEGISLATIVE PROPOSALS, 65 JUDICATURE 199, 202 (1981) (DESCRIBING PENDING BILLS).

[33] THESE OATHS ARE REQUIRED BY THE SUPREMACY CLAUSE, U.S. CONST. ART. VI.

THIRD, AND MOST IMPORTANT, THESE PROPOSED STATUTES GIVE THE APPEARANCE OF PROCEEDING FROM THE PREMISE THAT STATE COURT JUDGES WILL NOT HONOR THEIR OATHS TO OBEY THE UNITED STATES CONSTITUTION, NOR GIVE FULL FORCE TO CONTROLLING SUPREME COURT PRECEDENTS.[34] SO VIEWED, THESE EFFORTS TO TRANSFER JURISDICTION TO THE STATE COURTS NEITHER ENHANCE THE IMAGE OF THOSE INSTITUTIONS NOR DEMONSTRATE CONFIDENCE THAT STATE COURT JUDGES WILL DO THEIR DUTY. THIS CONCEPT APPLIES, WITH A REVERSE TWIST, AN OBSOLETE AND DENIGRATING NOTION ENTERTAINED BY SUPPORTERS OF THE CURRENT OVEREXTENDED REACH OF FEDERAL HABEAS CORPUS COLLATERAL ATTACKS, DIVERSITY JURISDICTION, AND SECTION 1983: THAT STATE COURTS ARE INFERIOR AND CANNOT BE TRUSTED, THAT STATE JUDGES ARE INSENSITIVE TO FEDERAL CONSTITUTIONAL RIGHTS AND IGNORANT OF FEDERAL LAW. THERE IS NO EVIDENCE TO SUPPORT THOSE CONCLUSIONS, AND IT IS PAST TIME FOR THESE MISCONCEPTIONS TO BE REJECTED.

THERE IS HARD EVIDENCE THAT SHOWS HOW INTERTWINED STATE AND FEDERAL LAW HAS BECOME. AMONG THE 281 PUBLISHED OPINIONS OF THE IOWA SUPREME COURT IN 1981, 72 CRIMINAL CASES CITED A

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[34] SAGER, THE SUPREME COURT, 1980 TERM--FORWARD: CONSTITUTIONAL LIMITATIONS ON CONGRESS' AUTHORITY TO REGULATE THE JURISDICTION OF THE FEDERAL COURTS, 95 HARV. L. REV. 17, 68 (1981)("IN ATTEMPTING TO PASS TO THE STATE COURTS THE BURDEN OF ADJUDICATING CASES IN THIS AREA, CONGRESS BETRAYS ITS HOPE AND EXPECTATION THAT THE STATE COURTS WILL DISHONOR FEDERAL PRECEDANT AND REFUSE TO RECOGNIZE THE DISFAVORED RIGHTS.").

TOTAL OF 327 FEDERAL DECISIONS.[35] FIFTY-THREE FEDERAL CASES WERE CITED IN EIGHT POST-CONVICTION OPINIONS. FIFTY-SEVEN CIVIL CASES CITED A TOTAL OF 188 FEDERAL CASES. TWENTY OF OUR OPINIONS CITED THE UNITED STATES CODE; 27 CITED THE FEDERAL RULES OF CRIMINAL OR CIVIL PROCEDURE OR THE FEDERAL RULES OF EVIDENCE. I AM CONVINCED, BUT CANNOT PROVE, THAT IOWA APPELLATE JUSTICES SPEND ALMOST AS MUCH TIME IN THE FEDERAL REPORTERS AS IN STATE REPORTERS. DEGRADING THE SENSE OF RESPONSIBILITY, EXPERIENCE AND TRAINING OF MODERN-DAY STATE JUDGES IGNORES THE ENORMOUS STRIDES MADE IN STATE COURT JUDICIAL SYSTEMS, INCLUDING BUT NOT LIMITED TO MERIT SELECTION AND TENURE, THE NATIONAL COLLEGE FOR THE JUDICIARY IN NEVADA, THE INSTITUTE FOR COURT MANAGEMENT IN COLORADO, AND THE NATIONAL CENTER FOR STATE COURTS IN THIS HISTORIC CITY. THE SUPREME COURT, MOST RECENTLY IN ALLEN V. MCCURRY[36] IN 1980 AND SUMNER V. MATA[37] IN 1981, HAS EXPRESSED ITS CONFIDENCE IN THE ABILITY OF STATE COURTS TO UPHOLD FEDERAL LAW.

I SUGGEST THE SAME TRUST SHOULD NOW BE EVIDENCED IN FEDERAL LEGISLATION DESIGNED TO ELIMINATE WASTEFUL DUPLICATION OF FEDERAL AND STATE COURT EFFORTS AND TO MESH THEIR RESPECTIVE

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[35] IN CONTRAST, THE IOWA SUPREME COURT CITED ONLY 12 FEDERAL DECISIONS IN THE 52 CRIMINAL CASES IT DECIDED IN 1927. IT WAS NOT UNTIL POWELL V. ALABAMA, 287 U.S. 45 (1932), THAT THE UNITED STATES SUPREME COURT BEGAN TO APPLY THE REQUIREMENTS OF THE FEDERAL BILL OF RIGHTS TO THE STATES.

[36] 449 U.S. 90, 105 (1980).

[37] 449 U.S. 539, 549 (1981)("STATE JUDGES AS WELL AS FEDERAL JUDGES SWEAR ALLEGIANCE TO THE CONSTITUTION OF THE UNITED STATES, AND THERE IS NO REASON TO THINK THAT BECAUSE OF THEIR FREQUENT DIFFERENCES OF OPINIONS AS TO HOW THAT DOCUMENT SHOULD BE INTERPRETED THAT ALL ARE NOT DOING THEIR MORTAL BEST TO DISCHARGE THEIR OATH OF OFFICE.").

JURISDICTIONAL GEARS, EACH ROTATING ON ITS OWN AXIS IN THE HIGHEST TRADITION OF FEDERALISM, TO GENERATE EFFICIENT JUSTICE FOR THE GREATEST NUMBER OF AMERICANS.

IN CLOSING, I CANNOT AVOID ADDING (ALTHOUGH MR. CIKINS CAUTIONED ME YOU ARE THOROUGHLY ACQUAINTED WITH THE CONCEPT) THAT ADOPTION OF THE STATE JUSTICE INSTITUTE ACT[38] WOULD FACILITATE BETTER STATE-FEDERAL JUDICIAL RELATIONS. THE STATE JUSTICE INSTITUTE WOULD HAVE AUTHORITY TO FUND RESEARCH, DEMONSTRATION AND EVALUATION PROJECTS, INFORMATION CLEARINGHOUSES, JUDICIAL EDUCATION AND TRAINING PROGRAMS, AND JOINT PROJECTS WITH OTHER AGENCIES INCLUDING THE FEDERAL JUDICIAL CENTER, THE NATIONAL INSTITUTE OF JUSTICE, AND THE BUREAU OF JUSTICE STATISTICS. SUCH ACTIVITY WOULD ENHANCE STATE COURT CASEFLOW AND STATURE, AND DEFUSE LOBBYING EFFORTS OF THOSE CLAIMING STATE COURTS ARE INADEQUATE FORUMS FOR DIVERSITY CASES AND OTHER LITIGATION NOW LOGJAMMING FEDERAL COURTS. IN TURN, THIS SHOULD MAKE IT POLITICALLY FEASIBLE TO RETURN TO THE STATES DIVERSITY JURISDICTION, AND EVENTUALLY, THE FIRST-LINE RESPONSIBILITY IN A SIZABLE SEGMENT OF THOSE CASES NOW INITIATED IN FEDERAL COURT UNDER HABEAS CORPUS AND SECTION 1983.

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[38] S. 537, 97TH CONG., 1ST SESS. (1981); H.R. 2407, 97TH CONG., 1ST SESS. (1981). THE SENATE BILL HAS BEEN APPROVED BY THE SENATE COMMITTEE ON THE JUDICIARY.

THE PROPOSAL FOR CREATION OF THE STATE JUSTICE INSTITUTE WAS INTRODUCED IN THE 96TH CONGRESS AS S. 2387 AND H.R. 6709. THE BILL WAS BROUGHT TO A VOTE AND UNANIMOUSLY PASSED BY THE SENATE ON JULY 21, 1980. IT WAS APPROVED AT THE SUBCOMMITTEE LEVEL IN THE HOUSE.

THE STATE JUSTICE INSTITUTE'S LIMITED COST SHOULD BE OVERSHADOWED BY THE SUBSTANTIAL FEDERAL SAVINGS RESULTING FROM RESTRAINTS ON THE GROWTH OF THE FEDERAL CASE LOAD. A CONCOMITANT DECREASE IN THE DEMAND FOR MORE FEDERAL JUDGESHIPS SHOULD AID PRESENT JUDGES IN MAINTAINING THAT ELITE STATUS AND SENSE OF COLLEGIALITY, FLOWING FROM THEIR LIMITED NUMBER, THAT THEY FIND SO ATTRACTIVE. FINALLY, THE STATE JUSTICE INSTITUTE COULD BECOME ONE OF THE TOOLS UTILIZED BY CONGRESS IN A CONTINUING STUDY OF THE ALLOCATION OF FEDERAL AND STATE JURISDICTION, WITH THE OBJECT OF FINE-TUNING AMERICA'S JUDICIAL SYSTEMS "TO RESTORE THE MUTUAL RESPECT AND THE BALANCED SHARING OF RESPONSIBILITY BETWEEN THE STATE AND FEDERAL COURTS WHICH OUR TRADITION AND THE CONSTITUTION ITSELF SO WISELY CONTEMPLATE."[39]

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[39] SCHNECKLOTH V. BUSTAMONTE, 412 U.S. 218, 265 (1973) (POWELL J., CONCURRING).

BE IT RESOLVED that the Judicial Council of the State of Nevada, endorses the report of the Task Force of the Conference of Chief Justices and Conference of State Court Administrators, for a State Court Improvement Act.

This council recognizes that there is a legitimate basis for financial support to state judiciaries by the Federal Government if federal funds can be used in such a way as to be consistent with the doctrine of separation of powers and federalism, and that they can provide an impetus for excellence in the operation of state courts. We also concur that federal funds should not be used for basic court services.

We specifically support the establishment of an independent federal corporation known as the State Justice Institute to accomplish these objectives.

Adoption of this resolution was fully concurred by the Judicial Council at their meeting on September 21, 1979 in Reno, Nevada.

Chief Justice John Mowbray, Chairman
Nevada Supreme Court
Capitol Complex
Carson City, Nevada 89701

The Honorable Seymore Brown
Municipal Court Judge
City of Las Vegas
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Las Vegas, Nevada 89101

The Honorable Stephen Dollinger
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The Honorable Thomas Davis
Justice of the Peace/Muni Judge
Carson City Township
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The Honorable Michael Fondi
District Judge
First Judicial District
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The Honorable John Fleckenstein
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The Honorable Llewellyn Young
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SUPREME COURT OF NEW JERSEY

ROBERT N. WILENTZ
CHIEF JUSTICE

STATE HOUSE ANNEX
TRENTON, NEW JERSEY

November 21, 1980

Honorable Peter W. Rodino, Jr.
2462 Rayburn House Office Building
Washington, D. C. 20515

Dear Pete:

Thanks for discussing H. R. 6709 -- the State Justice Institute bill with me the other day. I called you only because I believe the measure is of critical importance to the state courts, and probably to the continued strength of a federal -- state court system. All of us appreciate your sponsorship of this bill and the help you have given.

I thought it might be helpful to state in somewhat more detail my reasons for supporting this measure.

We in New Jersey's judiciary believe that the federal government has an inherent interest in the quality of justice in the states similar to its interest in health and education. State courts handle 98 per cent of the nation's judicial caseload and it is through experience with these courts that the overwhelming majority of our citizens form their opinion of the judicial system. More directly, the federal interest is based on the facts that:

1. Under the supremacy clause of the Constitution, state courts have a responsibility to enforce the Constitution and laws of the United States and Congress is increasingly relying on them to implement its enactments, i.e., the 55 mile-per-hour speed limit, clean air standards, welfare and employment standards, etc.

2. Federal courts and executive agencies are diverting increasing numbers of civil and criminal matters to state courts in order to maintain a comparatively small, high quality federal justice system.

3. Federal courts have imposed increasing procedural due process requirements on state courts in both criminal and civil cases, making them responsible for enforcement of federal rights.

Federal policy is increasing the workload of state judiciaries and effective implementation of federal law and policy requires that state judges know of it and how to apply it in a wide variety of cases. If state courts are to remain the basic judicial forum effectively handling the nation's massive caseload, and if the federal courts are to remain a relatively small system of limited jurisdiction, it is essential that state courts be strengthened and that programs for strengthening them be conducted in a manner respecting the independence and individual character of each state system.

The State Justice Institute has been carefully structured to meet these goals while bringing national resources to bear on problems common to many or all of the states. It also will provide a mechanism by which the 50 state court systems can deal effectively with the national issues that arise resulting from our dual state-federal justice system. These include complex issues arising under federal diversity of citizenship jurisdiction. Except for programs of the now moribund Law Enforcement Assistance Administration, which have been administered at the federal level without input from the judiciary, there has been no national agency providing direction and funding for the kind of programs essential to the improvement and long term survival of state judiciaries.

The State Justice Institute would provide a national resource for which there is a unique and critical need. It would bring national perspectives and resources to bear on problems long neglected because they have fallen between the cracks of a complex federal structure founded on the doctrine of separate powers at both the state and federal levels.

To solve the organizational problems posed by our system of federalism and the separation of powers, the State Justice Institute would be an independent federal agency with a majority of its Board of Directors appointed by the President from a panel of judges and state court administrators selected by the Conference of Chief Justices. A minority would be public members selected directly by the President.

The bill authorizing its establishment carries no appropriation and even when it is funded it would be a small agency with a modest budget and conduct most of its business by funding projects through the state courts themselves or existing court organizations such as the National Center for State Courts and the National Judicial College.

Court funding would be available on a project basis only; there would not be formula or block grants to the states. Funds could be used for research, demonstration, education, training, and national clearinghouse programs.

Each state's supreme court or its designated agency would be the responsible administrator of all Institute funds going to a court project in its jurisdiction.

The emphasis would be on projects to improve the administration of justice for which state funds are not available. Use of Institute funds for regular activities of the courts is specifically forbidden, i.e., this is not a financial assistance program, but a program to provide the "margin of excellence" essential to an effective system of justice and to fund necessary national programs serving the courts of all 50 states.

I am sure the foregoing is all well known to you but thought the matter was important enough to set forth my views. Thanks again.

Sincerely,



Robert N. Wilentz



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Atlanta, Georgia

October 27, 1981

The Honorable Robert Kastenmeier
United States House of Representatives
Room 2232
Dirksen (NSOB) Building
Washington D.C. 20515

Dear Representative Kastenmeier:

Let me congratulate you on your proposed legislation entitled, "State Justice Institute Act of 1981." As President of this organization, and the Deputy Commissioner of the New York State Bureau for Municipal Police, I have been following with interest the progress of your bill. The introduction of such a bill, at a time when law enforcement needs are greatest, serves to underscore your involvement and your concern for the profession. In many regards, your philosophy and principles parallel those of the National Association of State Directors of Law Enforcement Training.

This being the case, I would like to take the opportunity to offer you the services of NASDLET's resource network. In law enforcement circles, it is felt that collectivley and individually NASDLET possesses certain resources which should be of benefit to you in your efforts. First, and most important, NASDLET's member states are aware of and in-tune with the needs and problems of the law enforcement community within their respective states. It is felt that by the composition of the various Boards, Councils and Commissions which supervise the individual state activities, that NASDLET members have the "pulse" of the police communities within these areas. These Boards, Councils and Commissions are composed of representatives of the law enforcement community within the respective regions and are entrusted with the responsibility for the particular state's operation.

Secondly, NASDLET members are responsible for the certification or licensing of peace officers. Such certification and licensing are generally based upon compliance with certain pre-employment, personal qualification standards and upon successful completion of a basic training course. In many NASDLET member states, the member agency is responsible for developing and delivering the training component, certifying the instructors and institutions authorized to deliver the course, and also for funding of the course

The Honorable Robert Kastenmeier October 27, 1981

or the institution.

Specific activities which can be provided to you by NASDLET are as follows:

1. Data Collection - the organization can serve as a data collecting "broker" by gathering information upon request from the various state level organizations which comprise NASDLET and from the individual law enforcement agencies that represent its clientele.

2. Report Review and Analysis - NASDLET's Executive Board could be used as a sounding mechanism for reviewing and/or analyzing law enforcement related reports or proposals This role may be perceived as one of assistance to you and your staff.

3. Information Dissemination - NASDLET has already in place a delivery system for disseminating information on law enforcement matters. Specifically, information could be included in the Newsletter to the NASDLET membership, and, in turn, NASDLET members could disseminate this information to the law enforcement agencies in their respective states. In addition, NASDLET maintains current and mechanized mailing lists of all law enforcement agencies within the respective member states.

4. Coordination - the individual members of NASDLET or the regional chairpersons of the Boards, Councils and Commissions could serve a coordinative function by assisting in the setting up of public hearings, forums or conferences. In addition, NASDLET could submit for examination and discussion relevant questions relating to identified topics.

5. Speech Writing - NASDLET's Executive Office could provide input and drafts of speeches for law enforcement audiences.

6. People Identification - NASDLET could provide lists of individuals for assignment to various task force groups, committees or forums. NASDLET maintains contacts with subject matter experts throughout the law enforcement community.

In November, I will be in Washington D.C. to meet with representatives of various federal agencies. I will be accompanied by Gary F. Egan and Stephen J. Mandra, respectively, Executive Director and Director of Police Training for the Massachusetts Criminal Justice Training Council. We would appreciate an opportunity to meet with you or one of your staff members for a discussion of how NASDLET may actively assist you.

Sincerely yours,

William G. McMahon

William G. McMahon
President

Enclosure (1)
WGM/rk

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C. 20510

STROM THURMOND, S.C., CHAIRMAN
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QUENTIN CROMMELIN, JR., STAFF DIRECTOR

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HOWELL HEFLIN, ALA.
MAX BAUCUS, MONT.
RICHARD W. VELDE, CHIEF COUNSEL AND STAFF DIRECTOR

August 27, 1982

Honorable Robert W. Kastenmeier
U.S. House of Representatives
2232 Rayburn House Office Building
Washington, D.C. 20515

Dear Bob:

Please find enclosed a copy of a letter from C. Delbert Hosemann, Jr., Chairman of the Judicial Administration Committee of the American Bar Association, in regard to the State Justice Institute Act. I thought this letter might be of some interest to you.

Sincerely yours,

Howell

HOWELL HEFLIN

Enclosure

HH/abm

MAGRUDER, MONTGOMERY, BROCATO & HOSEMANN

ATTORNEYS AT LAW

LAUCH M. MAGRUDER, JR.
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LOUISIANA AND NEW YORK)

(601) 354-3804

1800 DEPOSIT GUARANTY PLAZA
JACKSON, MISSISSIPPI 39201

OFFICE OF SENATOR HEFLIN
1982 AUG 6 AM 9 55

August 3, 1982

Mr. C. Edward Dobbs
Suite 1200
Standard Federal Savings Building
Atlanta, Georgia 30303

Dear Ed:

Pursuant to my recent correspondence, I would like to inform you of the ballot taken by the Judicial Administration Committee on Senate Bill 537 - the State Justice Institute Act of 1981. I am enclosing a copy of the ballot for your review.

Slightly less than fifty percent (50%) of the committee members replied to the ballot. Of those replying, 81% favored the appointment of four (4) additional members to the State Justice Institute Act from a list of fourteen (14) attorneys to be furnished by the American Bar Association.

Seventy-five percent (75%) favored the allowance of provisions for in-house research capabilities for the State Justice Institute Act.

Seventy-five percent (75%) of those responding did not favor the right of each State Supreme Court to veto any grant for that state.

A total of eighty-eight percent (88%) were in favor of support of the State Justice Institute Act by the YLD Judicial Administration Committee.

I am forwarding a copy of this report to the current Chairman and Chairman-elect of the Judicial Administration Division. I am also distributing a copy of the report to the Judicial Administration coChairman. I am also forwarding a copy to Senator Heflin for his information.

It is my summation of our research and it is the Judicial Administration Committee's position that strong sentiment exist in the American Bar Association Young Lawyers Division for the appointment of at least four (4) attorneys to the proposed non-profit corporation to provide a very real and needed input from members of the legal profession. Furthermore, the Young Lawyers Division Judicial Administration Committee strongly feels that State Supreme Courts should not have veto powers over the funding request by a state or local court or its designated agency or council.

I would recommend to you, the officers and Board of the American Bar Association - Young Lawyers Division, and to its membership that a resolution be passed at the annual convention reflecting the position of your Judicial Administration Committee. Unfortunately, I will be unable to attend the annual meeting in San Francisco and I have asked Tom Miller, our co-Chairman of the Judicial Administration Division to answer any questions which may be raised concerning our position.

Best personal regards.

Sincerely,

C. Delbert Hosemann, Jr., Chairman
Judicial Administration Committee

CDHjr/cyn

Enclosure

cc: Carolyn B. Lamm
W. David Watkins
Laurance E. Baccini
David Ratcliff
Wayne E. Ferrell, Jr.
Ward Mundy
Thomas E. Miller
Kenneth L. Waggoner
Senator Heflin

OFFICE OF SENATOR HEFLIN
1982 AUG -9 AM 9:55

M E M O R A N D U M

TO: MEMBERS OF THE JUDICIAL ADMINISTRATION COMMITTEE

FROM: C. DELBERT HOSEMANN, JR.

RE: SENATE BILL 537 - State Justice Institute Act of 1981.

DATE: June 25, 1982

PLEASE TAKE FIVE MINUTES AND COMPLETE THE ATTACHED FORM IT WILL REALLY HELP US IN DETERMINING A FINAL COMMITTEE POSITION.

As you may know, Senate Bill 537 introduced by Senator Heflin (D-AL) was passed from the Senate Judiciary Committee on July 31, 1981. As of this date, the Senate has not taken affirmative action on this Senate Bill.

The Judicial Administration Division of the American Bar Association has passed a resolution recommending the American Bar Association support enactment by Congress of Senate 537. The State Justice Institute Act of 1981 is an outgrowth of the report of the Task Force on the State Court Improvement Act which was issued in May of 1979. This report was jointly issued by Committee of the Conference of Chief Justices and the Conference of State Court Administrators. American Bar Association representation participated in some of the deliberations of this committee. Senate Bill 537 would create a private non-profit

corporation supervised by an 11 member board of directors appointed by the President. There are to be 4 public members, 6 judges, and 1 court administrator. The stated purpose of the institute is to "assist the State Courts and organizations which support them to obtain the requirements . . . for a strong and effective court through a funding mechanism, consistent with the doctrines of separation of powers and federalism, and thereby to improve the quality of justice available to the American people."

Previous meetings with committee members have indicated that this noble cause certainly is one which should be supported by our committee. However, there have been raised several specific questions concerning provisions of Senate Bill 537. I have prepared a ballot which is attached to this memorandum for your vote on these specific issues. Your ballot must be returned in the self-addressed envelope by July 15, 1982 in order to be calculated in determining the official Judicial Administration Committee position on the Bill. The following is a summary of the arguments concerning the Bill's provisions:

1. The Bill does not provide for any input from attorneys participating as members of the Board of Directors of the non-profit corporation. There is no requirement that the 4 public members be attorneys. However, the 6 judges and 1 state court administrator are appointed from a list of candidates submitted by the conference of Chief Justices. The conference of Chief Justices must submit a list of at least 14 individuals including judges and state court administrators from which the

President may make an appointment. Several committee members have voiced strong opposition to these criteria for selecting the board of directors. They argue attorneys who participate in the judicial system on every level would add an additional perspective not necessarily offered by judges or public members unfamiliar with the daily workings of the court system.

2. Jim Wright has raised the questions proposed as No. 2 and 3 on your ballot. His feeling is that the legislation does not envision the institute having significant in house research capabilities. He believes existence of a more substantial research staff could be more cost efficient in providing supporting coordination for many different organizations. Also, he has raised the question that the State Supreme Court has a right to veto any grant application. This is provided in Section 6(b)(4) which specifically states "each application for funding by a state or local court shall be approved by the state's supreme court, or its designated agency or counsel, which shall receive administer and be accountable for all funds awarded by the institute to such courts." This could lead to a veto of a grant to an organization which is unpopular with members of the supreme court and does not assure that the separation of powers and judicial accountability.

Finally, we have asked your opinion concerning whether or not the bill should be supported by the Judicial Administration Committee at all. Please do not forget the July 15th deadline.

Should you have any questions or desire any copies of any bills or the ABA Judicial Administration Report, please do not hesitate to contact me or in the event of my absence, my secretary, Gail Butler. Thank you very much for your help and I will keep everyone informed on how matters progress.

JUDICIAL ADMINISTRATION BALLOT

SENATE BILL 537

STATE JUSTICE INSTITUTE ACT OF 1981

1. I do _____, I do not _____ favor the appointment of 4 additional members to the State Justice Institute from a list of 14 attorneys furnished by the American Bar Association. This will increase the members of the board of directors to 15.

2. I do _____, I do not _____ favor the allowance of provisions for in-house research capabilities for the State Justice Institute.

3. I do _____, I do not _____ favor the right of each State Supreme Court to veto any grant for that state.

4. I do _____, I do not _____ favor the support of the State Justice Institute Act of 1981 by the YLD Judicial Administration Committee.

This ballot must be returned to C. Delbert Hosemann, Jr., Suite 1800 Deposit Guaranty Plaza, Jackson, Mississippi 39201 by July 15, 1982.

APPENDIX II

MATERIALS PROVIDED BY THE U.S. DEPARTMENT OF JUSTICE

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

JUL 29 1981

Honorable Peter W. Rodino
Chairman
Committee on the Judiciary
House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Justice on H.R. 2407, the State Justice Institute Act. For the reasons set out in this letter, the Administration opposes this legislation.

The concept of the State Justice Institute was initially advanced in the report on the Conference of Chief Justices and Conference of State Court Administrators Task Force for a State Justice System Improvement Act. 1/ The Institute was conceived of as a more satisfactory means of managing federal funding of state court improvement projects, and of providing a secure source of continued financial support for national organizations concerned with state court improvement, such as the National Center for State Courts. 2/ The existing system of funding, administered primarily by LEAA, was thought to be deficient on several grounds. The setting of policy by a federal executive agency with respect to state court improvement projects was seen to raise problems of federalism and of separation of powers. 3/ The inclusion of state

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1/ The report is reprinted in State Justice Institute Act of 1979: Hearings on S. 2387 Before the Subcomm. on Jurisprudence and Governmental Relations of the Senate Comm. on the Judiciary, 96th Cong., 1st & 2d Sess., at 135-201 (1980) [hereafter cited as "Senate Hearings"].

2/ See S. Rep. No. 843, 96th Cong., 2d Sess. 26-28 (1980) [hereafter cited as "Senate Committee Report"]; Senate Hearings, supra note 1, at 64-66, 77-82, 173-74.

3/ See Senate Committee Report, supra note 2, at 22-23; Senate Hearings, supra note 1, at 10-11, 170-172.

court funding as one aspect of a broader program concerned with all types of law enforcement activities placed the state courts in the position of competing with state executive agencies for limited federal funds, and failed to give recognition to the distinctive and independent character of the state judiciaries. 4/ The law enforcement mandate of LEAA imposed constraints on the use of funds for projects concerned with the civil aspects of state court systems, 5/ and the uncertainty that existed over the general fate of LEAA raised doubts that funding of state court projects would continue without special provision. 6/

The solution proposed was to create a private non-profit corporation, the State Justice Institute, which would be governed by a body composed primarily of state court personnel. The Institute would receive a separate appropriation from the federal government and, within the context of the broad guiding principles set out in the implementing legislation, would have discretion to allocate funds to the state courts and to organizations concerned with state court improvement. The proposal for creation of the State Justice Institute was introduced in the 96th Congress as S. 2387 and H.R. 6709. S. 2387 was the subject of hearings on Oct. 18 and Nov. 19, 1979, and on March 19, 1980, before the Subcommittee on Jurisprudence and Governmental Relations of the Senate Judiciary Committee, under the direction of Senator Heflin. 7/ The bill was brought to a vote on July 21, 1980, and passed unanimously by the Senate. 8/

4/ See Senate Committee Report, supra note 2, at 24; Senate Hearings, supra note 1, at 16-17.

5/ See Senate Committee Report, supra note 2, at 24-25; Senate Hearings, supra note 1, at 26-27, 74.

6/ See Senate Committee Report, supra note 2, at 25.

7/ See Senate Hearings, supra note 1.

8/ The Senate Committee Report accompanying the bill is cited in note 2 supra. The report contained a statement by Senator Thurmond indicating that he would have preferred that the states bear all the financial burden for maintaining and improving their judicial systems, but that he had decided not to oppose the legislation, subject to two amendments he had proposed which were incorporated into the version of the bill approved by the full Judiciary Committee. See Senate Committee Report, supra note 2, at 33-35.

The current version of the proposal, on which we have been asked to comment, is H.R. 2407. 9/ The bill would create a State Justice Institute that would direct a national program of assistance for state court improvement by providing funds to state courts and other appropriate organizations. The Institute would be headed by a Board of Directors whose voting members would be six judges, one state court administrator, and four public members. The President would appoint the Board members with the advice and consent of the Senate. The President's choices in nominating the six judges and the state court administrator for membership on the Board would be limited to a list of at least fourteen candidates submitted by the Conference of Chief Justices.

The provisions of the bill relating to grants and contracts indicate that Institute funds are to be used primarily for research, demonstrations, innovative projects, and other justice improvement measures, and are not to be employed to support basic court services. Matching funds equal to 25% of the total cost of a grant to, or contract with, a state or local judicial system must normally be provided by the recipient. The Institute is generally barred from involvement in litigation and political activities. The funding authorized for the Institute is $20,000,000 in 1982, $30,000,000 in 1983, and $40,000,000 in 1984.

The goals that the Institute proposal is designed to further are obviously important, and the specific arrangements set out in H.R. 2407 seem generally well designed to advance these objectives. However, we have concluded that we cannot support this legislation. The reasons for this conclusion are largely budgetary. The proposal does not bear any of the most obvious earmarks of a new funding project that should be advanced in a time of austerity. It does not relate specifically to an area that has been made the responsibility of the federal government by the Constitution or federal law; it does not relate specifically to a stated priority of the Administration or the Department of Justice; and it does not address a problem of national scope that the states are inherently incapable of dealing with on their own. Indeed, it is far from clear to us that the state courts are the element of state justice systems most urgently in need of additional funding. These three points will be discussed with greater particularity in the remainder of this letter.

(i) Federal Interest and Responsibility. The proponents of the State Justice Institute have argued that the propriety and desirability of federal funding for state court improvement projects follow from the fact that the state courts are, in a sense,

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9/ The current Senate counterpart is S. 537.

federal courts. The state courts, under the Supremacy Clause, are required to enforce federal law, and a substantial portion of their time and resources is taken up in doing so. The state courts are also required to comply with the constitutional requirements of due process. The costs of discharging both of these responsibilities have increased greatly in recent decades as a result of the decisions of Congress in expanding the scope of federal law and the decisions of the Supreme Court in interpreting the federal Constitution. It is argued that some level of federal funding for state court activities is required as a matter of fairness, or is at least appropriate, given the general federal interest in the adequate administration of federal law, and the burdens which the state courts bear in discharging their federal responsibilities. 10/

These considerations are not without force. However, certain countervailing considerations may also be noted. In forming the United States the individual states made the judgment that the general benefits of national government would outweigh the resulting costs to them. The same judgment was made subsequently by the remaining states in joining the union. The quid pro quo for the burdens resulting from the responsibilities of statehood--including enforcement and compliance with federal law--need not take the form of reimbursement to the states for the specific expenditures incurred in discharging these responsibilities, but may be found in the general functions which the federal government carries out to the benefit of the states, such as national defense and the regulation of interstate commerce.

It may also be noted that the federal courts bear certain burdens which would otherwise be borne by the state courts, though no reimbursement is expected from the states in return for such activities. For example, when jurisdiction is based on diversity of citizenship, the federal courts hear state law cases which would otherwise have to be handled by the state courts. Essentially the same point can be made in relation to the full range of subjects which are currently regulated by federal laws whose enforcement is partially or wholly committed to the federal courts. In the absence of assumption of responsibility by the federal government for regulation and enforcement in these areas--for example, patents, bankruptcy and antitrust--the states would need to undertake their own regulation, and the resulting burden of enforcement would fall on the state courts.

10/ See Senate Committee Report, supra note 2, at 18-22; Senate Hearings, supra note 1, at 7-8, 111-13, 144-61.

Finally, while the federal interest in the adequate administration of federal law does provide some support for the propriety or desirability of federal assistance to state courts in enforcing and complying with federal law, the State Justice Institute Act is not especially designed to further this interest. The Act does not require that funds disbursed by the Institute be used exclusively or primarily to assist state courts in enforcing or complying with federal law, but authorizes support of projects relating to nearly all aspects of state court improvement.

(ii) Relationship to Administration Priorities. The Administration has identified violent crime as an area of priority concern. This priority has been reflected in the creation of the Attorney General's Task Force on Violent Crime. The State Justice Institute proposal does have some general relationship to this priority, since many of the projects funded by the Institute would presumably contribute, directly or indirectly, to improvement of the ability of the state courts to deal with violent crime, and crime in general. However, the legislation does not create any presumption in favor of the allocation of Institute funds to projects concerned with violent crime, or any other Administration priority. By design, decisions concerning grants and contracts are left to the Institute's Board of Directors which would operate free of federal control.

The Violent Crime Task Force is reportedly considering recommending the resumption of LEAA-type funding of certain projects on a more limited and controlled scale. If such a recommendation is forthcoming, the criticisms of the past system of assistance to state court projects through LEAA funding that have accompanied the State Justice Institute proposal should be taken into account in deciding on the mechanism for allocating funds to judicial projects, if such projects are to be funded. However, this question will have to be considered within the context of the general recommendations of the Task Force concerning federal funding of state and local justice improvement projects.

(iii) State Competence. The principal functions of the State Justice Institute would be to make decisions concerning the disbursement of federal funds to state court improvement efforts, and to handle the award and monitoring of such grants and contracts. At least in theory, the same type of Institute might be created by all the states, or a group of interested states, with funds contributed by the subscribing states substituting for the federal money authorized in the current legislative proposals. Supporters of the legislation have responded to this objection by pointing to the uneven commitment of the various states to provision of

sufficient support for the operation and improvement of their own court systems, 11/ and the difficulty of securing state funding for national organizations--such as the National Center for State Courts--which provide important services to the state judiciaries. Problems of this sort may make a state-based alternative less effective than a federally supported State Justice Institute, or perhaps simply unfeasible. 12/ However, the proponents of the Institute have only claimed that the states have been unwilling to provide adequate overall support for state court improvement efforts--not that they are incapable of doing so--and a state-based system would offer certain advantages over the federal funding approach. In particular, a state-based system would remove all elements of federal influence and control from decisions concerning the allocation of funds to state court systems, and would allow each state to decide whether the benefits to it from participation in the system justify the cost of subscription or membership.

In sum, the Administration opposes H.R. 2407 and equivalent proposals for the creation of a federally funded State Justice Institute. 13/

11/ See Senate Hearings, supra note 1, at 47.

12/ A state-based system would also face the practical problem of allocating costs among the subscribing states in a mutually acceptable manner. See Senate Hearings, supra note 1, at 112.

13/ There is a specific feature of H.R. 2407 which merits separate comment. As noted earlier, the President's choices for seven of the members of the Board of Directors of the State Justice Institute would be limited to a list of candidates submitted by the Conference of Chief Justices. This provision raises serious constitutional doubts. We recognize that Congress can impose qualifications for the persons whom the President seeks to appoint, and define the general class of persons from which the President may make an appointment, including the requirement that appointees to certain offices must be selected from lists submitted by the Conference of Chief Justices. See Myers v. United States, 252 U.S. 52, 265-74 (1926) (Brandeis, J., dissenting). On the other hand, the power of Congress to impose qualifications for appointments does not mean that the President can be compelled to appoint persons whom he considers unsuitable for the position. In other words, the qualification provision of the type here involved means that the appointee must be acceptable to the Conference of Chief Justices as well as to the President. A list submitted to the

(Continued)

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

(Signed) Robert A. McConnell

Robert A. McConnell
Assistant Attorney General

13/ (Continued) President therefore must contain a sufficient number of candidates to afford the President "ample room of choice." 13 Op. A.G. 516, 525 (1871); see also 29 Op. A.G. 254, 256 (1911); 41 Op. A.G. 291, 292 (1956). A provision for a list containing "at least" fourteen names for seven appointments, i.e., two for each vacancy, does not in our view comply with that requirement, unless it is assumed implicitly, in order to save the constitutionality of the provision, that the President has the right to reject a list which does not contain any acceptable nominees. See § 4 (b)(2) of the Pacific Northwest Electric Power Planning and Conservation Act, 94 Stat. 2702. This section provides explicitly that the appointing authority, the Secretary of Energy, "may decline to appoint for any reason any of a Governor's nominees for a position and shall so notify the Governor. The Governor may thereafter make successive nominations within forty-five days of receipt of such notice until nominees acceptable to the Secretary are appointed for each position."

Department of Justice

STATEMENT

OF

JONATHAN C. ROSE
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY

BEFORE

THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES
AND THE ADMINISTRATION OF JUSTICE
U.S. HOUSE OF REPRESENTATIVES

CONCERNING

H.R. 2407, A BILL TO CREATE
A STATE JUSTICE INSTITUTE

ON

SEPTEMBER 15, 1982

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to advise this Subcommittee of the Administration's views concerning H.R. 2407, a bill that would create a State Justice Institute.

The concept of the State Justice Institute was initially advanced in the Report of the Conference of Chief Justices and Conference of State Court Administrators Task Force for a State Justice System Improvement Act. 1/ The principal function of the Institute would be to administer a funding program for state court improvement. The program would involve grants to particular state and local court systems for innovative and demonstration projects, and provision of financial support to the national support institutions of the state judiciaries, including the National Center for State Courts. 2/ The Institute would receive federal funds for purposes of carrying out this program. The Institute would also carry out other functions, including serving as a liaison between the federal and state judiciaries, making

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1/ The report is reprinted in State Justice Institute Act of 1979: Hearings on S. 2387 Before the Subcomm. on Jurisprudence and Governmental Relations of the Senate Comm. on the Judiciary, 96th Cong., 1st & 2d Sess., at 135-201 (1980).

2/ The importance of the activities of the National Center for State Courts was recently re-emphasized by the Chief Justice in his 1981 Year-End Report on the Judiciary. See id. at 23-24. We concur in his assessment of the importance of the work of the National Center for the nation's judicial systems.

recommendations concerning the proper allocation of responsibilities between the state and federal courts, promoting recognition of the importance of the doctrine of separation of powers, and promoting judicial education. 3/

In response to a request of Chairman Rodino, the Administration transmitted a letter to Congress in July of 1981 stating our views regarding the State Justice Institute proposal. 4/ Our response noted that the objectives of the proposal are obviously important, and that difficulties could arise in connection with efforts to achieve them by other means. However, we concluded that the proposal should not be adopted for budgetary reasons and certain other reasons. For example, while the President would appoint the Board of Directors of the Institute, it would not be subject to the control of the federal executive. It would accordingly be free to transmit its funding requests directly to Congress, with the role of the Office of Management and Budget limited to review and comment at the time of transmittal.

At this point we must reiterate our opposition to enactment of the State Justice Institute proposal. As before, our objections are largely budgetary in nature. In the remainder of my

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3/ See H.R. 2407 § 3(b).

4/ See Letter of Assistant Attorney General Robert A. McConnell to Honorable Peter W. Rodino, Chairman, House Committee on the Judiciary (July 29, 1981).

statement I will explain the grounds for our opposition and address the relationship of the State Justice Institute proposal to certain court improvement measures supported by the Administration.

I. Grounds of Opposition

The proponents of the State Justice Institute have advanced a number of arguments in support of the desirability and propriety of providing federal funds for its operation. They have noted that there is a degree of direct federal interest in the fairness and efficiency of state proceedings, since the state courts play a role in the administration of federal law. The specifically federal activities of the state courts include adjudicating federal causes of action in a variety of areas in which Congress has given the state courts concurrent jurisdiction, entertaining federal defenses that are raised in any type of civil action, and protecting the federal rights of defendants in state criminal proceedings. The burden of these responsibilities on the state courts has grown in recent years as a result of the decisions of Congress in expanding the scope of federal law and the decisions of the Supreme Court in interpreting the federal Constitution. The Institute's proponents have also suggested that the Institute's activities would facilitate future adjustments in the division of jurisdiction between the state and federal courts, thereby relieving the overburdened dockets of the federal courts and achieving an allocation of state and federal responsibilities that better serves the interests of federalism.

We are not insensitive to the force of these considerations, but do not believe that they can be accorded conclusive weight. The acute financial condition of the federal government, and the need to exercise restraint even in relation to proportionately limited budgetary items, require no comment. The appropriations authorized by H.R. 2407 for the first three years of the Institute's operation are $20,000,000, $30,000,000, and $40,000,000. An expenditure approaching $100,000,000 over a three year period is certainly substantial. Moreover, we are concerned over the ascending scale of the proposed appropriations, suggesting an ever-increasing federal contribution from year to year. Federal funding programs, once underway, have all too often grown far beyond initial expectations.

It should also be noted that we have limited federal assistance to state justice systems in other areas. Police, prosecutors and correctional institutions at the state and local level, as well as the state courts, are presently soliciting renewed federal financial support. The arguments that might be advanced by these other interests are similar to those of the courts -- police and prosecutors have also incurred additional burdens and expenditures as a result of the expansion of the federal rights of suspects and defendants, and prison systems in many states have been required to undertake major reforms as the result of direct federal intervention in suits challenging prison conditions. In terms of need, it is not apparent that the other elements of state and local justice systems are less deserving than the courts, or that

denial of their requests could be justified if those of the courts were granted.

II. Relationship to Diversity Jurisdiction and Habeas Corpus Proposals

The solicitation of the Administration's views for these hearings included a specific request for discussion of the relationship of the State Justice Institute proposal to other judicial improvement measures that the Administration supports, including the abolition of diversity jurisdiction and habeas corpus reform. The diversity proposal is H.R. 6816, which was recently voted out by the full Judiciary Committee. The Administration's habeas corpus reform proposals have been introduced by Representative Lungren as H.R. 6050, which is presently before this Subcommittee.

There is an obvious relationship between the State Justice Institute proposal and the proposal to abolish diversity jurisdiction. The elimination of diversity jurisdiction would bring about a very large reduction in the workload of the federal courts and a substantial reduction in the expenditures required for their operation, but would do so at the expense of a slight increase in the overall workload of the state judiciaries. We would accordingly give further thought to our position on the State Justice Institute proposal if the diversity proposal were adopted.

There is otherwise no direct relationship between H.R. 2407 and these other proposals. The habeas corpus reform proposals of H.R. 6050 would not increase the workload of the state judiciaries, but would reduce litigational burdens resulting from collateral proceedings at both the state and federal levels. We are aware that much of the opposition to the diversity jurisdiction and habeas corpus proposals has reflected apprehension by some members of Congress concerning possible bias or other deficiencies in the state courts. We do not, however, believe that such concerns are well-founded. The state courts are competent to decide civil disputes between inhabitants of different states, and to protect the rights of state criminal defendants under a more limited system of federal review, without the contribution of federal funds contemplated by the State Justice Institute proposal.

III. Conclusion

In sum, the Administration continues to oppose enactment of the State Justice Institute proposal of H.R. 2407. We do not believe that a new funding program of this type can be justified. 5/

5/ In a concluding footnote in our initial response letter, we stated a particular objection to the requirement that the President appoint seven members of the Board of Directors from a list of at least fourteen candidates submitted by the Conference of Chief Justices. We questioned the constitutionality of such a mode of selection on the basis of Constitution, Art. II, Section 2, Cl. 2, which regulates the manner of appointment of "officers of the United States." It is dubious, however, that the members of the Board of Directors would be "officers of the United States" in the pertinent sense in light of various provisions of the proposed Act, including an express statement in section 4(e) that the members of the Board shall not, by reason of their membership, be considered officers or employees of the United States. Independently of any question of constitutional constraint, we find objectionable as a basic matter of policy a selection procedure which narrowly constrains the President's discretion and is open to the possibility that he will be required to appoint a person he regards as inappropriate or unfit for the position. Provisions calling for the President to appoint individuals from a list of submitted names should provide that the President can require the submission of additional names.

APPENDIX III

LAW REVIEW ARTICLES

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STATE CONSTITUTIONS AND THE PROTECTION OF INDIVIDUAL RIGHTS

(By William J. Brennan, Jr.*)

During the 1960's, as the Supreme Court expanded the measure of federal protection for individual rights, there was little need for litigants to rest their claims, or judges their decisions, on state constitutional grounds. In this Article, Mr. Justice Brennan argues that the trend of recent Supreme Court civil liberties decisions should prompt a reappraisal of that strategy. He particularly notes the numerous state courts which have already extended to their citizens, via state constitutions, greater protections than the Supreme Court has held are applicable under the federal Bill of Rights. Finally, he discusses, and applauds, the implications of this new state court activism for the structure of American federalism.

Reaching the biblical summit of three score and ten seems to be the occasion—or the excuse—for looking back. Forty-eight years ago I entered law school and forty-four years ago was admitted to the New Jersey Bar. In those days of innocence, the preoccupation of the profession, bench and bar, was with questions usually answered by application of state common law principles or state statutes. Any necessity to consult federal law was at best episodic. But those were also the grim days of the Depression, and its cure was dramatically to change the face of American law. The year 1933 witnessed the birth of a plethora of new federal laws and new federal agencies developing and enforcing those laws; ones that were to affect profoundly the daily lives of every person in the nation.

In my days at law school, Felix Frankfurter had taught administrative law in terms of the operations of the Interstate Commerce Commission—because that was the only major federal regulatory agency then existing. But then came in rapid succession the National Labor Relations Board, the Securities and Exchange Commission, the Civil Aeronautics Board, the Federal Communications Commission, the Federal Power Commission and a host of others. In addition, laws such as the Fair Labor Standards Act, administered by the Labor Department, also began to require practitioners to master new, and federal, fields of law in order to serve their clients. And, of course, those laws and agencies did not disappear with the end of the Depression—rather a procession of still more federal agencies and federal laws has followed. Only recently, for example, Congress created the Environmental Protection Agency and the Equal Employment Opportunity Commission—new major sources of concern for today's clients keeping lawyers everywhere very federal law-minded.

In the beginning of this legal revolution, however, federal law was not a major concern of state judges. Judicial involvement with decisions of the new federal agencies was the business of federal courts. I have tried to recall how often in my years on the New Jersey courts from 1949 to 1956 issues of federal laws were relevant to cases tried before me as a trial judge in Paterson and Jersey City, or were addressed by me on the appellate division or in the supreme court. I can remember only three cases out of the hundreds with which I was involved over those years that turned on the resolution of a federal question, and in all three that question was statutory. Two were cases tried before me in Jersey City, one a railroad worker's suit under the Federal Employers Liability Act and the other a case that implicated the Immigration and Naturalization Act. Undoubtedly the reason they are still fresh in my memory is that I had frantically to dig up the federal statutes and federal cases that bore on their disposition because both presented federal questions of first impression in my experience. The third instance was a labor injunction case in which I first circulated

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an opinion to my brethren on the supreme court sustaining a chancery injunction against peaceful picketing, only to have to withdraw the opinion and set aside the injunction when the United States Supreme Court held that federal law preempted state regulation of such picketing.

In recent years, however, another variety of federal law—that fundamental law protecting all of us from the use of governmental powers in ways inconsistent with American conceptions of human liberty—has dramatically altered the grist of the state courts. Over the past two decades, decisions of the Supreme Court of the United States have returned to the funadmental promises wrought by the blood of those who fought our War between the States, promises which were thereafter embodied in our fourteenth amendment—that the citizens of all our states are also and no less citizens of our United States, that this birthright guarantees our federal constitutional liberties against encroachment by governmental action at any level of our federal system, and that each of us is entitled to due process of law and the equal protection of the laws from our state governments no less than from our national one. Although courts do not today substitute their personal economic beliefs for the judgments of our democratically elected legislatures [1] Supreme Court decisions under the fourteenth amendment have significantly affected virtually every other area, civil and criminal, of state action. And while these decisions have been accompanied by the enforcement of federal rights by federal courts, they have significantly altered the work of state court judges as well. This is both necessary and desirable under our federal system—state courts no less than federal are and ought to be the guardians of our liberties.

But the point I want to stress here is that state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.

* * * * * * *

The decisions of the Supreme Court enforcing the protections of the fourteenth amendment generally fall into one of three categories. The first concerns enforcement of the federal guarantee of equal protection of the laws. While the best known, of course are *Brown* v. *Board of Education* [2] and *Baker* v. *Carr*, [3] perhaps even more the concern of state bench bar in terms of state court litigation are decisions invalidating state legislative classifications that impermissibly impinge on the exercise of fundamental rights, such as the rights to vote,[4] to travel interstate,[5] or to bear or beget a child.[6] Equally important are decisions that require exacting judicial scrutiny of classifications that operate to the peculiar disadvantage of politically powerless groups whose members have historically been subjected to purposeful discrimination—racial minorities [7] and aliens [8] are two examples.

The second category of decisions concerns the fourteenth amendment's guarantee against the deprivation of life, liberty or property where that deprivation is without due process of law. The root requirement of due process is that, except for some extraordinary situations, an individual be given an opportunity for a hearing before he is deprived of any significant "liberty" or "property" interest. Our decisions enforcing the guarantee of the due process clause have elaborated the essence of that "liberty" and "property" in light of conditions existing in contemporary society. For example, "property" has come to embrace such crucial expectations as a driver's license [9] and the statutory entitlement to minimal economic support, in the form of welfare, of those who by accident, birth or circum-

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[1] *Ferguson* v. *Skrupa*, 372 U.S. 720, 730 (1963).
[2] 347 U.S. 483 (1954) (invalidating state laws requiring public schools to be racially segregated).
[3] 369 U.S. 186 (1962) (invalidating state laws diluting individual voting rights by legislative malapportionments). See also *Reynolds* v. *Sims*, 377 U.S. 533 (1964).
[4] *Harper* v. *Virginia State Bd.*, 383 U.S. 663 (1966).
[5] *Shapiro* v. *Thompson*, 394 U.S. 618 (1969).
[6] *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).
[7] *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954).
[8] *Sugarman* v. *Dougall*, 413 U.S. 634 (1973); *Graham* v. *Richardson*, 403 U.S. 365 (1971).
[9] *Bell* v. *Burson*, 402 U.S. 535 (1971).

stance find themselves without the means of subsistence.[10] The due process safeguard against arbitrary deprivation of these entitlements, as well as of more traditional forms of property, such as a workingman's wages [11] and his continued possession and use of goods purchased under conditional sales contracts,[12] has been recognized as mandating prior notice and the opportunity to be heard. At the same time, conceptions of "liberty" have come to recognize the undeniable proposition that prisoners and parolees retain some vestiges of human dignity, so that prison regulations and parole procedures must provide some form of notice and hearing prior to confinement in solitary [13] or the revocation of parole.[14] Moreover, the concepts of liberty and property have combined to recognizing that under modern conditions tenured public employees may not have their reasonable expectation of continued employment,[15] and school children their right to a public education,[16] revoked without notice and opportunity to be heard.

I suppose, however, that it is mostly the third category of decisions by the United States Supreme Court during the last twenty years—those enforcing the specific guarantees of the Bill of Rights against encroachment by state action—that has required the special consideration of state judges, particularly as those decisions affect the administration of the criminal justice system. After his retirement, Chief Justice Earl Warren was asked what he regarded to be the decision during his tenure that would have the greatest consequence for all Americans. His choice was *Baker v. Carr*, because he believed that if each of us has an equal vote, we are equally armed with the indispensable means to make our views felt. I feel at least as good a case can be made that the series of decisions binding the states to almost all of the restraiuts of the Bill of Rights will be even more significant in preserving and furthering the ideals we have fashioned for our society.

Before the fourteenth amendment was added to the Constitution, the Supreme Court held that the Bill of Rights did not restrict state, but only federal, action.[17] In the decades between 1868, when the fourteenth amendment was adopted, and 1897, the Court decided in case after case that the amendment did not apply various specific restraints in the Bill of Rights to state action.[18] The breakthrough came in 1897 when the prohibition against taking private property for public use without payment of just compensation was held embodied in the fourteenth amendment's proscription, "nor shall any state deprive any person of . . . property, without due process of law." [19] But extension of the rest of the specific restraints was slow in coming. It was 1925 before it was suggested that perhaps the restraints of the first amendmept applied to state action.[20] Then in 1949 the fourth amendment's prohibition of unreasonable searches and seizures was extended,[21] but the extension was made virtually meaningless because the states were left free to decide for themselves whether any effective means of enforcing the guarantee was to be made available. It was not until 1961 that the Court applied the exclusionary rule to state proceedings.[22]

It was in the years from 1962 to 1969 that the face of the law changed. Those years witnessed the extension to the states of nine of the specifics of the Bill of Rights; decisions which have had a profound impact on American life, requiring the deep involvement of state courts in the application of federal law. The eighth amendment's prohibition of cruel and unusual punishment was applied to state action in 1962,[23] and is the guarantee under which the death penalty as then

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[10] *Goldberg* v. Kelly, 397 U.S. 254 (1970).
[11] Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).
[12] Fuentes v. Shevin, 407 U.S. 67 (1972).
[13] Wolff v. McDonnell, 418 U.S. 539 (1974).
[14] Morrissey v. Brewer, 408 U.S. 471 (1972).
[15] Perry v. Sindermann, 408 U.S. 593 (1972).
[16] Goss v. Lopez, 419 U.S. 556 (1975).
[17] Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).
[18] *See* O'Neil v. Vermont, 144 U.S. 323, 332 (1892); McElvaine v. Brush 142 U.S. 155, 158–59 (1891); *In re* Kemmler, 136 U.S. 436, 446 (1890); Presser v. Illinois, 116 U.S. 252, 263–68 (1886); Hurtado v. California, 110 U.S. 516 (1884); United States v. Cruikshank, 92 U.S. 542, 552–56 (1875); Walker v. Sauvinet, 92 U.S. 90 (1875).
[19] Chicago B. & Q.R.R. v. Chicago, 166 U.S. 226, 241 (1897).
[20] *Compare* Gitlow v. New York, 268 U.S. 652 (1925), *with* Prudential Ins. Co. v. Cheek, 259 U.S. 530, 543 (1922).
[21] *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949).
[22] Mapp v. Ohio, 367 U.S. 643 (1961).
[23] Robinson v. California, 370 U.S. 660 (1962).

administered was struck down in 1972.[24] The provision of the sixth amendment that in all prosecutions the accused shall have the assistance of counsel was applied in 1963, and in consequence counsel must be provided in every courtroom of every state of this land to secure the rights of those accused of crime.[25] In 1964, the fifth amendment privilege against compulsory self-incrimination was extended.[26] And after decades of police coercion, by means ranging from torture to trickery, the privilege against self-incrimination became the basis of *Miranda v. Arizona*, requiring police to give warnings to a suspect before custodial interrogation.[27]

The year 1965 saw the extension of the sixth amendment right of an accused to be confronted by the witnesses against him,[28] in 1967 three more guarantees of the sixth amendment—the right to a speedy and public trial, the right to a trial by an impartial jury, and the right to have compulsory process for obtaining witnesses—were extended.[29] In 1969 the double jeopardy clause of the fifth amendment was applied.[30] Moreover, the decisions barring state-required prayers in public schools,[31] limiting the availability of state libel laws to public officials and public figures,[32] and confirming that a right of association is implicitly protected,[33] are significant restraints upon state action that resulted from the extension of the specifics of the first amendment.

These decisions over the past two decades gave full effect to the principle of *Boyd v. United States*,[34] the case Mr. Justice Brandeis hailed as "a case that will be remembered so long as civil liberty lives in the United States." [35] That principle, stated by Mr. Justice Bradley, was ". . . constitutional provisions for the security of person and property should be liberally construed . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." [36]

The thread of this series of Bill of Rights holdings reflects a conclusion—arrived at only after a long series of decisions grappling with the pros and cons of the question—that there exists in modern America the necessity for protecting all of us from arbitrary action by governments more powerful and more pervasive than any in our ancestors' time. Only if the amendments are construed to preserve their fundamental policies will they ensure the maintenance of our constitutional structure of government for a free society. For the genius of our Constitution resides not in any static meaning that it had in a world that is dead and gone, but in the adaptability of its great principles to cope with the problems of a developing America. A principle to be vital must be of wider application than the mischief that gave it birth. Constitutions are not ephemeral documents, designed to meet passing occasions. The future is their care, and therefore, in their application, our contemplation cannot be only of what has been but of what may be.

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Of late, however, more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased. This is surely an important and highly significant development for our constitutional jurisprudence and for our concept of federalism. I suppose it was only natural that when during the 1960's our rights and liberties were in the process of becoming increasingly federalized, state courts saw no reason to consider what protections, if any, were secured by state constitutions. It is not easy to pinpoint why state courts are now beginning to emphasize the protections

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[24] Furman v. Georgia, 408 U.S. 238 (1972). *But see* Gregg v. Georgia, 96 S. Ct. 2909 (1976); Proffitt v. Florida, 96 S. Ct. 2960 (1976); Jurek v. Texas, 96 S. Ct. 2950 (1976).
[25] Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972).
[26] Malloy v. Hogan, 378 U.S. 1 (1964).
[27] Miranda v. Arizona, 384 U.S. 436 (1966).
[28] Pointer v. Texas, 380 U.S. 400 (1965).
[29] Klopfer v. North Carolina, 386 U.S. 213 (1967); Parker v. Gladden, 385 U.S. 363 (1966); Washington v. Texas, 388 U.S. 14 (1967).
[30] Benton v. Maryland, 395 U.S. 784 (1969).
[31] School Dist. v. Schempp, 374 U.S. 203 (1963).
[32] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
[33] NAACP v. Alabama, 377 U.S. 288 (1964).
[34] 116 U.S. 616 (1886).
[35] Olmstead v. United States, 277 U.S. 438, 474 (1928) (dissenting opinion).
[36] 116 U.S. at 635.

of their states' own bills of rights. It may not be wide of the mark, however, to suppose that these state courts discern, and disagree with, a trend in recent opinions of the United States Supreme Court to pull back from, or at least suspend for the time being, the enforcement of the *Boyd* principle with respect to application of the federal Bill of Rights and the restraints of the due process and equal protection clauses of the fourteenth amendment.

Under the equal protection clause, for example, the Court has found permissible laws that accord lesser protection to over half of the members of our society due to their susceptibility to the medical condition of pregnancy,[37] as well as laws that impose special burdens on those of our citizens who are of illegitimate birth.[38] The Court has also found uncompelling the claims of those barred from judicial forums due to their inability to pay access fees,[39] and has further handicapped the indigent by limiting their right to free trial transcripts when challenging the legality of their imprisonment.[40]

Under the due process clause, the Supreme Court has found no liberty interest in the reputation of an individual—never tried and never convicted—who is publicly branded as a criminal by the police without benefit of notice, let alone a hearing.[41] The Court has recently indicated that tenured public employees might not be entitled to any more process before deprivation of their employment than the government sees fit to give them.[42] It has approved the termination of payments to disabled individuals who are completely dependent upon those payments, prior to an oral hearing, a form of hearing statistically shown to result in a huge rate of reversals of preliminary administrative determinations.[43] And it has veered from its promise to recognize that prisoners, too, have liberty interests that cannot be ignored.[44]

The same trend is repeated in the category of the specific guarantees of the Bill of Rights. The Court has found the first amendment insufficiently flexible to guarantee access to essential public forums when in our evolving society those traditional forums are under private ownership in the form of suburban shopping centers,[45] and at the same time has found the amendment's prohibitions insufficient to invalidate a system of restrictions on motion picture theaters based upon the content of their presentations.[46] It has found that the warrant requirement plainly appearing on the face of the fourth amendment does not require the police to obtain a warrant before arrest, however easy it might have been to get an arrest warrant.[47] It has declined to read the fourth amendment to prohibit searches of an individual by police officers following a stop for a traffic violation, although there exists no probable cause to believe the individual has committed any other legal infraction.[48] The Court has held permissible police searches

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[37] Geduldig v. Aiello, 417 U.S. 484 (1974); *cf.* General Electric Co. v. Gilbert 45 U.S.L.W. 4031 (U.S. Dec. 7, 1976) (decided under Title VII).

[38] *Compare* Mathews v. Lucas, 96 S. Ct. 2755 (1976), *with* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) (". . . imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."). Recent decisions have also given rise to some doubt as to the Court's continuing commitment to the eradication of racial discrimination in employment and education. *See* Washington v. Davis, 96 S. Ct. 2040 (1976); Pasadena City Bd. of Educ. v. Spangler, 96 S. Ct. 2697 (1976); Milliken v. Bradley, 418 U.S. 717 (1974).

[39] *Compare* Ortwein v. Schwab, 410 U.S. 656 (1973), *and* United States v. Kras, 409 U.S. 434 (1973), *with* Boddie v. Connecticut, 401 U.S. 371 (1971).

[40] United States v. MacCollom, 96 S. Ct. 2086 (1976).

[41] Paul v. Davis, 424 U.S. 693 (1976).

[42] Arnett v. Kennedy, 416 U.S. 134 (1974); Bishop v. Wood, 96 S. Ct. 2074 (1976).

[43] Mathews v. Eldridge, 424 U.S. 319 (1976).

[44] *Compare* Meachum v. Fano, 96 S. Ct. 2532 (1976) (finding no liberty interest implicated in the transfer of a prisoner to a maximum security facility), *with* Wolff v. McDonnell, 418 U.S. 539 (1974).

[45] Hudgens v. NLRB, 424 U.S. 507 (1976), *overruling* Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Lloyd Corp v. Tanner, 407 U.S. 551 (1972).

[46] *Compare* Young v. American Mini-Theatres, Inc., 96 S. Ct. 2440 (1976), *with* Erznoznick v. City of Jacksonville, 422 U.S. 205 (1975).

[47] United States v. Watson, 423 U.S. 411 (1976). *See also* United States v. Santana, 96 S. Ct. 2406 (1976) (holding that in a *Watson*-like situation, police may pursue a suspect into his or her home).

[48] United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973). The Court has also declined to read the amendment to prohibit warrantless searches of the glove compartments of automobiles impounded for mere parking violations. South Dakota v. Opperman, 96 S. Ct. 3092 (1976).

grounded upon consent regardless of whether the consent was a knowing and intelligent one,[49] and has found that none of us has a legitimate expectation of privacy in the contents of our bank records, thus permitting governmental seizure of those records without our knowledge or consent.[50] Even when the Court has found searches to violate fourth amendment rights, it has—on occasion—declared exceptions to the exclusionary rule and allowed the use of such evidence.[51]

Moreover, the Court has held, contrary to *Boyd v. United States*, that we may not interpose the privilege against self-incrimination to bar government attempts to obtain our personal papers, no matter how private the nature of their contents.[52] And the privilege, said the Court, is not violated when statements unconstitutionally obtained from an individual are used for purposes of impeaching his testimony,[53] or securing his indictment by a grand jury.[54]

The sixth amendment guarantee has fared no better. The guarantee of assistance of counsel has been held unavailable to an accused in custody when shuffled through pre-indictment identification procedures, no matter how essential counsel might be to the avoidance of prejudice to his rights at alter stages of the criminal process.[55] In addition, the Court has countenanced a state's placing significant burdens—in the form of a "two-tier" trial system—on the constitutional right to trial by jury in criminal cases.[56] And in the face of our requirement of proof of guilt beyond a reasonable doubt, the Court has upheld the permissibility of less than unanimous jury verdicts of guilty.[57]

Also, a series of decisions has shaped the doctrines of jurisdiction, justiciability, and remedy, so as increasingly to bar the federal courthouse door in the absence of showings probably impossible to make.[58] At the same time, the *Younger* doctrine has been extended to allow state officials to block federal court protection of constitutional rights simply by answering a plaintiff's federal complaint with a state indictment.[59] And the centuries-old remedy of habeas corpus was so circumscribed last Term as to weaken drastically its ability to safeguard individuals from invalid imprisonment.[60]

It is true, of course, that there has been an increasing amount of litigation of all types filling the calendars of virtually every state and federal court. But a solution that shuts the courthouse door in the face of the litigant with a legitimate claim for relief, particularly a claim of deprivation of a constitutional right, seems to be not only the wrong tool but also a dangerous tool for solving the problem. The victims of the use of that tool are most often the litigants most in need of judicial protection of their rights—the poor, the underprivileged, the deprived minorities. The very life-blood of courts is popular confidence that they mete out evenhanded justice and any discrimination that denies these groups access to the courts for resolution of their meritorious claims unnecessarily risks loss of that confidence.

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Some state decisions have indeed suggested a connection between these recent decisions of the United States Supreme Court and the state court's reliance on the state's bill of rights. For example, the California Supreme Court, in holding that statements taken from suspects before first giving them *Miranda* warnings are inadmissible in California courts to impeach an accused who testifies in his own defense, stated: "We . . . declare that [the decision to the contrary of the United States Supreme Court [61]] is not persuasive authority in any state prosecu-

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[49] United States v. Watson, 423 U.S. 411 (1976); Schneckloth v. Bustamonte, 412 U.S. 218 (1973).
[50] United States v. Miller, 96 S. Ct. 1619 (1976).
[51] *E.g.*, United States v. Janis, 96 S. Ct. 3021 (1976).
[52] Andresen v. Maryland, 96 S. Ct. 2737 (1976); Fisher v. United States, 96 S. Ct. 1569 (1976).
[53] Harris v. New York, 401 U.S. 222 (1971).
[54] United States v. Calandra, 414 U.S. 338 (1974).
[55] *Compare* Kirby v. Illinois, 406 U.S. 682 (1972), *with* United States v. Wade, 388 U.S. 218 (1967).
[56] Ludwig v. Massachusetts, 96 S. Ct. 2781 (1976) (approving trial de novo system).
[57] Apodaca v. Oregon, 406 U.S. 404 (1972).
[58] Rizzo v. Goode, 423 U.S. 362 (1976); Simon v. Eastern Ky. Welfare Rights Org., 96 S. Ct. 1917 (1976); Warth v. Seldin, 422 U.S. 490 (1975); O'Shea v. Littleton, 414 U.S. 488 (1974).
[59] Hicks v. Miranda, 422 U.S. 332 (1975).
[60] Stone v. Powell, 96 S. Ct. 3037 (1976); Francis v. Henderson, 96 S. Ct. 1708 (1976).
[61] Harris v. New York, 401 U.S. 222 (1971).

tion in California. . . . We pause . . . to reaffirm the independent nature of the California Constitution and our responsibility to separately define and protect the rights of California citizens despite conflicting decisions of the United States Supreme Court interpreting the federal Constitution." [62]

Enlightenment comes also from the New Jersey Supreme Court. In 1973 the United States Supreme Court held that where the subject of a search was not in custody and the prosecution attempts to justify the search by showing the subject's consent, the prosecution need not prove that the subject knew he had a right to refuse to consent to the search.[63] The Court expressly rejected the contention that the validity of consent to a non-custodial search should be tested by a waiver standard requiring the state to demonstrate that the individual consented to the search knowing he did not have to, and that he intentionally relinquished or abandoned that right. In *State v. Johnson*,[64] Mr. Justice Sullivan writing for New Jersey's high court, first acknowledged that the United States Supreme Court decision was controlling on state courts in construing the fourth amendment and was therefore dispositive of the defendant's federal constitutional argument.[65] But Mr. Justice Sullivan went on to consider whether the identically phrased provision of the New Jersey Constitution, Art. I, para. 7, "should be interpreted to give the individual greater protection than is provided by" the federal provision.[66] Counsel had not made this argument either to the trial court or on appeal, but the supreme court, *sua sponte*, posed the issue and afforded counsel the opportunity for argument on the question. Mr. Justice Sullivan held for the court that, while Art. I, para 7, was *in haec verba* with the fourth amendment and until then had not been held to impose higher or different standards than the fourth amendment, "we have the right to construe our state constitutional provision in accordance with what we conceive to be its plain meaning." [67] That meaning, he went on to hold, was "that under Art. I, par. 7 of our State Constitution the validity of a consent to search, even in a non-custodial situation, must be measured in terms of waiver, i.e., where the state seeks to justify a search on the basis of consent it has the burden of showing that the consent was voluntary, an essential element of which is knowledge of the right to refuse consent." [68]

Among other instances of state courts similarly rejecting United States Supreme Court decisions as unpersuasive, the Hawaii [69] and California [70] Supreme Courts have held that searches incident to lawful arrest are to be tested by a standard of reasonableness rather than automatically validated as incident to arrest; [71] the Michigan Supreme Court has held that a suspect is entitled to the assistance of counsel at any pretrial lineup or photographic identification procedure; [72] and the South Dakota [73] and Maine [74] Supreme Courts have held that there is a right to trial by jury even for petty offenses.[75]

Other examples abound where state courts have independently considered the merits of constitutional arguments and declined to follow opinions of the United States Supreme Court they find unconvincing, even where the state and federal constitutions are similarly or identically phrased.[76] As the Supreme Court of

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[62] People v. Disbrow, 16 Cal. 3d 101, 113, 114–15, 545 P.2d 272, 280, 127 Cal. Rptr. 360, 368 (1976). The Hawaii and Pennsylvania Supreme Courts have taken similar positions. *See* State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1971); *Commonwealth* v. Triplett, 341 A.2d 62 (Pa. 1975).

[63] Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

[64] 68 N.J. 349, 346 A.2d 66 (1975).

[65] *See* Oregon v. Hass, 420 U.S. 714, 719 (1975).

[66] 68 N.J. at 353, 346 A.2d at 67–68.

[67] *Id.* at 353 n.2, 346 A.2d at 68 n.2.

[68] *Id.* at 353–54, 346 A.2d at 68.

[69] State v. Kaluna, 55 Hawaii 361, 520 P.2d 51 (1974).

[70] People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975).

[71] *Compare* cases cited notes 69 and 70 *supra*, *with* United States v. Robinson, 414 U.S. 218 (1973).

[72] *Compare* People v. Jackson, 391 Mich. 323, 217 N.W.2d 22 (1974) *with* United States v. Ash, 413 U.S. 300 (1973).

[73] Parham v. Municipal Court, 199 N.W.2d 501 (S.D. 1972).

[74] State v. Sklar, 317 A.2d 160 (Me. 1974). *See also* Baker v. City of Fairbanks, 471 P.2d 386 (Alaska 1970).

[75] *Compare* cases cited notes 73 and 74 *supra*, *with* Baldwin v. New York, 399 U.S. 66 (1970), *and* Duncan v. Louisiana, 391 U.S. 145 (1968).

[76] For a listing of such examples, see the cases collected in the following articles: Falk, *The Supreme Court of California 1971–1972, Foreword: The State Constitution: A More than "Adequate" Nonfederal Ground*, 61 Calif. L. Rev. 273 (1973); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 Va. L. Rev. 873 (1976); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 Ky. L.J. 421, 437–43 (1974); Wilkes, *More on the New Federalism in Criminal Procedure*, 63 Ky. L.J. 873 (1975); *Project Report, Toward an Activist Role for State Bills of Rights*, 8 Harv. C.R.-C.L. L. Rev. 271 (1973).

Hawaii has observed, "while this results in a divergence of meaning between words which are the same in both federal and state constitutions, the system of federalism envisaged by the United States Constitution tolerates such divergence where the result is greater protection of individual rights under state law than under federal law. . . ." [77] Some state courts seem apparently even to be anticipating contrary rulings by the United States Supreme Court and are therefore resting decisions solely on state law grounds. For example, the California Supreme Court held, as a matter of state constitutional law, that bank depositors have a sufficient expectation of privacy in their bank records to invalidate the voluntary disclosure of such records by a bank to the police without the knowledge or consent of the depositor; [78] thereafter the United States Supreme Court ruled that federal law was to the contrary.[79]

And of course state courts that rest their decisions wholly or even partly on state law need not apply federal principles of standing and justiciability that deny litigants access to the courts. Moreover, the state decisions not only cannot be overturned by, they indeed are not even reviewable by, the Supreme Court of the United States. We are utterly without jurisdiction to review such state decisions.[80] This was precisely the circumstance of Mr. Justice Hall's now famous *Mt. Laurel* decision,[81] which was grounded on the New Jersey Constitution and on state law. The review sought in that case in the United States Supreme Court was, therefore, completely precluded.

This pattern of state court decisions puts to rest the notion that state constitutional provisions were adopted to mirror the federal Bill of Rights. The lesson of history is otherwise; indeed, the drafters of the federal Bill of Rights drew upon corresponding provisions in the various state constitutions. Prior to the adoption of the federal Constitution, each of the rights eventually recognized in the federal Bill of Rights had previously been protected in one or more state constitutions.[82] And prior to the adoption of the fourteenth amendment, these state bills of rights, independently interpreted, were the primary restraints on state action since the federal Bill of Rights had been held inapplicable.

The essential point I am making, of course, is not that the United States Supreme Court is necessarily wrong in its interpretation of the federal Constitution, or that ultimate constitutional truths invariably come prepackaged in the dissents, including my own, from decisions of the Court. It is simply that the decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law.[83] Accordingly, such decisions are not mechanically applicable to state law issues, and state court judges and the members of the bar seriously err if they so treat them. Rather, state court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees. I suggest to the bar that, although in the past it might have been safe for counsel to raise only federal

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[77] State v. Kaluna, 55 Hawaii 361, 369 n.6, 520 P.2d 51, 58 n.6 (1974).

[78] Burrows v. Superior Court, 13 Cal. 3d 238, 529 P.2d 590, 118 Cal. Rptr. 166 (1974).

[79] United States v. Miller, 96 S. Ct. 1619 (1976).

[80] The Supreme Court's jurisdiction over state cases is limited to the correction of errors related solely to questions of federal law. It cannot review state court determinations of state law even when the case also involves federal issues. Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875). Moreover, if a state ground is independent and adequate to support a judgment, the Court has no jurisdiction at all over the decision despite the presence of federal issues. Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875). One reason for the refusal to review such decisions, even where the state court also decides a federal question erroneously, was explained by Mr. Justice Jackson in Herb v. Pitcairn, 324 U.S. 117, 125–26 (1945):

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

[81] Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (invalidating town's exclusive zoning ordinance), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

[82] *See generally* Brennan, *The Bill of Rights and the States*, in THE GREAT RIGHTS (E. Cahn ed. 1963).

[83] The Court has made this point clear on a number of occasions. *See* Oregon v. Hass, 420 U.S. 714, 719 (1975) (". . . a State is free *as a member of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards"); Cooper v. California, 386 U.S. 58, 62 (1967).

constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions.

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Every believer in our concept of federalism, and I am a devout believer, must salute this development in our state courts. Unfortunately, federalism has taken on a new meaning of late. In its name, many of the door-closing decisions described above have been rendered.[84] Under the banner of the vague, undefined notions of equity, comity and federalism the Court has condoned both isolated [85] and systmatic [86] violations of civil liberties. Such decisions hardly bespeak a true concern for equity. Nor do they properly understand the nature of our federalism. Adopting the premise that state courts can be trusted to safeguard individual rights,[87] the Supreme Court has gone on to limit the protective role of the federal judiciary. But in so doing, it has forgotten that one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens. Federalism is not served when the federal half of that protection is crippled.

Yet, the very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach. With the federal locus of our double protections weakened, our liberties cannot survive if the states betray the trust the Court has put in them. And if that trust is, for the Court, strong enough to override the risk that some states may not live up to it, how much more strongly should we trust state courts whose manifest purpose is to expand constitutional protections. With federal scrutiny diminished, state courts must respond by increasing their own.

Moreover, it is not only state-granted rights that state courts can safeguard. If the Supreme Court insists on limiting the content of due process to the rights created by state law,[88] state courts can breathe new life into the federal due process clause by interpreting their common law, statutes and constitutions to guarantee a "property" and "liberty" that even the federal courts must protect. Federalism need not be a mean-spirited doctrine that serves only to limit the scope of human liberty. Rather, it must necessarily be furthered significantly when state courts thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusions on their freedoms.

We can confidently conjecture that James Madison, Father of the Bill of Rights, would have approved. We tend to forget that Madison proposed not ten, but, in the form the House sent them to the Senate, seventeen amendments. The House approved all seventeen including Number XIV—a number of prophetic of things to come with the adoption of Amendment XIV seventy-nine years later—for Number XIV would have imposed specific restraints on the states. Number XIV provided: "No State shall infringe the right of trial by jury in criminal cases, nor the right of conscience, nor the freedom of speech or of the press." [89] Madison, in a speech to the House in 1789, argued that these restrictions on the state power were "of equal, if not greater, importence than those already made" [90] in the body of the Constitution. There was, he said, more danger of those powers being abused by state governments than by the government of the United States. Indeed, he said, he "conceived this to be the most valuable amendment in the whole list. If there were any reason to restrain the Government of the United States from infringing these essential rights, it was equally necessary that they should be secured against the State governments." [91]

But Number XIV was rejected by the Senate, and Madison's aim was not accomplished until adoption of Amendment XIV seventy-nine years later. The reason that Madison placed such store in the effectiveness of the Bill of Rights was his belief that "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights." [92] His reference was, of course, to his proposed Bill including Number XIV, but we may be confident that he would welcome the broadening by state courts of the reach of state constitutional counterparts beyond the federal model as proof of his conviction that independent tribunals of justice "will be naturally led to resist every encroachment upon rights expressly stipulated for. . . ." [93]

[84] *See* Stone v. Powell, 96 S. Ct. 3037 (1976); Francis v. Henderson, 96 S. Ct. 1708 (1976); Hicks v. Miranda, 422 U.S. 332 (1975).

[85] *See* Paul v. Davis, 424 U.S. 693 (1976); cases cited note 84 *supra*.

[86] *See* Rizzo v. Goode, 423 U.S. 362 (1976); O'Shea v. Littleton, 414 U.S. 488 (1974).

[87] *See* Stone v. Powell, 96 S. Ct. 3037, 3051 n.35 (1976); Doran v. Salem Inn, Inc., 422 U.S. 922, 930 (1975).

[88] *See* p. 496 and notes 41–42 *supra*.

[89] *See* E. DUMBAULD, THE BILL OF RIGHTS 215 (1957); Brennan, *supra* note 82, at 69–70.

[90] 1 ANNALS OF CONG. 440 (Gales & Seaton eds. 1789).

[91] *Id.* at 755. *See* Brennan, *supra* note 82, at 69–70.

[92] 1 ANNALS OF CONG. 439 (Gales & Seaton eds. 1789). *See United States* v. *Calandra*, 414 U.S. 338, 356–57 (1974) (Brennan, J., dissenting).

[93] 1 ANNALS OF CONG. 439 (Gales & Seaton eds. 1789).

TRENDS IN THE RELATIONSHIP BETWEEN THE FEDERAL AND STATE COURTS FROM THE PERSPECTIVE OF A STATE COURT JUDGE

SANDRA D. O'CONNOR*

We live in an imperfect world. Most people would agree our court system suffers from some of that imperfection. We appear to be the only major country with two parallel court systems. Among other things, such an arrangement affords most convicted criminal defendants opportunities for multiple post-conviction appellate court reviews. The labyrinth of judicial reviews of the various stages of a state criminal felony case would appear strange, indeed, to a rational person charged with devising an ideal criminal justice system. Changes and improvements come very slowly, if at all, and, more often than not, incrementally, in small case by case adjustments.

State courts, which annually process the great majority of all civil and criminal cases filed in this country, handle their workload for the most part without a great deal of concern about the federal court system which exists alongside them. Trial judges in both systems are busy hearing cases. Most state court trial judges do not have time to think about what jurisdiction the federal courts should have; they simply take each case assigned and do the best they can with it, whether or not it involves a federal legal question. On the other hand, state appellate court judges occasionally become so frustrated with the extent of federal court intervention that they simply abdicate in favor of the federal jurisdiction. For example, concern in the Supreme Court of Arizona with the extent of the exercise of federal jurisdiction of prisoner complaints led it to refuse to hear any prisoner complaints because of "preemption of the field" by the federal courts.[1]

It is my purpose to comment on some of the trends in the relationship between the state and federal courts as viewed from the

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1. Patricella v. Arizona, No. H 650 (Ariz. April 24, 1973).

practical perspective of a state court judge.

Criminal Proceedings

Application of federal constitutional law by state courts is made most often in state criminal prosecutions. A state criminal defendant gains access to the federal courts by alleging that a violation of the Federal Constitution occurred during the state proceedings. There is seldom a state criminal felony trial in which the defendant is convicted that does not result in an appeal at the state level alleging some federal constitutional error in order to exhaust the state remedies before seeking federal review. As noted by Justice Powell in his concurring opinion in *Rose v. Mitchell*: "Federal constitutional challenges are raised in almost every state criminal case, in part because every lawyer knows that such claims will provide nearly automatic federal habeas corpus review."[2]

Every state court trial judge realizes, of course, that federal constitutional challenges will be raised in almost every state criminal case and that, after the state appellate review is exhausted, further review will be attempted in the federal courts. As a result, state courts in urban areas have tended to assign certain judges to hear only criminal cases in order that they may become more familiar with applicable state and federal, substantive and procedural, criminal and constitutional law. In addition, the National Center for State Courts, the Institute of Judicial Administration, and the National Judicial College continually offer assistance to courts and to state judges on various aspects of how they can appropriately function within the state and federal constitutional parameters. There is a keen awareness among state court judges in state criminal cases of the federal constitutional protections of the defendant.

With the election of President Reagan, there is no reason to think the recent trend in the United States Supreme Court shifting to the state courts some additional responsibility for determination of federal constitutional questions in state criminal cases will not continue. As stated by Charles Whitebread:

> [T]he Warren Court, which was extremely energetic in expanding the scope of federal constitutional claims open to state

2. 443 U.S. 545, 581 (1979) (Powell, J., concurring).

> prisoners, seemed to act on the premise that the state courts could not be depended upon to vindicate these newly created rights. Thus, it forged new law on the procedural as well as substantive front by providing greater access to federal court for state defendants. Federal habeas corpus became the principal remedy through which the newly created rights could be asserted and protected. By contrast, as the Burger Court has limited the substantive federal constitutional rights of the state criminal defendant, it has simultaneously reduced dramatically the avenues available for state prisoner access to the lower federal courts.[3]

A recent example of the increased reluctance of the United States Supreme Court to overturn by federal habeas corpus proceedings state court determinations in criminal cases is found in *Sumner v. Mata*.[4] The Court in *Sumner* held that a federal court that grants federal habeas corpus relief to a state criminal defendant is required by 28 U.S.C. § 2254(d) to presume the state appellate or trial court's factual findings are correct and to explain the reasons for determining that the state court's findings were not fairly supported by the record. The majority opinion states: "Federal habeas has been a source of friction between state and federal courts and Congress obviously meant to alleviate some of that friction when it enacted subsection (d) in 1966 as an amendment to the original Federal Habeas Act of 1867."[5]

The response of state courts to the trend toward some restriction of review of state criminal cases by federal habeas corpus is explored in an article by A.E. Dick Howard.[6] Professor Howard concludes that in the area of criminal procedure, most state courts show "an inertial tendency simply to follow the . . . federal decisions" because of the deference owed to the United States Supreme Court or the desirability of uniformity of state and federal law.[7] However, he details examples of a number of state courts

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3. C. WHITEBREAD, CRIMINAL PROCEDURE § 28.01, at 574 (1980).

4. 101 S. Ct. 764 (1981).

5. *Id.* at 770.

6. Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976).

7. *Id.* at 905. *See also* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

which have relied upon their own state constitutions as a means of defining rights of criminal defendants more broadly than do the federal courts.[8]

In the next decade, there will probably be significant additional state court variations in cases involving the issue of illegal search and seizure under the fourth amendment. Since *Stone v. Powell*,[9] state criminal defendants who have had a "full and fair opportunity" to raise their claims of illegal search and seizure in the state courts may not, thereafter, obtain federal habeas corpus relief. We do not yet know the tests to be employed in determining what is a "full and fair opportunity." However, assuming the state courts are providing a full and fair opportunity for the claims to be raised, and that federal habeas corpus review is unavailable, the state courts are more likely than their federal counterparts to reach widely varying results on search and seizure issues. Even the federal cases on search and seizure are not models of clarity and simplicity. The standards tend to be confusing and obtuse in some instances.[10]

One area where federal court review of state courts' determinations of federal constitutional questions may be expected to increase, however, is the area of state criminal defendants' waiver of their constitutional objections. State criminal defendants seeking habeas corpus relief in the federal court must raise their constitutional objections in a timely fashion in the state proceedings, or they will be held to have waived their claim for relief, absent a showing of cause why the objection was not raised and also a showing of actual prejudice.[11] We can expect a number of petitions to be filed for habeas corpus relief to test the extent to which failure

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8. *See, e.g.*, People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975); State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974); State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975) (Eagen, J., concurring); Commonwealth v. Richman, 458 Pa. 167, 320 A.2d 351 (1974); Advisory Opinion to the Senate, 108 R.I. 628, 278 A.2d 852 (1971). *See generally* Howard, *supra* note 6, at 891-905.

9. 428 U.S. 465 (1976).

10. For some articles addressing the confusion in the case law in the fourth amendment area, see Burkoff, *The Court that Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 OR. L. REV. 151 (1979), and Countryman, *Search and Seizure in a Shambles? Recasting Fourth Amendment Law in the Mold of Justice Douglas*, 64 IOWA L. REV. 435 (1979).

11. Francis v. Henderson, 425 U.S. 536, 542 (1976).

of defense counsel to raise the issue in the state proceedings will establish good cause for avoiding the waiver. Competence of counsel may be relevant to the determination of good cause and of prejudice.[12]

Closely related to the question of waiver of the constitutional issue at the state level is the question of competence of counsel as a ground for collateral attack on state convictions on the basis of the sixth amendment. This issue is one which will undoubtedly be raised very frequently during the next few years. At present, it is the single issue raised most frequently in Arizona appellate courts in petitions for post-conviction relief in criminal cases.[13]

The United States Supreme Court has held that counsel must render legal services "within the range of competence demanded of attorneys in criminal cases."[14] This standard is far from definitive. No doubt the range of competence varies somewhat from community to community and from state to state. The older test of whether the proceedings were a "farce and mockery of justice" has been rejected in all but three of the federal circuits.[15] The other circuits have developed differing standards for determining the competence of counsel.[16] The majority follow a "reasonable compe-

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12. *See* Wainwright v. Sykes, 433 U.S. 72, 94-96 (1977) (Stevens, J., concurring).

13. Seventy-five petitions for appellate post-conviction relief in criminal cases were filed in Arizona in 1980. Of these, twenty-seven, or 36%, raised the issue of competence of counsel. Letter from John Sticht, Staff Attorney, Arizona Court of Appeals to Judge Sandra D. O'Connor, Arizona Court of Appeals (Feb. 25, 1981).

Direct appeals from state criminal convictions frequently involve an allegation that there was a failure at trial to raise a defense, to make an evidentiary objection, or to request a jury instruction. Unless the failure resulted in "fundamental error," the state appellate court will ordinarily affirm the conviction. *See, e.g.,* State v. Workman, 123 Ariz. 501, 600 P.2d 1133 (Ariz. Ct. App. 1979); Bell v. State, 598 S.W.2d 738 (Ark. 1980); People v. Means, 97 Mich. App. 641, 296 N.W.2d 14 (1980); State v. Moon, 602 S.W.2d 828 (Mo. Ct. App. 1980); People v. Vasquez, 430 N.Y.S.2d 501 (Sup. Ct. 1980); State v. Foddrell, 269 S.E.2d 854 (W. Va. 1980). The same is true in appeals to federal appellate courts from convictions in federal criminal cases. FED. R. CRIM. P. 52; *see, e.g.,* McKissick v. United States, 379 F.2d 754 (5th Cir. 1967).

14. McMann v. Richardson, 397 U.S. 759, 771 (1970).

15. Schwarzer, *Dealing with Incompetent Counsel — The Trial Judge's Role*, 93 HARV. L. REV. 633, 641 n.40 (1980); *Fifth Annual Ninth Circuit Survey—Criminal Law and Procedure—New Effective Assistance of Counsel Standard—Prejudice Required*, 10 GOLDEN GATE U.L. REV. 75, 79 n.29 (1980). *See generally* Strazzella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems*, 19 ARIZ. L. REV. 443 (1977).

16. *See* authorities cited note 15 *supra*.

tency" or analogous standard.[17] The District of Columbia Circuit has adopted a standard which requires the defendant to show that his counsel performed measurably below accepted standards and that the inadequacy of counsel had a "likely" effect on the outcome of the trial.[18] State standards for determining competency likewise vary.[19]

It is reasonable to expect that we will continue to see many state and federal cases dealing with the appropriate standard for effective assistance of counsel under the sixth amendment. In view of the conflicting holdings in the federal appellate courts, the Supreme Court may accept jurisdiction and attempt to establish a more definite standard. It is also likely that some strain may be felt by some state courts as their determinations of attorney competence are reviewed in the federal courts.

Civil Cases

Although the present trend in federal review of state criminal matters appears to be to restrict some of the federal jurisdiction, quite the reverse trend seems to be occurring in civil cases, both by federal judicial decisions and by congressional action. Although not arising as frequently as in the criminal area, federal constitutional law, as it applies to state legislative and executive action, is perhaps of more concern to state courts in terms of forcing significant decisions to be made in cases of great public interest. We have seen recently examples of acute confrontations between federal district courts and state courts in school busing and school desegregation cases. Application of the federal guaranty of equal protection of the laws has resulted in court review of state voting requirements,[20] state durational residence requirements for welfare

17. *See* Cooper v. Fitzharris, 586 F.2d 1325, 1328 n.3 (9th Cir. 1978), *cert. denied*, 440 U.S. 974 (1979).

18. United States v. Decoster, 624 F.2d 196 (D.C. Cir. 1976) (plurality opinion) (quoting Commonwealth v. Saterian, 366 Mass. 89, 96, 315 N.E.2d 878, 883 (1974)).

19. *See, e.g.*, Bays v. State, 240 Ind. 37, 159 N.E.2d 393 (1959) (requiring reasonable skill and diligence), *cert. denied*, 361 U.S. 972 (1960); State v. Osgood, 266 Minn. 315, 123 N.W.2d 593 (1963) (requiring consultations that adequately inform the accused of all his legal rights).

20. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

benefits,[21] and other state welfare eligibility requirements,[22] in addition to public educational opportunities.[23] Application of the due process clause of the fourteenth amendment has resulted in court review of state prison regulations,[24] state procedures for garnishment,[25] and prejudgment attachment of property by creditors.[26]

The *Sniadach*,[27] *Fuentes*,[28] and *Mitchell*[29] decisions of the United States Supreme Court have resulted in a great many state court cases which have focused on interpretations of those cases, and in various state legislative amendments to prior state laws on prejudgment garnishments and attachments. Confusion exists among students of the subject concerning the meaning and import of the Supreme Court decisions on prejudgment creditors' rights and remedies.[30] The subject of creditors' rights is surely one of the subjects most often addressed in state courts on a continuing basis. It is apparent that we have not heard the end of the matter from a federal constitutional perspective, and that the federal courts will continue to issue additional opinions defining the validity of various state laws on the subject.

Another area of recent contact and some confusion between the state and federal courts is in medical malpractice cases in some states. With the rapid escalation of malpractice insurance premiums, many states have adopted legislation requiring administrative

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21. Shapiro v. Thompson, 394 U.S. 618 (1969).

22. Graham v. Richardson, 403 U.S. 365 (1971).

23. Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

24. Wolff v. McDonnell, 418 U.S. 539 (1974).

25. North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

26. Fuentes v. Shevin, 407 U.S. 67 (1972).

27. Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

28. Fuentes v. Shevin, 407 U.S. 67 (1972).

29. Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974).

30. *See, e.g.*, Kheel, *New York's Amended Attachment Statute: A Prejudgment Remedy in Need of Further Revision*, 44 BROOKLYN L. REV. 199 (1978); Levine, *Due Process of Law in Pre-Judgment Attachment and the Filing of Mechanics' Liens*, 50 CONN. B.J. 335 (1976); Nickles, *Creditors' Provisional Remedies and Debtors' Due Process Rights: Attachment and Garnishment in Arkansas*, 31 ARK. L. REV. 607 (1978); TeSelle & Love, *Attachment, Garnishment, Replevin, and Self-Help Repossession in Oklahoma*, 30 OKLA. L. REV. 253 (1977); Comment, *Can Georgia Bank on Its Garnishment Laws?*, 28 MERCER L. REV. 341 (1976); Comment, *Attachment in California: Another Round of Creditors' Rights and Debtor Protection*, 20 U.C.L.A. L. REV. 1015 (1979).

review, quasi-judicial review, or mediation prior to trial.[31] The procedures are generally not binding on the parties and are designed to screen out frivolous claims.

When the malpractice suit is filed in a federal court under its diversity jurisdiction, the federal courts are divided on whether they must follow the state's review procedure when that procedure is to be implemented after the lawsuit is filed.[32] The issue focuses on whether the federal court in a diversity suit must apply the substantive law of the forum state as required by *Erie Railroad Co. v. Tompkins*,[33] and thereby discourage forum shopping,[34] or whether the federal court should refuse to apply the state law because it would violate an important federal policy or would "alter the essential character or function of [the] federal court."[35] Where the state law requires submission to a state review or mediation panel *before* the lawsuit is filed, the federal cases uniformly appear to dismiss the federal action if the state prefiling procedure is not followed.[36] As states attempt to control more of the tort litigation by arbitration and other devices, we can anticipate more confusion and confrontation with federal courts on whether the state procedures must be followed in the diversity cases.

The next decade is also likely to see continued expansion of litigation in the federal courts under 42 U.S.C. § 1983,[37] the civil rights statute, unless Congress decides to limit the availability of relief under that statute. Many, if not most, of the cases alleging

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31. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-567 (West Supp. 1980); VA. CODE ANN. §§ 8.01-581.1 to .20 (1977 & Supp. 1980). *See generally* Alexander, *State Medical Malpractice Screening Panels in Federal Diversity Actions*, 21 ARIZ. L. REV. 959 (1979).

32. *Compare* Wheeler v. Shoemaker, 78 F.R.D. 218 (D.R.I. 1978) (refusing to refer a diversity malpractice action to a Rhode Island mediation panel), *with* Byrnes v. Kirby, 453 F. Supp. 1014 (D. Mass. 1978) (following the Massachusetts system of presenting offer of proof to a state panel), *and* Von Mosher v. Tan, No. Civ. 77-3 (D. Ariz. March 27, 1979) (referring the matter to state medical review panel).

33. 304 U.S. 64 (1938).

34. Hanna v. Plumer, 380 U.S. 460, 466-69 (1965).

35. Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 538-39 (1958) (quoting Herron v. Southern Pacific Co., 283 U.S. 91, 94 (1931)).

36. *See* Edelson v. Soricelli, 610 F.2d 131 (3d Cir. 1979); Davidson v. Sinai Hosp. Inc., 462 F. Supp. 778 (D. Md. 1978), *aff'd*, 617 F.2d 361 (4th Cir. 1980); Marquez v. Hahnemann Medical College & Hosp., 435 F. Supp. 972 (E.D. Pa. 1976); Flotemersch v. Bedford County Gen. Hosp., 69 F.R.D. 556 (E.D. Tenn. 1975).

37. 42 U.S.C. § 1983 (1976).

due process or equal protection violations by the states, their officers, and employees are filed under section 1983. Allegations that the plaintiff has been deprived of either personal liberty or property of any amount in violation of his civil rights will give the federal court jurisdiction to hear the claim. Even state court judges are not immune from a section 1983 suit if the allegation is that the judge acted in the clear absence of jurisdiction in the matter.[38] Judge Aldisert has observed that each expansion of the use of section 1983 to challenge state action has been prompted by a distrust of the state courts as proper forums to consider the issues raised.[39]

In the past, the United States Supreme Court has held that plaintiffs alleging state civil rights violations need not exhaust state remedies before filing suit in the federal court under section 1983.[40] More recently, however, the Court has stated, "whether this is invariably the case . . . is a question we need not now decide."[41] In *Barry v. Barchi*,[42] the Court reaffirmed the *Gibson v. Berryhill*[43] holding that exhaustion of administrative remedies is not required when the question of the adequacy of the administrative remedies is for all practical purposes identical with the merits of the section 1983 action. The United States courts of appeals are divided on the issue of whether exhaustion of state administrative remedies is a necessary prerequisite to the federal suit.[44]

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38. Rankin v. Howard, 633 F.2d 844, 849 (9th Cir. 1980).

39. Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 L. & Soc. Order 557, 572.

40. Wilwording v. Swenson, 404 U.S. 249 (1971) (per curiam); Damico v. California, 389 U.S. 416 (1967) (per curiam); McNeese v. Board of Educ., 373 U.S. 668 (1963).

41. Gibson v. Berryhill, 411 U.S. 564, 574-75 (1973).

42. 443 U.S. 55, 63 n.10 (1979).

43. 411 U.S. 564 (1973).

44. For cases holding exhaustion of state administrative remedies is required, see Patsy v. Florida Int'l. Univ., 634 F.2d 900 (5th Cir. 1981); Secret v. Brierton, 584 F.2d 823 (7th Cir. 1978); Gonzales v. Shanker, 533 F.2d 832 (2d Cir. 1976); Wishart v. McDonald, 367 F. Supp. 530 (D. Mass. 1973), *aff'd*, 500 F.2d 1110 (1st Cir. 1974).

For a case holding exhaustion of state administrative remedies is required only when prospective relief is sought, see Canton v. Spokane School Dist. No. 81, 498 F.2d 840 (9th Cir. 1974).

For cases holding exhaustion of state administrative remedies is not required, see Simpson v. Weeks, 570 F.2d 240 (8th Cir. 1978); United States *ex rel.* Ricketts v. Lightcap, 567 F.2d 1226 (3d Cir. 1977); Gillette v. McNichols, 517 F.2d 888 (10th Cir. 1975); Hardwick v. Ault, 517 F.2d 295 (5th Cir. 1975); McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975), *cert. dismissed*, 426 U.S. 471 (1976); Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

In view of the great caseload increase in the federal courts and the expressed desire of the Reagan administration to hold down the federal budget, one would think that congressional action might be taken to limit the use of section 1983. It could be accomplished either directly, or indirectly by limiting or disallowing recovery of attorneys' fees. Such a move would be welcomed by state courts, as well as state legislatures and executive officers. In fact, however, Congress appears to have moved recently to open further the federal jurisdictional doors. In the closing days of the 96th Congress, the $10,000.00 amount in controversy requirement was totally eliminated for federal question jurisdiction under 28 U.S.C. § 1331.[45] The elimination of the amount in controversy requirement may have been prompted by the fact that there is no amount in controversy requirement for section 1983 actions filed under the jurisdictional statute, 28 U.S.C. § 1343(a)(3).[46] For claims arising under the Constitution or a federal statute securing equal rights, plaintiffs wishing to file in federal court were able to simply couch their complaints in terms of section 1343(a)(3) rather than section 1331. Regardless of the reasons, Congress has expanded the jurisdiction of the federal courts by the amendment to section 1331.

Congress has also added to the scope of federal court jurisdiction in the Bankruptcy Reform Act of 1978.[47] The Act gives the federal district courts "original but not exclusive jurisdiction of all civil proceedings arising . . . in or related to" the debtor in a Title 11 proceeding.[48] Starting in 1984, that jurisdiction will be exercised by the new bankruptcy courts.[49] Effectively, then, this broad grant of

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45. Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2, 94 Stat. 2369. However, the Act retains the $10,000.00 amount in controversy requirement for suits based on knowing violations of consumer product safety rules unless suit is brought against the United States or an agency of the United States or an officer or agent of the United States in his official capacity. *Id.* § 3.2.

46. 28 U.S.C. § 1343(a)(3) (Supp. III 1979) grants district courts original jurisdiction to hear claims alleging a "deprivation, under color of any State law, . . . of any right, privilege or immunity secured by the Constitution of the United States *or by any Act of Congress* providing for equal rights of citizens . . . ." *Id.* (emphasis added). Because a § 1983 claim may be based upon the deprivation of *any* statutory right provided by Congress, Maine v. Thiboutot, 100 S. Ct. 2502 (1980), § 1983 and § 1343(a)(3) are not coextensive.

47. Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified in scattered sections of 11, 28 U.S.C.).

48. 28 U.S.C. § 1471(b) (Supp. III 1979).

49. *Id.* § 1471(c).

jurisdiction will allow the bankruptcy courts to hear any proceeding related to the debtor.[50] Actions which formerly had to be tried in state court, or in a federal district court, such as a tort or contract action involving the debtor, or perhaps even a divorce, may, as of 1984, be tried in the bankruptcy court. The bankruptcy court may abstain from exercising its jurisdiction, but the decision to accept jurisdiction or to abstain is not reviewable by appeal or otherwise.[51] The expanded jurisdiction repesents "an assertion of the bankruptcy power over State governments under the supremacy clause, notwithstanding a state's sovereign immunity."[52] Under the new code, all pending civil proceedings in any forum, with only a few listed exceptions, are stayed by the debtor's filing of a bankruptcy petition.[53]

The potential effect on state courts of the exercise of jurisdiction by the federal bankruptcy court over proceedings in state courts in which the debtor is a party is great. For example, in Maricopa County, Arizona, there were 4,462 petitions in bankruptcy filed in 1980.[54] It is estimated that in the Maricopa County Superior Court of Arizona alone there are already 186 pending cases which have been stayed because one of the parties is involved in a federal bankruptcy proceeding.[55]

Another area of federal civil case jurisdiction which Congress may exammine in the next few years is the diversity jurisdiction. The debate over whether Congress should eliminate diversity jurisdiction from the federal courts has continued for some years.[56]

Any discussion of whether diversity jurisdiction should be elimi-

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50. H.R. REP. No. 595, 95th Cong., 1st Sess. 48-49 (1977), *reprinted in* [1979] U.S. CODE CONG. & AD. NEWS 5963, 6010.

51. 28 U.S.C. § 1471(d) (Supp. III 1979).

52. S. REP. No. 989, 95th Cong., 2d Sess. 51 (1978), *reprinted in* [1979] U.S. CODE CONG. & AD. NEWS 5787, 5837.

53. 11 U.S.C. § 362 (Supp. III 1979).

54. Unpublished figures compiled by Virginia Fritz, Clerk, United States Bankruptcy Court, District of Arizona.

55. Unpublished figures compiled by Gordon Allison, Maricopa County Superior Court Administrator.

56. For an argument favoring abolition of federal diversity jurisdiction, see Kastenmeier & Remington, *Court Reform and Access to Justice: a Legislative Perspective*, 16 HARV. J. LEGIS. 301, 311-18 (1979), and authorities cited therein. For an argument in support of maintaining federal diversity jurisdiction, see Frank, *The Case for Diversity Jurisdiction*, 16 HARV. J. LEGIS. 403 (1979).

nated, and any discussion of where the line should be drawn for the exercise of federal jurisdiction in state criminal and civil cases generally, requires examination of the assertion often heard that the federal courts are the preferred forum. Let us examine the arguments made to justify the conclusion that federal judges are preferred. First, it is argued that federal judges are better paid and have more prestige.[57] It is certainly true that most federal judges are better paid.[58] However, the higher pay does not necessarily attract only the most competent lawyers to the federal bench. Often political considerations are more important than pure competence in the appointing process. In addition, many appointments to the federal bench are made from state court benches.[59] When the state court judge puts on his or her new federal court robe he or she does *not* become immediately better equipped intellectually to do the job.

Second, it is said that life tenure insulates the judge from majoritarian pressure, and, therefore, the federal judges are more receptive to controversial principles.[60] In twenty states, however,

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57. *See, e.g.*, Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1121, 1124-27 (1977).

58. From March 1977 to December 31, 1980, yearly salaries for federal district judges were $54,500 and for federal circuit judges, $57,500. United States v. Will, 101 S. Ct. 471, 476 (1980). Beginning January 1, 1981, yearly salaries for federal district judges are $67,100 and for circuit judges, $70,900. 67 A.B.A.J. 162, 165 (1981).

As of January 31, 1979, the national average salary for associate justices (excluding chief justices) of the highest state courts was $45,248; for state intermediate appellate court judges, $45,278; and for general trial court judges, $38,971. U.S. DEP'T OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, AND NATIONAL CRIMINAL JUSTICE INFORMATION AND STATISTICS SERVICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS - 1979 110, Table 1.57 (1980) [hereinafter cited as 1979 SOURCEBOOK].

However, the average salaries of state trial court judges increased by more than 90% between 1969 and 1980, while the salaries of federal courts of appeals and district court judges increased by less than 40% during the same period. 67 A.B.A.J. 162, 164 (1981). And certain state judges receive salaries far higher than the averages given above. For instance, the chief justice of the state of California now receives $77,409 a year, and the chief judge of the highest New York court, the court of appeals, receives $75,000 a year. *Id.*

59. A study of characteristics of presidential nominees and appointees to United States court judgeships from 1963 to August 27, 1978, broken down by presidential administration, reveals that percentages of nominees who at the time of their nomination or appointment were employed by the judiciary ranged from 28.5% under President Nixon to 42.2% under President Carter. In addition, percentages of nominees with prior judicial experience ranged from 34.3% under President Johnson to 46.7% under President Carter. 1979 SOURCEBOOK, *supra* note 58, at 115, Table 1.60.

60. *See, e.g.*, Neuborne, *supra* note 54, at 1105, 1127-28.

we now have merit selection of state judges rather than popular elections.[61] These judges are relatively safe and secure in their positions. Even those state judges who are elected often have reasonably long terms of office.[62] I have seen remarkable examples of the exercise of courage and judicial independence by state court judges.

Third, it is argued that federal judges will be more receptive to federal constitutional claims. Professor Bator has answered this argument quite well in his article published in this issue.[63] What is really being said is that federal judges are inclined to be more receptive to *some* federal constitutional claims. Professor Bator is correct in stating what is required is a sensitivity and responsiveness to *all* the constitutional principles, not just *some* of them.[64] There is no reason to assume that state court judges cannot and will not provide a "hospitable forum" in litigating federal constitutional questions. As stated by Justice William H. Rehnquist in a recent opinion:

> State judges as well as federal judges swear allegiance to the Constitution of the United States, and there is no reason to think that because of their frequent differences of opinions as to how that document should be interpreted that all are not doing their mortal best to discharge their oath of office.[65]

The allegations concerning relative competency and judicial mindset are essentially subjective impressions not subject to confirmation in fact. Perhaps even the subjective impressions of lawyers are changing. In a recent survey conducted by Justice James Duke Cameron of the Arizona Supreme Court, attorneys in ten jurisdictions, at various locations throughout the United States, were asked certain questions as they filed civil actions in the state courts.[66] The attorneys were asked to state the nature of the action filed, their preference for the court, state or federal, for filing the

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61. Carbon, *Judicial Retention Elections: Are they serving their intended purpose?*, 64 JUD. 210, 213-15 (1980).

62. Adamany & Dubois, *Electing State Judges*, 1976 WISC. L. REV. 731, 769.

63. Bator, *The State Courts and Federal Constitutional Litigation*, pp. 605-37 *supra*.

64. *Id.* at 631-32.

65. Sumner v. Mata, 101 S. Ct. 764, 770 (1981).

66. *See* Appendix A *infra*.

action, assuming there were no jurisdictional barriers or time constraints, and the reasons for that preference. Two hundred and fifty-two lawyers responded. One hundred and ninety-three lawyers stated they preferred to file in the state court, and thirty-four stated they preferred to file in a federal court. Of those preferring the federal court, the reasons most often given were a superior procedure, better judges, and quicker disposition of cases. Of the majority preferring to file in state courts, the reasons most often given were a quicker disposition of cases, familiarity with the state court, and convenience. In general, a majority of lawyers responding to the questionnaire indicated they perceived no difference in the quality of judges between the federal and state courts. The results indicate that the lawyers who responded saw no great difference in the quality of judges or justice between the state and federal courts.

Another indication that attorneys do not perceive substantial differences in the quality of judges in the state and federal courts can be found in the bar association polls taken in jurisdictions having a merit selection system for judges. For example, in Arizona's most recent bar poll, both the state and federal judges were rated on a variety of qualifications. The overall results varied in Maricopa County, Arizona, from a low rating of sixty-three percent for the federal district court judges to a high rating of ninety-seven percent and from a low rating of sixty percent for the state court judges to a high rating of ninety-nine percent.[67]

CONCLUSION

If our nation's bifurcated judicial system is to be retained, as I am sure it will be, it is clear that we should strive to make both the federal and the state systems strong, independent, and viable. State courts will undoubtedly continue in the future to litigate federal constitutional questions. State judges in assuming office take an oath to support the federal as well as the state constitution. State judges do in fact rise to the occasion when given the responsibility and opportunity to do so. It is a step in the right direction to defer to the state courts and give finality to their judgments on

67. 15 ARIZ. B.J. (August 1980) (Newsletter).

federal constitutional questions where a *full* and *fair* adjudication has been given in the state court.

The jurisdiction of state courts to decide federal constitutional questions cannot be removed by congressional action, whereas the federal court jurisdiction can be shaped or removed by Congress.[68] Proposals are sometimes made to restrict federal court jurisdiction over certain types of cases or issues. Among the proposals which have merit from the perspective of a state court judge are the elimination or restriction of federal court diversity jurisdiction, and a requirement of exhaustion of state remedies as a prerequisite to bringing a federal action under section 1983. If we are serious about strengthening our state courts and improving their capacity to deal with federal constitutional issues, then we will not allow a race to the courthouse to determine whether an action will be heard first in the federal or state court. We should allow the state courts to rule first on the constitutionality of state statutes.

At both the state and federal levels, efforts should continue to be made to improve the judicial selection processes, and to provide adequate and appropriate training for those selected. The states should, in my view, adopt procedural rules which are generally patterned after the federal rules of criminal and civil procedure, and evidentiary rules which are the same or parallel to the federal rules of evidence. In this way perhaps parity will become less a myth and more a reality.

68. U.S. CONST. art. III, §§ 1, 2; *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869); Sheldon v. Sill, 49 U.S. (8 How.) 440 (1850).

REINCARNATION OF STATE COURTS

Fifth Annual Roy R. Ray Lecture*

by
Shirley S. Abrahamson
Justice, Wisconsin Supreme Court

I AM honored to have been selected to deliver the Fifth Annual Roy R. Ray Lecture, named in honor of Professor Emeritus Roy R. Ray of this faculty, and to have the opportunity to speak with the faculty, students, and alumni of this distinguished university.

I speak today of a subject near and dear to me—state courts. I have been sitting on the highest court of the State of Wisconsin for six years, and I am eligible to sit for another twenty-two years. I have pondered long and hard about how to present state courts to you. My law clerk gave me what he considered sage advice. He said I should remember to be neither partial on the one hand nor impartial on the other.

The title of my lecture is, as you know, "Reincarnation of State Courts." The word reincarnation, like most words, has several meanings and usages. The one I use is that of a "rebirth." A major theme of this lecture is that in the 1980s there will, I believe, be a "rebirth" of the state courts, a rebirth in the sense of a renewed recognition of the significance of the work of the state courts. In the past three decades, when mention was made of courts, both the legal and academic communities and the public thought of federal courts. The 1980s will be the decade of the state courts. I think by the end of the 1980s a lawyer or academician might look at the state courts and say, "You've come a long way, Baby." The state courts have always been important, but it's taken some people in the legal world, including the state judges themselves, a long time to recognize this fact.

I deliberately chose to use the word reincarnation rather than the word rebirth so that I could conjure up the image of old concepts returning to the earth in new forms. The old concepts to which I refer are two recurring themes in American legal history, states' rights and individual rights.[1] Both states' rights and individual rights predate the founding of this coun-

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* This Article is a revised and annotated version of the lecture delivered at Southern Methodist University School of Law, Dallas, Texas, March 5, 1982.

1. *See* ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, AMERICAN FEDERALISM: TOWARD A MORE EFFECTIVE PARTNERSHIP (1975); B. MARSHALL, FEDERALISM AND CIVIL RIGHTS (1964); *Developments in the Law, Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1135-83 (1977); Comment, *Theories of Federalism and Civil Rights*, 75 YALE L.J. 1007, 1017-29 (1966).

try. These two concepts return in the 1980s in new forms, called "new federalism" or "recycled federalism."[2] In judicial jargon new federalism describes a growing awareness in the state courts of the importance of state law, especially state constitutional law, as the basis for the protection of individual rights against state government. New federalism describes the willingness of state courts to assert themselves as the final arbiters in questions of their citizens' individual rights by relying on their own law, especially the state constitutions. New federalism is based on the premise that the federal Constitution establishes minimum, rather than maximum, guarantees of individual rights and that, in appropriate cases, state courts should independently determine, according to their own law (generally their own state constitutions), the degree to which individual rights will be protected within the state jurisdiction. Independent interpretation of the state's own constitution is part of the double security of having both federal and state bills of rights.

Legal literature has used the term new federalism to refer to the relationship of the federal and state courts before President Reagan popularized the term in his 1980 campaign. President Reagan proposes, as you know, decentralizing governmental activities so that many federally legislated and administered programs will be established and maintained by the states and localities. President Reagan's proposals have engendered intensive discussions about the proper alignment of power between the central government and the states. You will soon realize that many of the arguments relating to Reagan's new federalism have counterparts in my discussion of new federalism for the judicial branch.

In the 1980s it may very well be the state supreme court, not the United States Supreme Court, that will be the significant constitutional law court. And the state supreme court will be looking to its own law; it will be interpreting the state constitution, not the United States Constitution.

My theme then is the emerging role of state courts in relation to the federal courts and the emerging role of state law, especially state constitutional law, in relation to federal constitutional law.

In law school it is customary to use hypotheticals. I will follow precedent. Suppose that University Park, the municipality in which Southern Methodist University is located, has an ordinance requiring every speaker in the community who will address an audience of more than fifty persons to submit the text of his or her speech twenty-four hours in advance of the speech to obtain a license for the public gathering. I think you all recognize that this ordinance is in trouble. Let us suppose that the year is 1921, the tenth anniversary of the founding of Southern Methodist University, and I am here to speak on that occasion. What provision of law protects my right to speak?

If your answer is the first amendment to the federal Constitution you are

2. "I detect a phoenix-like resurrection of federalism, or, if you prefer, states' rights, evidenced by state courts' reliance upon provisions of state constitutions." Mosk, *The State Courts*, in AMERICAN LAW—THE THIRD CENTURY 216 (B. Schwartz ed. 1976).

wrong. Although in the early part of the twentieth century a minority of Justices of the United States Supreme Court were pressing for recognition of free expression as a fundamental freedom guaranteed by the federal Constitution against state action, these Justices were the minority.[3] Having the dissenting Justices on your side doesn't mean you're right, nor does it mean you're wrong. It does mean, however, that you lose.

In 1921 I, the speaker, was not protected by the federal Constitution. I was nevertheless protected by article I, section 8, of the Texas Constitution, which guarantees that "[e]very person shall be at liberty to speak, write or publish his opinions on any subject."[4] The freedom of speech and press provision of the Texas Constitution differs from the text of the first amendment.[5] In 1921 you and I would go to the Texas trial court to seek the protection of my rights under the state constitution.

Now suppose this was the year 1969, the forty-fourth anniversary of the founding of this law school. Here I am again, and University Park has, in the Vietnam years, reenacted its former ordinance. What provisions of law protect my right to speak? If this were 1969 you'd answer, without hesitation, the first amendment to the federal Constitution. This time you would be right. The dissenters obviously got some votes. And we would then be faced with the issue of what court to go to, state or federal. You and I could still go to the Texas trial court to seek protection of my rights under the federal Constitution. Remember that the state courts have the power, indeed the duty, to enforce the federal Constitution and federal law. The Texas judges take an oath, as I do, to support the federal Constitution. Article VI of the federal Constitution provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

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3. *See* Gilbert v. Minnesota, 254 U.S. 325, 343 (1920) (Brandeis, J., dissenting); Patterson v. Colorado, 205 U.S. 454, 465 (1907) (Harlan, J., dissenting). In Prudential Ins. Co. of Am. v. Cheek, 259 U.S. 530, 543 (1922), the Court stated that "neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about 'freedom of speech'. . . ."

4. TEX. CONST. art. I, § 8, provides:

> Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers, investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

5. The first amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

For a discussion of the Texas Constitution of 1876 and its Bill of Rights, see Hart, *The Bill of Rights: Safeguard of Individual Liberty*, 35 TEX. L. REV. 919 (1957); Thomas & Thomas, *The Texas Constitution of 1876*, 35 TEX. L. REV. 907 (1957).

Having a 1969 mind set we would probably have avoided the Texas trial court. We would probably have gone to the federal district court, believing it to be a more receptive forum for preservation of individual rights than is the state trial court.

Now it is 1982 and I have returned, older but not really surprised at my advanced age to find again that University Park has recently adopted a similar ordinance. Old fights don't stay won. What provision of law protects my right to speak in 1982? If you are a good constitutional lawyer your answer should be that my rights are doubly protected, protected by the Texas Constitution and protected by the federal Constitution. You might say we should talk about which constitution we want to rely upon. And now in 1982 we will again face the question of whether to go to federal or to state court.

In my hypothetical, the facts are the same in 1921, 1969, and 1982. The University Park ordinance, the Texas Constitution, and the United States Constitution are the same in 1921, 1969, and 1982. Yet the answers to the same question have changed. Why? This hypothetical reminds me of my teaching federal income tax at the University of Wisconsin Law School. I gave the same exam each year; I just changed the answers. To understand the 1921, 1969, and 1982 answers to my ordinance hypothetical, let's go back to our two themes—states' rights and individual rights.

We'll talk about states' rights first. I use the terms states' rights and federalism interchangeably. Both refer to the division of power between the central authority and the constituent jurisdictions. Throughout most of our country's history fundamentally different views have persisted about the nature of the American government: Is it a federal or national system? A federal system of government is one formed by the confederacy of several states that retain residual powers of government. In contrast to a federal government, a national government is a union of people under a single sovereign government.

In 1787, when the federal Constitution was drafted, a decision had to be made whether there would be a compact among state sovereignties or a union of the whole people. The decision was never made. Our Constitution is a compromise. Madison described the new government as partly national, partly federal.[6]

Our founding fathers left us with two governments, state and federal—two governments governing the same people in the same geographic territory. In addition to the division of powers between the federal and state governments, we have delegated the legislative, executive, and judicial functions to three separate branches of government. Thus we live in a country with a dual court system, federal and state, operating side by side. Conflict is endemic in the system. When we talk of new federalism, judicial federalism, we talk of the respective spheres of federal and state courts.

6. Madison, *The Federalist No. 39*, in THE ENDURING FEDERALIST 164-68 (C. Beard ed. 1948).

The framers thought these conflicts could be tolerated, and the framers relied upon these conflicts to operate as checks and balances on the power of the governments. Setting up a government with these internal conflicts illustrates colonial America's distrust of government, and leads me to the second theme: individual rights.

Protection of individual rights by a formal constitution starts with the state constitutions, which predate the federal Constitution. Between 1776 and 1784 each of the original thirteen states adopted its own constitution, which asserted the principle that citizens' individual liberties were to be protected against government action. Formal bills of rights were part of many of the colonial charters and revolutionary declarations and constitutions.[7] During the months preceding independence, uniformity of state constitutions was debated but rejected in favor of the states calling conventions to draw up constitutions satisfactory to the respective states. Diversity was the politically realistic answer.[8]

From an historical standpoint state constitutions have a real significance. The draftsmen of the federal Constitution used the state constitutions and state experience as models for the federal Constitution. Strange as it seems, states formed after the drafting of the federal Constitution did not look to it as a model for their own constitutions. They looked to their territorial framework of government (like the Northwest Ordinance) or to the constitutions of their sister states.

Thus the 1848 Wisconsin Constitution, which is Wisconsin's first and only constitution, was patterned after the New York Constitution, because the Wisconsin Constitution was adopted by a convention in which New Yorkers were prominent.[9]

The present Texas Constitution dates back to 1876 and is the eighth constitution of this state.[10] The 1876 Texas constitution was based on the 1845 constitution and the constitutions of other states, particularly Pennsylvania and Louisiana.[11]

Although the state constitutions had bills of rights, the federal Constitution as originally drafted in 1787 had no bill of rights, no list of protections of individual rights. The Bill of Rights, the first ten amendments to the

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7. 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 49-379 (1971).

8. Linde, Book Review, 52 OR. L. REV. 325, 334 (1973) (reviewing B. SCHWARTZ, *supra* note 7).

9. A. SMITH, THE HISTORY OF WISCONSIN: FROM EXPLORATION TO STATEHOOD 653 (1973).

10. The 1824 Constitution of the Republic of Mexico recognized Coahuila and Texas as a single state and provided that each state should frame its own constitution. The state of Coahuila and Texas published a constitution in 1827. In 1832 Texas drew up a separate state constitution, which was not approved by the Mexican Congress. In 1836 the Republic of Texas adopted its own constitution. Texas was admitted to the Union with the constitution of 1845. In 1861 Texas amended its constitution to reflect Texas's transfer of allegiance. After the civil war a convention drafted and the voters approved the constitution of 1866. In 1869 the 1868 or Reconstruction Constitution was ratified by voters. In 1876 the present constitution was ratified by the voters. *See* 1 TEX. CONST. ANN. preamble (Vernon 1955); 2 C. WHARTON, TEXAS UNDER MANY FLAGS 230-31 (1930).

11. 1 TEX. CONST. ANN. preamble (Vernon 1955).

Constitution, was adopted by Congress on September 25, 1789, and ratified on December 15, 1791.

It was assumed at adoption that the Bill of Rights would limit only the federal government's exercise of power. There was no need to limit the states; the state constitutions did that. The assumption that the eight amendments limited only the federal government became constitutional doctrine in 1833 in the case of *Barron v. Mayor of Baltimore*,[12] an opinion written by Chief Justice John Marshall.

It was the Civil War amendments to the Constitution, the thirteenth, fourteenth, and fifteenth amendments, that wrote into the Constitution broad new guarantees of liberty and equality by which the federal government committed itself to protect citizens against states. Nationalism was the spirit of the Civil War.

Not long after the passage of the fourteenth amendment, however, it was argued in the *Slaughter-House Cases* of 1872[13] that the fourteenth amendment had the effect of blanketing in the original Bill of Rights as limitations upon state action. The United States Supreme Court rejected this theory. It refused to say that the fourteenth amendment protected a Louisiana butcher from a state-created monopoly in slaughtering.

It was not until 1925 in *Gitlow v. New York*[14] that the United States Supreme Court in a dictum recognized that the free speech guarantees of the first amendment applied to the states as a result of the fourteenth amendment.[15]

Thus for most of the history of this country—namely, for 138 years, from 1787 to 1925 (the date of the founding of this law school)—the federal Bill of Rights offered citizens little or no protection in their relations with the state and local governments. The individual state constitutions offered them those protections.

Armed with state law and the state constitution, and operating in an area that received little or no federal attention, the state courts could contribute to the development of preservation of freedom of expression and other rights guaranteed by the states' constitutions. From 1787 to 1925 the state constitution, not the federal Constitution, was the primary source of protection of individual rights. Remember, in 1921 when I came to University Park, I was protected by only the state constitution.

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12. 32 U.S. (7 Pet.) 242 (1833).
13. 83 U.S. (16 Wall.) 36 (1872).
14. 268 U.S. 652 (1925).
15. In *Gitlow* the Court said:

> For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States.

268 U.S. at 666. In later cases the Supreme Court viewed *Gitlow* as settling the issue that the first amendment applied to the states through the fourteenth amendment. *See, e.g.*, Stromberg v. California, 283 U.S. 359, 368 (1931); Fiske v. Kansas, 274 U.S. 380, 386-87 (1927); Whitney v. California, 274 U.S. 357, 371 (1927).

The states' records in preserving individual rights in the years from 1787 to 1925 are not uniform within each state or from state to state. Some states, in some areas, have records of which they can be proud. In the area of appointment of counsel for indigent criminal defendants at public expense, the states' records are good, far ahead of the federal government's record.

In 1859 the Wisconsin Supreme Court in *Carpenter v. Dane County*,[16] as a matter of its own state constitutional law, required counties to appoint counsel for indigent felons at county expense. It was not until 1963, 104 years after the Wisconsin Supreme Court had acted, that the United States Supreme Court required, as a matter of fourteenth amendment due process, a state to provide counsel in state felony trials.[17] By the time the United States Supreme Court imposed this requirement, most states appointed counsel at public expense, as called for by state constitutions, state laws, or state practice. In *Gideon v. Wainwright* the United States Supreme Court was bringing the few laggards into line.[18]

In other areas of individual rights the states' records are sorry ones indeed. And many have said that the states' failure to protect individual rights in this period created a void, and voids, as you know, are generally filled.[19]

After *Gitlow* in 1925 the United States Supreme Court started filling the void. The year 1925 marks the end of the first stage of federalism and the beginning of the second stage. After 1925 the United States Supreme Court adopted the rationale that certain aspects of the Bill of Rights were so necessary to an ordered scheme of liberty that it was reasonable to conclude that they were encompassed within the fourteenth amendment and therefore were applicable to the states. The process of absorption began. As late as 1961, only twenty years ago, less than a handful of the twenty-four or twenty-five specific rights of the first eight amendments to the federal Constitution were held to be absorbed into the fourteenth amendment and applicable to the states. From 1961 to about 1970, however, the United States Supreme Court made many, but not all, of the provisions of the Bill of Rights applicable to the states. In a decade, the 1960s, the fourteenth amendment was used to impose national standards of fair procedure and equal treatment on states and localities.

As the federal constitutional guarantees grew during the Warren Court years, the protection of individual rights under the state constitutions almost came to a halt. In the 1960s the United States Supreme Court went faster and probably farther than many of the state courts were willing to go. Not inclined to take the lead, state courts followed, some reluctantly, the lead of the United States Supreme Court. During the 1960s most law-

16. 9 Wis. 274, 278 (1859).

17. Gideon v. Wainwright, 372 U.S. 335 (1963).

18. *Id.*

19. *See* Sheran, *State Courts and Federalism in the 1980's: Comment*, 22 WM. & MARY L. REV. 789, 790-91 (1981).

yers, academicians, and state courts tended to follow the decisions of the United States Supreme Court. They did not examine the state constitution to determine whether it afforded the same or greater rights.[20] The 1960s was the zenith of the second period of federalism and individual rights. The emphasis was on the central government. You remember that when I spoke in University Park in 1969 we viewed my rights as protected by the first amendment.

In the 1970s we find new faces on the United States Supreme Court bench. In 1976 the *New York Times* would write:

> There was a time not so far distant when the United States Supreme Court was the staunch and ultimate defender of civil rights and liberties . . . . [T]he Court [now] seems clearly to be beating a retreat from its once proud forward position in this delicate and difficult area of the relationship between citizen and state.[21]

I am not sure that there has been such a retreat. Certainly some decisions since 1970 have been highly protective of citizens' rights against both state and federal action. Nevertheless, Justice Brennan, writing in the *Harvard Law Review* in the spring of 1977, pointed out what he and others saw as two significant changes in the United States Supreme Court and its attitude toward individual rights.[22] First, Justice Brennan and others saw a retrenchment of the Supreme Court from its aggressive position in protecting the rights of citizens against both state and federal encroachments;[23] second, they saw the conscious barring of the door to federal courthouses by procedural devices to limit adjudication of claims against state action.[24] In the 1960s Justice Brennan spoke of the Bill of Rights as the primary source of constitutional liberty.[25] In the 1970s Justice Brennan repeatedly urged state courts to look to their own constitutions and to become a new "font of individual liberties."[26]

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20. One exception was McCauley v. Tropic of Cancer, 20 Wis. 2d 134, 139, 121 N.W.2d 545, 548 (1963).

21. N.Y. Times, Mar. 31, 1976, at 40, col. 1.

22. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

23. *Id.* at 495.

24. *Id.* at 501.

25. *See* sources cited in Galie & Galie, *State Constitutional Guarantees and Supreme Court Review: Justice Marshall's Proposal in* Oregon v. Hass, 82 DICK. L. REV. 273, 275 n.14 (1978); *see also* Sobeloff, *Federalism and Individual Liberties—Can We Have Both?*, 1965 WASH. U.L.Q. 296 (federal system justifiable when it operates to maximize the liberty of persons as against the central government).

26. Brennan, *supra* note 22, at 491. Justice Brennan continued:

> The essential point I am making, of course, is not that the United States Supreme Court is necessarily wrong in its interpretation of the federal Constitution, or that ultimate constitutional truths invariably come prepackaged in the dissents, including my own, from decisions of the Court. It is simply that the decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law. Accordingly, such decisions are not mechanically applicable to state law issues, and state court judges and the members of the bar seriously err if they so treat them. Rather, state court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the

Personally, I do not view the United States Supreme Court developments in the 1970s as the result of ill motives or a conscious desire to limit individual rights. The present may be a time for the Court to digest the changes and fill in the details of earlier doctrine, rather than break new ground. There are good reasons for limiting access to the federal courts when their procedures duplicate fair and constitutionally sufficient state court procedures. Redundant procedures exhaust judge power, a precious and limited commodity, and may have the effect of limiting or diluting the quality of justice for all litigants. In any event, the purpose of this speech is neither to praise nor to condemn either the Warren or the Burger Court.

It is clear, in view of the recent decisional trends of the United States Supreme Court, that litigants will become more and more dependent upon their state courts in matters of civil liberties than they have in the recent past. Thus, in the 1980s we reach the third stage of the interrelation of federalism and individual rights. Once again we look to state courts and state constitutions. But there is a difference. In the 1980s, unlike pre-1925, the federal Constitution is a federal safety net for the protection of individual rights.

Thus, in 1982 when I speak in University Park and worry about the ordinance, I have double security for my rights—both the federal and state constitutions.

Let us move from my hypothetical free speech case to an actual case in the 1970s involving the individual's protection against unreasonable search and seizure. I speak of *Texas v. White*.[27] Mr. White was arrested by Amarillo police officers while he was attempting to pass fraudulent checks. He was taken to the police station and questioned. Although he refused to consent to have his auto searched, the police conducted a search and seized four wrinkled checks that corresponded to those he had attempted to pass. The fourth amendment to the United States Constitution protects individ-

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> policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees. I suggest to the bar that, although in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions.

Id. at 502 (footnote omitted); *see also* Brennan, *Guardians of Our Liberties—State Courts No Less Than Federal*, 15 JUDGES' J. 82 (1976).

The 1969 report of the Virginia Commission on Constitutional Revision noted the importance of the Virginia Bill of Rights as follows:

> That most of the provisions of the Virginia Bill of Rights have their parallel in the Federal Bill of Rights is, in the judgment of the Commission, no good reason not to look first to Virginia's Constitution for the safeguards of the fundamental rights of Virginians. The Commission believes that the Virginia Bill of Rights should be a living and operating instrument of government and should, by stating the basic safeguards of the people's liberties, minimize the occasion for Virginians to resort to the Federal Constitution and to the federal courts.

1969 REPORT OF THE COMM'N ON CONSTITUTIONAL REVISION, part III, at 86; *see also* Countryman, *Why a State Bill of Rights?*, 45 WASH. L. REV. 454 (1970); Force, *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U.L. REV. 125 (1969).

27. 423 U.S. 67 (1975).

uals against unreasonable searches and seizures. Article I, section 9 of the Texas Constitution, in language almost identical to that of the fourth amendment of the United States Constitution, prohibits unreasonable searches and seizures.

The Texas trial court found the search reasonable under the fourth amendment. The Texas Court of Criminal Appeals held that the warrantless search of the automobile violated the fourth amendment, but made no reference to the Texas Constitution or statutes.[28] The United States Supreme Court reversed the Texas court, saying the Texas court was wrong in its interpretation of the fourth amendment and the prior United States Supreme Court cases.[29] The Court sent the case back to the Texas Court of Criminal Appeals.[30] What does this tell us? It tells us that if the state court incorrectly predicts what the United States Supreme Court will do, the state court gets reversed.

Justice Thurgood Marshall dissented on the merits and further commented that "it should be clear to the court below that nothing this Court does today precludes it from reaching the result it did under applicable state law."[31] On remand following Justice Marshall's suggestion, the Texas court considered whether state law could sustain the original opinion. The Texas court concluded that it would not look to the available state constitution.[32] It took a procedural way out, saying that "[a]t no time during the trial of this case did the appellant urge that Art. I, Sec. 9, of the Texas Constitution supported his motion to suppress," and "[i]t is fundamental that the grounds for reversal urged on appeal must comport with the objections made at trial."[33] Accordingly, the Court of Criminal Appeals affirmed White's conviction.

Consider Justice Marshall's message. If Texas wants to decide rules of evidence for Texas courts it can do so. If Justice Marshall were a lone dissenting voice crying out in the wilderness telling lawyers and state judges to turn to state law, to state constitutions, to determine how state courts should process state criminal cases, we might not pay him too much heed. But Justice Marshall is not alone. We know Justice Brennan agrees with him. And a majority, if not all, of the other Justices of the United States Supreme Court recognize that a state may, as a matter of its own law, impose greater restrictions on state action than the United States Supreme Court does under federal constitutional standards. Chief Justice Burger,[34] and Justices White,[35] Rehnquist,[36] and Stevens[37] have expressed

28. White v. Texas, 521 S.W.2d 255, 258 (Tex. Crim. App. 1974), *rev'd per curiam*, 423 U.S. 67 (1975), *on remand*, 543 S.W.2d 366 (Tex. Crim. App. 1976).
29. 423 U.S. at 68.
30. 543 S.W.2d 366 (Tex. Crim. App. 1976).
31. 423 U.S. at 72.
32. 543 S.W.2d at 370.
33. *Id.* at 369.
34. *See* California v. Green, 399 U.S. 149, 171-72 (1970) (concurring opinion).
35. *See* Lego v. Twomey, 404 U.S. 477, 489 (1972).
36. *See* PruneYard Shopping Center v. Robins, 447 U.S. 74, 81 (1980); Ross v. Moffitt, 417 U.S. 600, 618-19 (1974).

similar sentiments. Justice Sandra Day O'Connor, then judge of the Arizona Court of Appeals, acknowledged in the 1981 *William and Mary Law Review* that state courts are using their own state constitutions as a means of defining rights of criminal defendants and urged less federal court intervention in state court proceedings.[38]

The Burger Court has urged state courts to step forward and apply their own constitutional doctrine. The Burger Court has taken a states' rights stance. And the states' rights issue is as controversial in legal circles today as it was in the nineteenth century. Many resist the Burger Court's suggestion to base state court decisions on the state constitution.

The critics of new federalism are strange bedfellows. The critics are the nationalists, those who think power should rest with the central government. The critics are states' rightists who view the new federalism as a plot to enlarge protection of individual rights. The critics are the civil libertarians who see new federalism as a technique for the federal government to get out of the business of ensuring civil liberties and civil rights and who think it will be harder to persuade fifty state courts instead of one United States Supreme Court of the correctness of their position. The critics also include those who fear that the state judges cannot handle the task and that the job of protecting individual rights will not be done by either the federal or state courts if new federalism prevails.

There is, as you may know, a bias in the legal system against state judges. There is a myth that state judges play in the minor leagues of the American judicial system. The myth is that the best that can be said of many state judges is that they are buddies of the Governor whom the judge helped get elected. In contrast, so the myth goes, federal judges are competent students of the law and are sensitive to individual rights, even if they are buddies of the Senator or President whom the judge helped get elected. I do not take this criticism of state judges personally. I obviously believe individual judges should be judged on their individual merit, not on profiles or stereotypes.[39]

The fact is that the vast bulk of criminal litigation in this country is handled by state courts. The everyday burglar, robber, rapist, or murderer has violated state law and is tried in state court. Indeed, the bulk of all litigation in this country, civil or criminal, is handled by state courts. In Wisconsin, the federal judicial system is composed of six federal district judges, nine circuit judges of the Seventh Circuit, and the nine Supreme Court Justices. The Wisconsin court system has approximately 200 judges. The state judges are the workhorses. The state courts carry the heavy burden of dispensing justice. It is the state courts that interpret the rules people live by. It is the state judges, not the federal judges, who day in and

37. City of Mesquite v. Aladdin's Castle, Inc., 50 U.S.L.W. 4210 (U.S. Feb. 23, 1982).

38. O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801 (1981).

39. For a defense of state judges, see O'Connor, *supra* note 38, at 812; *see also* Sumner v. Mata, 449 U.S. 539, 547 (1981); Stone v. Powell, 428 U.S. 465, 493 n.35 (1976).

day out decide motions to suppress evidence that was allegedly unlawfully seized. It is the state judges rather than the federal judges who are probably best qualified to establish the guidelines for search and seizure of automobiles under the state constitution, subject, of course, to the federal safety net.

And finally among the critics of new federalism are many state judges. They fear that the state courts cannot take the heat that comes from deciding the tough individual rights cases. They worry that moving the arena of individual rights from Washington to the state capitals puts the constitutional issues closer to the public, who will become hostile to state court judges. A state judge in California says, "I am frightened about the reactions of the lay person."[40] He is concerned that the public accepts the United States Supreme Court as setting ultimate rules and will not accept the state court's exercising this power. He implies that state judges should be content to pass the buck to the United States Supreme Court on the difficult issues. Popularly elected state judges, he says, may have trouble resisting the popular and political pressures that may be adverse to individual rights. Federal judges with lifetime tenure are immunized from popular pressure and sentiment. There is concern that if the people are unhappy about a state court decision, they will amend the state constitution, which in many states may be relatively easy to do. If my memory is right, the death penalty was put into the California Constitution by the ballot in response to a decision of the California Supreme Court.

Regardless of the critics, and they make good points and raise difficult issues, the issue presented by Justice Marshall in *Texas v. White* and by the Burger Court is this: Do good lawyering and good judging in the 1980s require an analysis of the state constitution in addition to or in lieu of an analysis of the federal Constitution? My answer is an unequivocal "yes." But to aid you in evaluating my answer, I report, in keeping with the Wisconsin rules of open government and full disclosure, that a student note in a recent *Marquette Law Review* had the following comment about me and new federalism:

> The most vociferous advocate of the new federalism on the Wisconsin court is Justice Abrahamson. In the most recent term of the court [1978], Justice Abrahamson has twice written concurring opinions in which she suggests that the Wisconsin constitutional provision against unreasonable searches and seizures should serve as the basis for determining the validity of warrantless searches.[41]

I should again make clear just what it is that the *Marquette Law Review* thinks I am advocating. I am suggesting a process, a process for lawyers to use in presenting cases involving individual rights and a process for state courts to use in deciding such cases. I join those who propose that the state

40. Welsh & Collins, *Taking State Constitutions Seriously*, CENTER MAG., Sept.-Oct. 1981, at 6, 33.

41. Comment, *The Independent Application of State Constitutional Provisions to Questions of Criminal Procedure*, 62 MARQ. L. REV. 596, 604 n.49 (1979).

supreme courts should first examine state law, almost as a matter of routine, in cases in which individual rights are involved. If the court concludes that state law, whether statute, the exercise of the court's supervisory power, or the state constitution, protects the rights, the court should say so.[42] The case should be decided on the independent state grounds. If analysis of federal law would reach the same result, the holding can be further based on federal constitutional law. The court must make clear, however, that the federal rationale does not dictate the result of the case. Only by carefully and responsibly explicating the different bases for the state and federal rationales can the state court justify a decision as being on independent and adequate state grounds.

I want to make clear that I am not, I am *not*, advocating a result. I am advocating a process. Although both proponents and critics of new federalism see the doctrine as a technique to expand protection for individual rights and to avoid following decisions of the United States Supreme Court, new federalism does not necessarily work this way. The state court might decide that the state law provides the same protection as the federal Constitution, using the same rationale as the United States Supreme Court, or using different reasons, or that state law provides more protection than the federal Constitution. I suppose that the state courts might construe their constitution as providing a lesser degree of protection than the federal Constitution and that the state must apply the more rigorous command of the federal Constitution. My discussion should imply no preference for the decision to be made under the state constitutions. I suggest a process, not a result.

Many trace new federalism to the reaction against the Burger Court and charge that new federalism is just a euphemism for a result-oriented doctrine. But I remind you that looking to the state's law, usually the state's constitution, for protection of individual rights predates the Burger Court. State protection of individual rights is as old as the nation.

In 1968, while the Warren Court was intact, Professor Countryman urged the importance of a state bill of rights when talking to a constitutional convention redrafting a state constitution. He reasoned that not all the federal rights are applied to states through the fourteenth amendment; modern society needs additional guarantees not found in the United States Constitution, and the fourteenth amendment governs only state action, not private action. The fourteenth amendment governs state infringement on free speech or unreasonable search and seizure. State constitutions can govern private action; thus California's free speech constitution, unlike the first amendment, can be interpreted to protect high school students distributing hand bills at private shopping centers.[43]

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42. The state court, in lieu of, or in addition to, relying on the state constitution, may rely on a state statute, or use its supervisory authority over the administration of justice to formulate a state rule. Decisions based on the state statutes or on the court's supervisory power avoid the rigidities of a decision based on the state constitution.

43. PruneYard Shopping Center v. Robins, 447 U.S. 74, 88 (1980).

In *Texas v. White* and other cases the United States Supreme Court is saying: State courts, look at your own state constitution. Whatever your view of the merits of new judicial federalism, I conclude that as lawyers and judges we must be alert to the concept, and we must deal with it. Professor Dawson writes in a recent *Texas Law Review*[44] that *Texas v. White* is not likely to be soon forgotten by the Texas bench or bar. His reading of the Texas cases decided after *Texas v. White* demonstrates that when the Texas Court of Criminal Appeals decides a fourth amendment issue in favor of the defendant, the court routinely attaches a citation to the Texas Constitution. He assumes that the lawyers cite the Texas Constitution. Professor Dawson does not detect any movement by the Texas courts to determine independently of United States Supreme Court determinations as to what Texas constitutional provisions mean for the criminal process in Texas. The Texas Constitution is cited, but not analyzed.[45] The Wisconsin Supreme Court similarly all too often treats its constitution in the same manner as the Texas courts.

Why don't the state courts turn to their own state constitution? It's a puzzle. The state courts do analyze and rely on their own constitution if there is no federal constitutional counterpart. They tend not to analyze their constitutional provision if there is a federal counterpart. I see several explanations. First, there is an understandable human tendency on the part of state judges to view a United States Supreme Court decision on a particular topic as the absolute, final truth. The Supreme Court said it; it must be right. Second, habit explains a great deal. In the 1960s and 1970s the lawyers and the courts got out of the habit of examining the state constitutional claim. They examined the federal claim and no more. Third, simplicity and ease. The fourteenth amendment establishes the minimum, the floor below which the state cannot move. If the state action passes the minimum requirement, the lawyer and court are loathe to go on. It is easier for state judges and for lawyers to go along with the United States Supreme Court than to strike out on their own to analyze the state constitution.

It is not an easy task to decide the nature of the rights protected by the state constitution. State constitutional law is rarely taught in law school.[46] State constitutional law was not even taught at my law school in the 1950s, an era prior to the expansion of the fourteenth amendment. There are few contemporary works devoted to state constitutional law or to the subject of civil liberties under state constitutions.[47] There are, as far as I know, no

44. Dawson, *State-created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEX. L. REV. 191, 217 (1981).

45. *Id.* at 216-17.

46. Professor Levinson of Vanderbilt University School of Law advises me that the law schools' interest in state constitutional law has increased in recent years. At the January 1982 annual meeting of the Association of American Law Schools, a "standing room only" audience heard a panel discussion on state constitutional law.

47. *See, e.g.*, C. BROWNE, STATE CONSTITUTIONAL CONVENTIONS FROM INDEPENDENCE TO THE PRESENT UNION, 1776-1959 (1973); B. CANNING, STATE CONSTITUTIONAL CONVENTIONS, REVISIONS, AND AMENDMENTS, 1959-1976 (1977); J. DEALEY, GROWTH OF

continuing legal education courses for the bar on state constitutional law. Judicial education courses are beginning to include some mention of this topic, but much time in judicial education courses is spent on a review of recent United States Supreme Court decisions.

In the past fifteen years or so numerous pieces have appeared in the law reviews on the concept of new federalism. And there are now appearing single state analyses of state constitutional law developments. There are excellent resource materials on the state constitutions, but they are not very well known to the bench or bar. There is an Index Digest of State Constitutions and a current compilation of state constitutions. In 1962 I worked on the prior editions of the most recent Index Digest and the compilation.[48] I am not a Shirley-come-lately to the scene of state constitutional law.

How am I as a state judge to decide what the state constitution means? I use the same techniques as I use to decide what any law means. I try to find the intent of the framers. First, I look at the language of the constitution. Then I go to the legislative history—the proceedings of the convention, the state constitutions upon which our constitution is based. I examine the earlier decisions of our court, the decisions of sister courts, and the decisions of the United States Supreme Court construing the same or similar provisions. The reasoning of other courts may be persuasive. I look at the peculiarities of my state—its land, its industry, its people, its history. Alas, it would be easier for me just to read the writings of the United States Supreme Court in the *United States Law Week* and follow the teachings. Why take the hard road when you can take the easy path?

AMERICAN STATE CONSTITUTIONS (1915); C. KETTLEBOROUGH, THE STATE CONSTITUTIONS AND THE FEDERAL CONSTITUTION AND ORGANIC LAWS OF THE TERRITORIES AND OTHER COLONIAL DEPENDENCIES OF THE UNITED STATES OF AMERICA (1918); NAT'L MUN. LEAGUE, THIRTY YEARS OF STATE CONSTITUTION-MAKING: 1938-1968 (1970); NEW YORK STATE CONSTITUTIONAL CONVENTION COMM., CONSTITUTIONS OF THE STATES AND UNITED STATES (1938); B. POORE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES (2d ed. 1878); B. SCHWARTZ, *supra* note 7; W. SWINDLER, SOURCES AND DOCUMENTS OF THE UNITED STATES CONSTITUTIONS (1973); F. THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATE, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA (1909); S. YARGER, STATE CONSTITUTIONAL CONVENTIONS 1959-1975 (1976); David, *Our California Constitutions: Retrospections in This Bicentennial Year*, 3 HASTINGS CONST. L.Q. 697 (1976); Graves, *State Constitutional Law: A Twenty-Five Year Summary*, 8 WM. & MARY L. REV. 1 (1966); Mazor, *Notes on a Bill of Rights in a State Constitution*, 1966 UTAH L. REV. 326.

48. *See* INDEX DIGEST OF STATE CONSTITUTIONS (R. Edwards ed. 2d ed. 1959); CONSTITUTIONS OF THE UNITED STATES—NATIONAL AND STATE (S. Abrahamson ed. 1962). In his foreword to the 1962 compilation, Professor Kernochan wrote:

> The present Compilation, like the *Index Digest*, is part of a broad program of state constitutional studies jointly developed some years ago by the Brookings Institution, the National Municipal League and the Fund. In general terms, the program calls for preparation of basic research aids, studies and other materials designed to stimulate and assist civic groups, government officials, scholars and other interested persons to explore, to appraise and, hopefully, to reform a vital but neglected area of our government and law.

Kernochan, *Foreword* to CONSTITUTIONS OF THE UNITED STATES—NATIONAL AND STATE at v (S. Abrahamson ed. 1962).

I advocate the process of analyzing the state constitution because I think such analysis has positive advantages. One advantage of such analysis is diversity. We are at the same time a homogenous and an heterogenous culture, and we should have both a homogenous (national) and heterogenous (state) legal culture. We have uniform state laws like the commercial code. Yet, our states have different laws governing property, marriage, divorce, and torts. Your rights to recover in an auto accident depend substantially upon which state's law applies. All the differences in our state constitutions are not accidents of draftsmanship. Some of these differences reflect differences in our tradition. Texas's Constitution has an equal rights amendment; Wisconsin's Constitution does not.

When the federal Supreme Court decides a case limiting the powers of the states, the decision is one of national applicability and, hence, the Court is properly loath to establish a rule unless it can be implemented effectively nationwide. A state supreme court has more limited geographical responsibility. Moreover, the Supreme Court of the United States is the court most remote from the problems of everyday concern for the administration of justice within a state and is less able to make a determination of the practical appropriateness of a new rule. New federalism serves as a reminder to state courts that they should experiment with new approaches that, if successful, may later be applied nationwide by the United States Supreme Court. State experimentation serves to guide the Supreme Court in its determinations.

Some lawyers are bothered by this diversity, bothered that unreasonable search and seizure might mean one thing in Texas and another in Wisconsin. I am not disturbed; the minimal guarantee is the same in both states, the federal safety net. And uniformity in law, like some nationalized franchise restaurants, brings security of product, but offers no exciting surprises.

In addition to diversity, a second advantage I see to the new federalism is stability. When state courts indiscriminately blanket United States Supreme Court decisions into the state's jurisprudence by basing their holdings on federal law, the law of the state changes each time the United States Supreme Court changes its decisions.

Constitutional holdings of the United States Supreme Court can be volatile. They change more frequently than we generally assume. A recent article in the *Wisconsin Law Review*[49] points out that forty-seven constitutional holdings were reversed by the United States Supreme Court in the period from 1960 to 1979. Search and seizure of automobiles, the issue in *Texas v. White*, is an example of a field of federal constitutional law that is in a state of change. The rights of states' citizens in relation to their own state government can be protected from the vagaries and shifts of the United States Supreme Court.

In this connection I note that the exclusionary rule, the rule that evi-

49. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467.

dence seized illegally cannot be used at a state trial, was adopted by statute in Texas in 1925.[50] The statute is still on the books. The exclusionary rule was imposed on the states as part of the fourteenth amendment in *Mapp v. Ohio*[51] in 1961, thirty-six years after Texas adopted the exclusionary rule.

The exclusionary rule, as articulated in *Mapp v. Ohio*, is in substantial danger of being overruled. Even if the United States Supreme Court overturns the exclusionary rule, the rights of Texas and Wisconsin citizens would not be affected. The protections afforded by state statute in Texas and by the Wisconsin Constitution[52] independently protect the right of the people to be secure against unreasonable searches and seizures, regardless of the holdings of the United States Supreme Court.

Hence, whatever may be the virtues and flaws of the exclusionary rule, it can be preserved in the states of Wisconsin and Texas by the people of these states regardless of the shifting sands of federal doctrine. Judge Roberts of the Texas Court of Criminal Appeals made this very point in his dissent in *Gillett v. State*[53] in which he laid the foundation for an independent interpretation of the Texas Constitution.

The Wisconsin and Texas exclusionary rules can be preserved, because the federal courts do not have jurisdiction over cases that arise under state law or state constitutions. Thus the states may interpret their own constitutions and their own laws as they see fit, provided always that the states do not lessen the rights guaranteed by the federal Constitution. When a state decision interpreting its own statutes or constitution is more protective of a citizen's rights than the United States Supreme Court's interpretation of the federal Constitution, the federal court will not review the state court decision if it rests on "adequate and independent state grounds." The reason for the federal court's not reviewing state decisions resting on adequate and independent state grounds is founded on the Constitution itself. In 1945 Justice Jackson in *Herb v. Pitcairn*[54] explained:

> This court from the time of its foundation has adhered to the principle that it will not review judgements of state courts that rest on adequate and independent state grounds. . . . The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.[55]

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50. The history of Texas's exclusionary rule is discussed in Dawson, *supra* note 44.
51. 367 U.S. 643 (1961).
52. *See* Hoyer v. State, 180 Wis. 407, 193 N.W. 89 (1923).
53. 588 S.W.2d 361, 367 (Tex. Crim. App. 1979) (en banc); *see* Dawson, *supra* note 44, at 217-19.
54. 324 U.S. 117 (1945).
55. *Id.* at 125-26 (citations omitted).

By relying upon their own state constitutions, state courts are able to insulate their decisions from federal review. What are adequate and independent state grounds could be the subject of discussion for a substantial part of a course on federal jurisdiction.[56] Suffice it to say that new federalism can result in less federal judicial review of state court decisions.

Thus some oppose the new federalism, saying the state courts are thwarting and evading judicial review. Sounds wicked, unlawful. But it is not. It is entirely appropriate in our federal system for state courts to base their decisions on state law, free of federal intervention.

And the United States Supreme Court is in a way encouraging the courts to cut off its review. My case in point is one very close to University Park. On February 23, 1982, the United States Supreme Court decided *City of Mesquite v. Aladdin's Castle, Inc.*[57] This case was originally tried by the United States District Court for the Northern District of Texas at Dallas.[58] It went to the Fifth Circuit[59] and then to the United States Supreme Court. This case involves Pac-Man and Space Invaders. The City of Mesquite adopted an ordinance prohibiting children under the age of seventeen from playing coin-operated games unless accompanied by a parent or guardian. Aladdin's Castle sued in federal court for declaratory and injunctive relief on the ground that the age restriction impermissibly trammels the children's constitutional interest in associational freedoms. To put it into non-legalese, the children are saying they want to be with their friends.

The jurisdiction of the federal district court was based on diversity and federal questions. The federal court of appeals held the ordinance unconstitutional, apparently resting its decision on its interpretation of the Texas Constitution as well as the federal Constitution. The Fifth Circuit said:

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56. *See* Oregon v. Kennedy, 50 U.S.L.W. 4544, 4545, 4547 n.1 (U.S. May 24, 1982) (Stevens, J., concurring); Delaware v. Prouse, 440 U.S. 648, 652-54 (1979).

In his remarks to the American Judicature Society on Aug. 6, 1982, Justice Stevens was critical of the Court's unwillingness to allow state courts to make the final decision in cases in which the state court remains free to reinstate its prior judgment by unambiguously relying on state rather than federal law. Justice Stevens said:

> The decision to review (and to reverse summarily without argument) a novel holding by a California intermediate appellate court concerning the burden of proof in an obscenity trial, or an equally novel holding by the Pennsylvania Supreme Court concerning a police officer's order commanding the driver of a vehicle to get out of his car after a traffic violation, are additional examples of the many cases in which the Court has been unwilling to allow a state court to provide one of its residents more protection than the Federal Constitution requires even though the state decision affected only a limited territory and did not create a conflict with any other decision on a question of federal law, and even though the state court had the power to reinstate its original judgment by relying on state law. A willingness to allow the decision of other courts to stand until it is *necessary* to review them is not a characteristic of this Court when it believes that error may have been committed.

Remarks by Justice John Paul Stevens, Annual Banquet of the American Judicature Society, San Francisco, California (Aug. 6, 1982).

57. 50 U.S.L.W. 4210 (U.S. May 24, 1982).

58. 434 F. Supp. 473 (N.D. Tex. 1977).

59. 630 F.2d 1029 (5th Cir. 1980).

"We hold that the seventeen year old age requirement violates both the United States and Texas constitutional guarantees of due process of law, and that the application of this age requirement to coin-operated amusement centers violates the federal and Texas constitutional guarantees of equal protection of the law."[60]

The United States Supreme Court concluded that it could not determine from the court of appeals' opinion whether the court of appeals placed independent reliance on Texas law or merely treated the Texas constitutional protections as congruent with the corresponding federal provisions. In other words, the United States Supreme Court couldn't tell whether the Texas Constitution provided an adequate and independent ground for the court of appeals' judgment. The United States Supreme Court held that it would not decide the novel federal constitutional question presented by *Mesquite* if Texas law provided independent support for the court of appeals' judgment.[61] So the United States Supreme Court remanded the case to the court of appeals to decide whether its opinion rested on Texas or federal law.[62]

Justice Stevens, writing for the majority, said some interesting things about state constitutional law. He said:

> It is first noteworthy that the language of the Texas constitutional provision is different from, and arguably significantly broader than, the language of the corresponding federal provisions. As a number of recent state supreme court decisions demonstrate, a state court is entirely free to read its own constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee. See generally Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977), and cases cited therein. Because learned members of the Texas bar sit on the Court of Appeals for the Fifth Circuit, and because that court confronts questions of Texas law in the regular course of its judicial business, that court is in a better position than are we to recognize any special nuances of state law. The fact that the Court of Appeals cited only four Texas cases is an insufficient basis for concluding that it did not make an independent analysis of Texas law.[63]

Justice White and Justice Powell dissented from the remand. Their opinions question why the United States Supreme Court did not reach the merits of the issue.[64]

The *Mesquite* case tells us that federal courts can base their decisions on state constitutions, and the United States Supreme Court will not review interpretations of state constitutional law, whether the interpretation is made by the federal or state courts. Thus, federal courts can protect their

60. *Id.* at 1038-39 (footnotes omitted).
61. 50 U.S.L.W. 4210, 4212 (U.S. Feb. 23, 1982).
62. *Id.* at 4213.
63. *Id.* at 4212.
64. *Id.* at 4213-15.

decisions from United States Supreme Court review by resting them on state constitutional grounds.[65] Of course, then the federal courts are subject to later "review" by the state courts on the state law issue.

As you can see, it is entirely appropriate for state courts to evade Supreme Court review by basing a decision on state law. On the other hand, it is not appropriate for state courts to object to the United States Supreme Court's establishing minimal national rights, the federal safety net. For new federalism to work, the United States Supreme Court and the state courts must maintain a healthy respect for the role each plays.

State court judges are not asking the United States Supreme Court to cease interpreting the fourteenth amendment. Let me give you an example of the state court judges being protective of the jurisdiction of the federal courts. As you know from the newspapers there are some twenty bills in Congress seeking to take away substantive jurisdiction of the federal courts in certain areas, including prayer in public schools, abortion, school busing, and sex discrimination in the armed services. These bills would also prohibit review by the United States Supreme Court of state court decisions in some of these areas.

A subcommittee of the State-Federal Relations Committee of the Conference of Chief Justices of the States studied these bills, not in terms of their constitutionality, but in terms of their policy. The subcommittee noted that these bills would have two results. First, the bills would make the existing Supreme Court interpretations in these taboo areas the law of the land forever. The bills would cast the existing federal constitutional law in concrete. Second, fifty state supreme courts would apply the federal Constitution in new fact situations without any single continuing unifying interpretation by the United States Supreme Court. A single interpretation of the Constitution is one thing, but fifty interpretations of one federal Constitution is another.[66]

The state chief justices are not happy about the bills. They suspect that Congress was going to give the state courts power, because Congress

65. The *Mesquite* majority commented on avoidance of Supreme Court appellate review by the federal courts as follows:

> Our dissenting brethren suggest that our "view allows federal courts overruling state statutes to avoid appellate review here simply by adding citations to state cases when applying federal law," *post*, at 3 (Powell, J., dissenting). We are unwilling to assume that any federal judge would discharge his judicial responsibilities in that fashion. In any event, in this case we merely hold that the Court of Appeals must explain the basis for its conclusion, if there be one, that the state ground is adequate and independent of the federal ground.

Id. at 4213 n.18. For a discussion of *Mesquite*, see Nat'l L.J., Apr. 19, 1982, at 5, col. 1. *See also* Schmidt v. Oakland Unified School Dist., 50 U.S.L.W. 3998 (U.S. June 21, 1982) (per curiam).

66. Subcommittee of the State-Federal Relations Committee, Report to the Conference of Chief Justices on Pending Federal Legislation to Deprive Federal Courts of Jurisdiction in Certain Controversial Areas Involving Questions of Constitutional Law, Conference of Chief Justices Midyear Meeting, Williamsburg, Virginia (Jan. 28-30, 1982); *see also* Statement of W. Ward Reynoldson, Chief Justice, Supreme Court of Iowa, before The Brookings Institution Fifth Seminar on the Administration of Justice, Williamsburg, Virginia (Jan. 31, 1982).

thought that state court judges would not enforce existing federal rights with the same vim and vigor as their sisters and brothers on the federal bench. The chief justices were somewhat offended, indeed miffed, in being so viewed by Congress. The state chief justices went on record questioning the wisdom of these bills.[67] The chief justices view the bills as a hazardous experiment on the vulnerable fabric of the nation's judicial system.

The terms federalism and states' rights are value laden. They conjure up images of secession from the national government, separatist movements, and retention of the status quo in face of change. Ironically, the modern version of new federalism calls upon the states, state courts, not merely to negate the federal influence, but to develop a body of state law for the protection of their citizens.

The new federalism proposed by the Burger Court makes life difficult for state judges, because it challenges them to make federalism work. To quote Chief Justice Burger: "The 50 states cannot exercise leadership in a national sense, but this does not mean they should not be allowed the independence and freedom that was plainly contemplated by the concept of federalism."[68] I concur.

I recognize that the practice of making every case a federal claim will die hard. I recognize that the practice of looking to the United States Supreme Court for all law will die hard. I recognize that it will take a long time before courts, as a matter of routine, look to their own state law, especially their own constitutions.

Nevertheless, I think we must begin to change our ways.

State constitutions are coming out of the archives into the legal literature and into the classroom. They are coming out of the literature and the classroom into the courtroom. State constitutions will go from the courtroom back into the legal literature and into the classroom, and maybe back to the courtroom, through the lawyers trained in the 1980s. And finally, state constitutions are beginning to come into popular consciousness through the media.[69] I think this is a good trend.

Today I carry with me from Wisconsin to Texas the admonition of Justice Smith of the Wisconsin Supreme Court in the 1855 case of *The Attorney General ex rel. Bashford v. Barstow*.[70] The justice's words in 1855 may serve state supreme courts well in 1982. Speaking of Wisconsin, he said: "The people then made this constitution, and adopted it as their primary law. The people of other states made for themselves respectively, constitu-

67. The Conference of Chief Justices adopted a resolution criticizing the bills pending in Congress at the 1982 Midyear Meeting.

68. Burger, *The Interdependence of Our Freedoms*, 9 AKRON L. REV. 403, 406 (1976).

69. *See, e.g.*, Flaherty, *"States' Rights" Are Our Rights, Too*, 46 THE PROGRESSIVE, Feb. 1982, at 40; Lewin, *Avoiding the Supreme Court*, N.Y. Times, Oct. 17, 1976 (Magazine), at 31, 98; Margolick, *State Judiciaries Are Shaping Law That Goes Beyond Supreme Court*, N.Y. Times, May 19, 1982, at A1, col. 1. On Sept. 20, 1982, *The National Law Journal* instituted a regular feature on state constitutional law to be written by Ronald K.L. Collins. *See The Move to Free State Courts from the 'Potomac's Ebb & Flow'*, Nat'l L.J., Sept. 20, 1982, at 28, col. 3.

70. 4 Wis. 567 (1855).

tions which are construed by their own appropriate functionaries. Let them construe theirs—let us construe, and stand by ours."[71]

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71. *Id.* at 758.

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Federal Review, Finality of State Court Decisions, and a Proposal for a National Court of Appeals—A State Judge's Solution to a Continuing Problem

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I. INTRODUCTION

Under the federal supremacy clause,[1] not only must state courts apply federal law where appropriate, but they are subject to review by the federal courts when federal law is applied improperly. Although state judges may disagree with particular decisions of the federal courts, state judges should have no quarrel with federal review of state court decisions involving federal questions. If there is to be any semblance of uniformity in the application of federal constitutional provisions by the state courts, it is inevitable, if not desirable, that federal courts, and particularly the United States Supreme Court, have the last word. Unfortunately, because of the manner in which federal review of state court decisions is exercised, state cases involving federal constitutional questions are no longer final, and excessive delay is commonplace, particularly in criminal cases. The resulting confusion and delay in the application of federal law by the state courts have detracted from the prestige of the state courts and eroded the force and effect of state court decisions. Assuming that the achievement of consistency, predictability, and reasonably prompt finality in state court decisions can be compati-

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I am indebted to Mack Jones, A.B., 1977, Northwestern University; J.D., 1980, University of Arizona College of Law, for his help and assistance. I wish also to thank Judge Clement Haynsworth of the Third Circuit, Dean Erwin Griswold, and John Frank Esquire for reading the initial draft of this Article and for their kind suggestions. The subject matter of this paper has been discussed previously in the *American Bar Association Journal*. Cameron, *National Court of State Appeals: A View from the States*, 65 A.B.A.J. 709 (1979). Special acknowledgment is made to Daniel J. Meador, James Monroe Professor of Law, University of Virginia, for his critical evaluation and helpful suggestions.

1. U.S. CONST. art. VI, cl. 2.

ble with federal review, this Article will discuss a proposed solution which, although designed to benefit the state judicial systems, would also assist the federal judicial system.

II. The Relationship Between State and Federal Courts

When we became a nation, routine review by the federal courts of state court decisions was not contemplated, and there is some question whether the framers of the Constitution envisioned the establishment of federal trial courts at all, leaving to the state trial courts the responsibility of deciding federal questions in a trial setting. The Judiciary Act of 1789,[2] however, created thirteen federal district courts, divided into three circuits.[3] The resulting system was simple enough: state cases were tried in state courts, and federal cases, what few there were, were tried in federal courts. Our population was agrarian and small, commerce among the new states was limited, and the right to travel was a little-used privilege under our federal Constitution. That the law in one state was different from the law of a sister state was of little concern to the citizens or the courts. Professor Daniel Meador has commented:

> In the first decade of its existence, the Supreme Court reviewed only seven state court decisions, and for the next several decades it reviewed about an average of one state judgment a year. The state judges, by virtue of the Federal Supremacy Clause, were compelled to apply federal law whenever it came into play, but federal law was so skimpy in the early decades that this posed little or no added burden on the state judges.[4]

This pattern began to change during the Reconstruction period that followed the War Between the States. In 1867 Congress gave federal courts jurisdiction over petitions for writs of habeas corpus filed by state prisoners,[5] and in 1868 ratification of the fourteenth amendment to the Constitution imposed due process and equal protection upon the states as a matter of federal law.

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2. Ch. 20, 1 Stat. 73 (1850).

3. *Id.* §§ 2, 4. Each circuit court consisted of two Supreme Court justices and one district judge.

4. Address by Daniel J. Meador, The Federal Government and the State Courts, The Robert Houghwout Jackson Lecture before the National College of the Judiciary, Reno, Nevada 5 (Oct. 14, 1977) [hereinafter cited as Meador Speech].

5. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (1868).

In 1908 the Supreme Court, in *Ex parte Young*,[6] held that federal courts could enjoin state officials from conduct that violated the United States Constitution. This gave the federal courts substantial power and jurisdiction, requiring them to supervise the constitutionality of state officials' activities. Thus, federal district court judges have the power to hear evidence, make factual determinations, and issue injunctions. As a practical matter, these powers are in some respects greater than those enjoyed by the United States Supreme Court. The result has been the expansion of the business of the federal courts.

This interest of federal courts in state matters—the result of a cooperative venture among the United States Congress, the executive branch of the federal government, and the federal judiciary—came about during a period in which federal power was increasing and becoming more centralized. This expansion of federal jurisdiction reflected a concern for minimum, if not uniform, standards of justice for all citizens throughout the country, a concern that has continued to this day. As Justice Brennan has stated:

> In recent years, however, another variety of federal law—that fundamental law protecting all of us from the use of governmental powers in ways inconsistent with American conceptions of human liberty—has dramatically altered the grist of the state courts. Over the past two decades, decisions of the Supreme Court of the United States have returned to the fundamental promises wrought by the blood of those who fought our War between the States, promises which were thereafter embodied in our fourteenth amendment—that the citizens of all our states are also and no less citizens of our United States, that this birthright guarantees our federal constitutional liberties against encroachment by governmental action at any level of our federal system, and that each of us is entitled to due process of law and the equal protection of the laws from our state governments no less than from our national one. . . . [S]tate courts no less than federal are and ought to be the guardians of our liberties.[7]

The Task Force of the Conference of Chief Justices and the Conference of State Court Administrators, in its report on a State Justice Institute, noted that there is just as much national

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6. 209 U.S. 123 (1908).

7. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 490-91 (1977).

interest in the quality of justice as there is in the quality of health care or public education, and stated, "[T]he achievement of fair and equal rights as well as effective justice has always been thought of as an essential characteristic of American society."[8] Unfortunately, along with this concern for minimum national standards has come the belief of some that federal courts offer the *only* solutions to certain problems.[9]

III. Public Perception of State and Federal Courts: A Survey

Stating that problems can be remedied only in the federal courts is but another way of saying that state judges are unable to adequately address federal questions in the state courts. Professor Meador has noted that one of the "speculated" theories for the habeas corpus decisions was the Supreme Court's lack of confidence in state judges.[10] Indeed, in the debate on the Civil Rights Act of 1871, Congressman Coburn stated: "The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage . . . ."[11] And Professor Neuborne has claimed that "parity" between the state and federal courts in the enforcement of federal rights is a "dangerous myth."[12]

Judge Aldisert has suggested that the low public image of the state courts is a result of academia and the media rather than an actual difference in the quality of the two court systems:

> There are significant reasons for the present infatuation with federal courts as the preferred forum for litigation. First, there is the influence of academia, exercised by the law professors and their captive audiences, the law students. A basic notion of modern legal academia is that the federal judiciary is a unique institution: That somehow the law is different there, or the proceedings more conducive to reasoned disposition; that

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8. National Center for State Courts, Report of the State-Federal Relations Task Force Joint Committee of the Conference of Chief Justices and Conference of State Court Administrators 5 (1979) [hereinafter cited as Task Force Report].

9. Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105, 1105-06 (1977).

10. Meador, *The Impact of Federal Habeas Corpus on State Trial Procedures*, 52 Va. L. Rev. 286, 290-91 (1966).

11. Cong. Globe, 42d Cong., 1st Sess. 460 (1871).

12. Neuborne, *supra* note 9, at 1105.

there is no politics in the appointment of federal judges; that federal judges come into their robes by a process akin to immaculate conception; that all federal judges are meritorious fountainheads of wisdom, whereas their state court counterparts are political hacks who happened to stump for a gubernatorial winner. . . .

Preference for federal courts is also reinforced by the poor public image of state courts. Although there is some professional literature, very few public accounts today praise the state judiciary. The media continually emphasizes the state judiciary's shortcomings; and the resulting public impression is that state courts do not amount to much, and the most constructive, judge-made, substantive law emanates from the United States Supreme Court or from the lower federal courts. Unfortunately, federal judges have not only fallen into the trap of believing their press notices, but are starting to say it themselves.[13]

Of course, not everyone believes state judges are inferior. Judge Donald P. Lay, of the Eighth Circuit, has noted, "It would be presumptuous to claim that federal judges are more competent, conscientious, or learned than their state brethren in the area of federal rights."[14] And Professor A. E. Dick Howard, while admitting that the preference for federal courts is frequently based upon a distrust of state courts, notes that there is still support for the state courts: "To this day, the argument goes on between those who look to the federal courts as the primary vindicator of federal rights and those who, noting that state judges also are sworn to uphold the Constitution, would repose more trust in the state tribunals."[15]

The idea that the state judiciaries are inferior has played a greater role in congressional legislation and federal court decisions than is willingly admitted. At this point we might ask if the assumed inferiority of the state judiciaries has any substance in fact. Of course, when we compare the smaller (fewer than 800 judges), better paid, and carefully selected federal judiciary with

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13. Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 L. & Soc. Ord. 557, 559.

14. Lay, *Modern Administrative Proposals for Federal Habeas Corpus: The Rights of Prisoners Preserved*, 21 De Paul L. Rev. 701, 716 (1972).

15. A. Howard, I'll See You in Court: The States and the Supreme Court, Challenge for the States No. 1, at 17 (National Governor's Association Center for Policy Research, Oct. 1980).

the many state judges at all levels of responsibility and jurisdiction, some selected by local and questionable political considerations, the comparisons are not always flattering to the state judges. But when comparing the state trial judges of courts of general jurisdiction with their counterparts on the federal district court bench, there is no reason to believe that the quality of state judges does not equal the quality of the federal judges, differences in tenure and compensation notwithstanding.

The persons who should be in the best position to evaluate the performance of state judges, as compared to the performance of federal judges, are the lawyers who practice before the trial courts. These lawyers, who submit their clients' cases for decision and who must rely upon the courts for their professional standing, as well as their professional income, should be in a position to compare the two court systems.

In order to ascertain their attitudes, a survey was made of ten jurisdictions in the United States:

San Diego County (San Diego), California
Gadsen County (Tallahassee), Florida
Palm Beach County (Palm Beach), Florida
Cook County (Chicago), Illinois
Sangamon County (Springfield), Illinois
Essex County (Newark), New Jersey
Monmouth County (Freehold), New Jersey
Bernalillo County (Albuquerque), New Mexico
Spokane County (Spokane), Washington
Milwaukee County (Milwaukee), Wisconsin.

The jurisdictions were selected on the basis of geographical location and on the basis of differences in judicial selection processes. New Mexico, for example, is a state in which the judges stand for election in a political campaign.[16] New Jersey was selected because it is not considered to have a "political judiciary"; it has a selection process more akin to the federal system.[17] Also, there was an attempt to compare urban and rural counties in two states: New Jersey and Illinois.

The clerks of the superior, district, or circuit courts in the selected state jurisdictions were asked to distribute a total of fifty questionnaires, one to each lawyer who had just filed a civil

16. N.M. CONST. art. 6, § 4.
17. N.J. CONST. art. 6, § 6, ¶ 1.

action in the state court.[18] The attorneys were asked to state the nature of the case, for example, tort, contract, divorce, etc. They were then asked, "If there were no time or jurisdiction problems and you had a choice, would you have preferred to file this case in a federal court or in the state court?"[19] They were also asked to make such comments as they felt necessary.

The actions were about equally divided among divorce (79), tort (71), and contract (74), with "other" accounting for 32 responses. Of those responding, the preference was:

Federal court	34
State court	193
No preference	18

When asked the reasons for their preferences, 11 of the 34 favoring the federal court and 48 of the 193 favoring state courts cited quicker disposition as the reason. Superior procedure and the quality of the judges were the second and third reasons for preferring the federal courts, while familiarity and convenience were the second and third reasons for preferring the state courts. When asked if the interest of their clients would be better served in the federal court or state court, the results were:

Federal court	30
State court	124
No difference	94

But when asked if the quality of the judges was better in the federal court or the state court, the results were:

Federal court	95
State court	30
No difference	125

Of interest is the fact that, out of the 95 who said the federal judges were of better quality, 58 still preferred to file in the state courts, and 28 thought the interests of their clients were better served in the state courts. The results of the survey are given in the Appendix to this Article.

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18. The matters were limited to civil cases because defense attorneys in criminal cases do not have a choice as to which court to appear in, and I assume they would be unhappy wherever they are *forced* to be at a particular time.

19. The one page questionnaire was contained in a stamped envelope addressed to me at my home address. There was no indication on the envelope or on the questionnaire that I was a state judge. The questionnaire did not have to be signed by the attorney, and although the county was indicated, the identity of the attorney was not known if he did not indicate it on the questionnaire.

A comparison of the results in four of the jurisdictions may be of interest. They include Essex (urban) and Monmouth (rural) counties in New Jersey, a state in which judges are selected in a manner similar to that of the federal system; Bernalillo County, New Mexico, which has a political system of election; and Cook County, Illinois, where politics in the selection of judges is reputed to be intrusive:

	Cook County, Illinois (29 replies)	Bernalillo County, N.M. (28 replies)	Monmouth County, New Jersey (19 replies)	Essex County, New Jersey (22 replies)
Prefer to file in federal court	9	3	2	5
Prefer to file in state court	16	23	16	15
No preference	4	2	1	2
Interest of client best served by:				
Federal court	7	5	1	4
State court	10	12	14	5
No difference	12	11	4	12
Believe quality of judges is better in:				
Federal court	15	12	8	10
State court	3	1	1	0
No difference	11	13	8	12
		No answer: 2	No answer: 2	

Despite the differences in the selection processes, there appears to be no striking correlation between the selection process and the attitude of the bar toward state and federal judges.

In fact, probably the most notable result of the survey in general is the lack of startling or conclusive differences that can be ascertained between state and federal judges or state and federal courts. Answers to one of the questions, for example, indicate that more lawyers (95 to 30) thought that the quality of federal judges was better than the quality of state judges, but one-half of those who answered the question (125) thought there was no difference. The preference for state courts as a forum for their clients may be the result of the nature of the case and more familiarity on the part of the lawyer with the procedures

followed and the personnel of the court. The differences between the two systems, rather than differences between the quality of the judges, may well be the more important factor. In any event, the answers to the questionnaire do not indicate that either federal or state judges are clearly superior in the perception of the lawyers. On the contrary, if the answers indicate anything at all, it is that there is not a great deal of difference between the quality of judges or justice in the two court systems.

IV. Unwarranted Federal Supervision of State Court Decisions

There being no great difference in the quality of judges or justice in the state and federal judiciaries, it may be questioned whether it is necessary for federal judges to review state court decisions to ensure that federal law will be enforced in the state courts. After all, state judges take an oath to uphold the Constitution of the United States as do federal judges, and state judges are just as capable of interpreting the Constitution and the decisions of the United States Supreme Court as are their brethren on the federal bench. Federal review, therefore, is not needed to ensure the quality of state court decisions; federal review is needed only to ensure consistency and uniformity in the application of federal constitutional standards in the state courts. The problem then is not that federal review of state court decisions involving federal questions is unnecesary; some form of federal review will always be necessary. The problem is that in discharging this review function the federal courts are guilty of delay and inconsistency and often review beyond the degree needed to ensure minimum federal standards of justice in the state courts, all to the detriment of state judicial systems.

Hart & Wechsler cites the *Hawk* case as an example of entangled and protracted procedures between the state and federal courts.[20] Henry Hawk was sentenced in 1936 by a Nebraska trial court to life imprisonment for murder. Sixteen years later, after numerous actions in both state and federal courts, including six trips to the United States Supreme Court, Hawk was finally ordered discharged by a federal district court.[21]

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20. P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 1490 (2d ed. 1973).

21. Hawk v. O'Grady, 137 Neb. 639, 290 N.W. 911 (1940), *cert. denied*, 311 U.S. 645 (1940); Hawk v. Olson, 130 F.2d 910 (8th Cir. 1942), *cert. denied*, 317 U.S. 697 (1943); *Ex*

Today a criminal defendant typically can take six steps after a conviction in the state courts. (1) he may seek review by the state's appellate court (if there is an intermediate appellate court, there may be a two-stage appellate process), and (2) he may follow postconviction procedures in the state court that provide a basis for entry into the federal courts. Next, (3) the defendant can petition for a writ of certiorari or a direct appeal to the United States Supreme Court. If access to the United States Supreme Court is denied, as is most often the case, (4) the defendant then, by filing a petition for writ of habeas corpus, may go to the federal district court. If denied relief there, (5) he may appeal to the United States circuit court of appeals, and if he loses there, (6) he may go back again to the United States Supreme Court, this time from the decision of the court of appeals.

The recent case of *Greene v. Massey*[22] is an example of these processes. In 1965, Greene and a codefendant, Sosa, were indicted for murder and were convicted. The conviction was set aside by the Florida Supreme Court,[23] and a new trial ordered. The new trial was held, and Green was again convicted. This conviction was upheld by the Florida Court of Appeals against the defendant's double jeopardy claim.[24] Greene then sought relief in the United States Supreme Court, which denied his petition for a writ of certiorari.[25] Greene next petitioned for a writ of habeas corpus in the federal district court, which was denied. From the federal district court, Greene went to the United States Court of Appeals for the Fifth Circuit, which affirmed the federal district court.[26] Again Greene petitioned to the United States Supreme Court, but this time certiorari was granted, and on June 14, 1978, the United States Suppeme Court reversed the decision of the Fifth Circuit.[27] But even this did not conclude

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parte Hawk, 318 U.S. 746 (1943); *Ex parte* Hawk, 321 U.S. 114 (1944); Hawk v. Olson, 145 Neb. 306, 16 N.W.2d 181 (1944), *rev'd*, 326 U.S. 271 (1945); Hawk v. Olson, 146 Neb. 875, 22 N.W.2d 136 (1946); Hawk v. Olson, 66 F. Supp. 195 (D. Neb. 1946), *aff'd sub nom.* Hawk v. Jones, 160 F.2d 807 (8th Cir. 1947), *cert. denied*, 332 U.S. 779 (1947); Hawk v. State, 151 Neb. 717, 39 N.W.2d 561 (1949), *cert. denied*, 339 U.S. 923 (1950); Hawk v. Hann, 103 F. Supp. 138 (D. Neb. 1952).

22. 437 U.S. 19 (1978).

23. Sosa v. State, 215 So. 2d 736 (Fla. 1968).

24. Greene v. State, 302 So. 2d 202 (Fla. Dist. Ct. App. 1974).

25. Greene v. Florida, 421 U.S. 932 (1975).

26. Greene v. Massey, 546 F.2d 51 (5th Cir. 1977).

27. Greene v. Massey, 437 U.S. 19 (1978).

the matter in the federal courts. The United States Supreme Court did not finally dispose of this case, but instead remanded it to the Fifth Circuit Court of Appeals for a reinterpretation of the Florida Supreme Court decision of 1968 (some 10 years earlier) in light of later opinions of the United States Supreme Court. The United States Supreme Court stated: "The Court of Appeals will be free to direct further proceedings in the District Court or to certify unresolved questions of state law to the Florida Supreme Court."[28]

The delay and confusion caused by this method of federal review of state court decisions has resulted in what must be the most costly and inefficient system ever devised by man. Admittedly, we have grown callous to this delay, but I would suggest that it cannot be justified when viewed in the light of any reasonable concept of efficient administration. Some reform is necessary if the state courts, which decide 98.8% of the cases in this country,[29] are to be able to apply federal law evenly and fairly, as the United States Constitution requires. The public and the parties are entitled to a reasonable, prompt determination of federal questions by a court that speaks uniformly and finally. As it is, there is neither promptness, finality, nor uniformity in federal review of state decisions.

State judges can take little satisfaction from the fact that only a relatively few state cases are actually overturned by the federal courts. The state judiciaries, like their federal counterparts, must depend upon public acceptance of their decisions to be effective. The damage done to the prestige of state courts and to the acceptability of their decisions is great. It is somewhat ironic that federal courts, in their stated desire to assure due process and equal protection to all citizens, are, by their efforts, robbing those citizens of some of the essential ingredients of due process and equal protection, to wit, speedy, final and predict-

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28. *Id.* at 27.

29. A memorandum from Nora Blair of the National Center for State Courts to Francis J. Taillefer, Project Director, and National Courts Statistics Project (dated April 16, 1979 on file at National Center for State Courts) indicates that 98.8% of current cases are handled in state courts. *See also* Sheran and Isaacman, *State Cases Belong in State Courts*, 12 CREIGHTON L. REV. 1 (1978).

Task Force Report, *supra* note 8, at 5 n.5.

> Our system is still structured on the basic premise that the state courts are the primary forums for deciding the controversies which arise in the great mass of day-to-day dealings among citizens.

Meador Speech, *supra* note 4, at 10.

able justice, uniformly and consistently applied. Chief Justice Burger stated, "The criminal process should not extend over a span of three, five or seven years, with repeated appeals and repeated collateral attacks on convictions. At some point, there must be finality. Without finality, justice is a myth."[30]

If the delay is intolerable, so is the inconsistent application of federal law to the states by the federal courts. The state judicial system is generally consistent in its application of both state and federal law. The state's highest court is the last word on what the law is for that state, and it will be alert to the need for a unified and consistent body of state law. The result is a predictable, uniform, and final system of law within the state. Such is not the case within the federal system.

The law from circuit to circuit can be different, and basic United States constitutional questions can depend upon the federal circuit in which the state happens to be located. The law within the circuit can also depend upon which panel of the circuit hears the case. The confusion is even worse on the federal district level. In each state there may be just as many interpretations as there are federal district judges. Also, there can be different results where the petitions to the federal courts contain variant recitations of the facts of the case and the law to be applied. This is not a criticism of the federal trial judiciary; most federal district judges attempt to harmonize the law of their district. However, except for the United States court of appeals, there is no unifying court over the district to enforce consistency in the same manner that a state supreme court does for the state courts.

What has happened in the federal judiciary is that the sheer number of cases makes it impossible for the United States Supreme Court to supervise effectively the state and federal judicial systems. Professors Carrington, Meador and Rosenberg have stated:

> The problem of national uniformity derives from a weakness in the federal appellate hierarchy. The weakness is a result of overgrowth: the hegemony of the Supreme Court of the United States is too attenuated to be effective as the unifying arch of the structure. By combined force of number of cases and complexity, the national law has outgrown the Court's su-

30. Address by Chief Justice Burger, Annual Report on the State of the Judiciary to the American Bar Association, Chicago, Illinois 8 (Feb. 3, 1980).

pervisory capacities. The Court is forced to scant many of the matters for which it bears the ultimate responsibility.[31]

V. The Need for Reform

As a possible solution to these problems, some observers suggest abolition of our dual system of justice. Professor Meador has compared recent trends with the consolidation of the courts in England:

> The accretion of federal jurisdiction, the growing dominance of the federal judiciary and the drawing together of the two systems are reminiscent of developments in England centuries ago. After the Normans arrived and established the seeds of a central national government, there arose in England for the first time some central, national courts — Common Pleas, King's Bench, and the Exchequer. But at the beginning and for many, many years, these courts had very limited jurisdiction. The great bulk of everyday dispute settlement rested in the local courts of various sorts—county seats, feudal courts, and others. Gradually, however, as the centuries passed, the jurisdiction of the central courts increased. By various procedural inventions and fictions they drew unto themselves an ever increasing amount of judicial business which previously had been in the hands of the local courts. Ultimately, the local courts were eclipsed, and the central courts became all embracing in their authority.[32]

It is Professor Meador's belief that the courts in the United States are presently in a period of transition and that the emergence of a federal structure quite different from the original state-federal design is not only possible but logical, as a strong federal judiciary, aided by Congress, asserts more federal authority over the state judiciaries.[33] Chief Justice Burger, while perceiving a dim outline of "state court dockets and federal dockets becoming more and more alike,"[34] cautions that "[t]hese observers may be in the position of a small boy looking down a stretch of straight railroad track when, by optical illusion, the rails seem to converge, but this presumption is not frivolous.

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31. P. Carrington, D. Meador, & M. Rosenberg, Justice on Appeal, 209 (1976).

32. Meador Speech, *supra* note 4, at 13-14.

33. *Id.* at 22-23.

34. Address by Chief Justice Burger, Welcoming Remarks, American Law Institute, Washington, D.C. 2 (June 10, 1980).

Like symptoms of illness, we ignore them at our peril."[35]

If uniformity alone is the goal, other countries provide examples. As Professor Meador has pointed out, in Australia and Canada, state court decisions are reviewed by a federal tribunal that decides all legal questions, both state and federal. The Federal Republic of Germany has no federal trial courts, the courts of first instance being provided by the states and reviewed in federal appellate courts.[36] Adoption of this mode in the United States would require a radical restructuring of our historical state-federal relationship. It is highly unlikely that this model would ever be adopted in this country, even if desirable.

Since a merger of the two court systems is unlikely, unless radical measures are taken, the present dual system is likely to continue, with the state courts deciding the overwhelming majority of cases and the federal courts exercising some kind of review of state court decisions involving federal questions. However, the present inefficient and time-consuming system must be modified. What is needed is a method that will rely more heavily on the proven abilities of state judges and the admitted capacity of the state judicial systems, while at the same time preserving the minimum amount of review necessary to ensure that federal questions are properly and uniformly addressed by the state judicial systems. State courts must continue to follow and apply federal law where necessary, but this can be accomplished without excessive and disruptive interference by the federal courts.

VI. The Proposal: A National Court of State Appeals

It is therefore proposed that Congress create a National Court of State Appeals consisting of nine judges, appointed by the President pursuant to Article III of the United States Constitution, with original appellate jurisdiction to review state court decisions, both civil and criminal, in which federal questions have been raised and state remedies exhausted. This court would consider not only direct appeals from the state's highest court, but would have exclusive original jurisdiction over all collateral attacks on state court decisions (presently filed in the federal district courts). This would completely divest the federal district courts of jurisdiction to review decisions of state courts on federal constitutional questions. It would be a discretionary

35. *Id.* at 4.

36. Meador Speech, *supra* note 4, at 22.

court. It would also be a court of entry to the United States Supreme Court from decisions of the state's highest court.

The concept of a National Court of State Appeals is not new. In 1968 the American Bar Foundation first proposed a National Court of Appeals, but the concept provoked little interest.[37] Judge Clement F. Haynsworth, Jr., proposed a court that would have "jurisdiction to review on writs of certiorari federal questions in convictions in the state and federal systems in which a conviction is called into question."[38] The Study Group on the Caseload of the United States Supreme Court (The Freund Committee) proposed a National Court of Appeals which would be a screening court for the United States Supreme Court and would be empowered to decide cases of conflicts among the circuit courts.[39] In 1975 the Commission on Revision of the Federal Court Appellate System (The Hruska Commission) proposed the establishment of a National Court of Appeals that would have reference jurisdiction from the United States Supreme Court and transfer jurisdiction from the Court of Claims or Court of Customs and Patent Appeals.[40] Dean Erwin N. Griswold proposed a National Court of the United States which would be assigned cases by the United States Supreme Court after that court had granted the petition for certiorari.[41]

All of the proposals for a National Court of Appeals had one thing in common. They viewed the problem from the standpoint of the federal judiciary and were concerned with relieving the pressure on the United States Supreme Court. There is no doubt that relief is needed, but if the individual litigant is to be relieved of the time-consuming process of federal review and if the states are to be given the proper guidance by the federal courts, then the needs of the state courts should be seriously considered in any proposal for reform of federal judicial procedure. For a

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37. AMERICAN BAR FOUNDATION, ACCOMMODATING THE WORKLOAD OF THE UNITED STATES COURT OF APPEALS (1968). *See also* Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 598 n.229 (1969).

38. Haynsworth, *A New Court to Improve the Administration of Justice*, 59 A.B.A.J. 841 (1973).

39. Report of the Study Group on the Caseload of the Supreme Court, 57 F.R.D. 573, 573-650 (1972) [hereinafter cited as the Freund Report].

40. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATION FOR CHANGE (1975); Hruska, *Commission Recommends New National Court of Appeals*, 61 A.B.A.J. 819 (1975).

41. Griswold, *Rationing Justice—The Supreme Court's Caseload and What the Court Does Not Do*, 60 CORNELL L. REV. 335 (1975).

National Court of Appeals to be acceptable, the following conditions must be met:

1. The United States Supreme Court must remain supreme.
2. The position and prestige of the state courts must not be demeaned.
3. The federal judiciary should not be unduly expanded.
4. The new court must be able to attract competent and able judges.
5. The docket of the court must be manageable.
6. It must be constitutional.
7. Justice must be done.

Others, in stating the conditions for the establishment of a National Court of Appeals, have stressed the avoidance of a fourth tier of federal courts and the avoidance of specialization.[42] These stated conditions are examined below in the hopes of overcoming some of the objections voiced by opponents of the concept of a National Court of State Appeals.[43]

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42. D. MEADOR, A PROPOSAL TO IMPROVE THE FEDERAL APPELLATE SYSTEM (Office for Improvements in the Administration of Justice, 1978); *Report No. 2 of the Special Committee on Coordination of Judicial Improvements*, 99 A.B.A. REP. 306, 307 (1974).

43. The proposal for a National Court of State Appeals was presented to the Conference of Chief Justices in Flagstaff, Arizona, in August of 1979, and the Conference deferred action. In Chicago, in February of 1980, action was again deferred. At that time, Chief Judge Lawrence H. Cooke, Chief Judge of the New York Court of Appeals, spoke in opposition based upon inadequate specification of the jurisdiction to be exercised and the inability of the court to handle the caseload. Chief Judge Cooke further opposed the resolution because:

> 3. Such a court would be an additional burden for the taxpayer.
>
> 4. With but one court in the entire country to handle these matters, great expense and inconveniences would be visited upon litigants and members of the bar, most of whom would be required to travel long distances to the seat of the court, wherever that might be.
>
> 5. It would be denigrating to the Supreme Courts of the states and convert their status from that of a final arbiter to that of an intermediate appellate court.
>
> 6. If the purpose of this new court is to end disparity between decisions of existing United States Courts of Appeals, the effort starts at the wrong end. Rather, there should be created for such a purpose a federal court to review the decisions of the federal Courts of Appeals.
>
> 7. Lastly and most importantly, the concept of such a court, as so briefly sketched in the resolution, is that, and I quote, "[it] would have jurisdiction to review on a discretionary basis criminal and quasi-criminal cases, including applications for writs of habeas corpus, presently reviewed by the Federl District Courts and the Circuit Courts of Appeal. . . . This jurisdiction would be in place of and not in addition to the jurisdiction presently exercised by the Federal District Courts and the Circuit Courts of Appeals." Such a concept, without doubt, would be violative of the United States Constitution. Under Article 1, section 9, clause 1 thereof, the right of habeas corpus shall not be abridged

A. The Supremacy of the United States Supreme Court

Of prime importance is that the United States Supreme Court remain supreme. Final state court decisions involving federal questions in criminal cases would bypass review by the federal district courts and the United States circuit courts of appeals but would not avoid review by the United States Supreme Court, which would have the ultimate review of these decisions and would be the final word on federal law. Two steps and two opportunities for federal courts to review state court criminal decisions would be replaced by one possible review by the National Court of State Appeals. Review of state court criminal decisions by the United States Supreme Court would be expedited, as there would be only one level of review between the highest state court and the United States Supreme Court. Since civil cases would also be routed through the National Court of State Appeals, there would be uniformity of processing for both civil and criminal matters.

For the United States Supreme Court to remain supreme, however, it is not necessary that the Court remain open for every matter that is thrust upon it. This is the very reason the United States Supreme Court is presently overloaded. This overloading increases the danger that worthy litigants will be overlooked in the crush of frivolous and meritless petitions. Two procedures will allow the National Court of State Appeals to dispose of, with finality, the vast majority of cases presented to it while providing an avenue for review by the United States Supreme Court of those cases that need the Court's attention.

First, as suggested by Judge Haynsworth in his proposal for a National Court of Appeals and as followed in some states that have intermediate courts of appeal, certiorari or appeal from the National Court of State Appeals to the United States Supreme Court should be allowed only when one or more of the judges of the National Court of State Appeals dissent. Since the court will have nine judges, presumably of varying shades of philosophy

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by Congress. And that is exactly what such a court as proposed by the resolution would do! No longer would the United States District Courts or the United States Courts of Appeals have jurisdiction over habeas corpus. This National Court of State Review would have such jurisdiction, but only on a "discretionary" basis — thus a clear and definite abridgement if there ever was one.

Remarks by Lawrence H. Cooke, Conference of Chief Judges, Chicago, Illinois (Feb. 1980).

and background, it is unlikely that appeal of a worthy case will be foreclosed by a unanimous opinion of the National Court of State Appeals.[44]

Second, a procedure can be provided that would allow the parties or the Chief Justice of the National Court of State Appeals, after briefs have been filed and the matter is ready for submission, to petition the United States Supreme Court for transfer to that court. The parties would have to show extraordinary reasons why the matter should be transferred. For example, a case like *Bakke*,[45] in which it was apparent to all that it should be decided by the United States Supreme Court, could, upon request, bypass the National Court of State Appeals and go directly to the United States Supreme Court. This method has been used effectively in Arizona to bypass the Court of Appeals.[46]

These two procedures will allow ample opportunity for review by the United States Supreme Court without placing too great a burden on the Court to hear petitions for review of each and every case decided by the National Court of State Appeals. The National Court of State Appeals would not be independent of the United States Supreme court, but subservient and always subject to review by the Supreme Court, except when the national court's opinion is unanimous. The United States Supreme Court would remain supreme but would have to consider a constitutional question only once, on review or transfer from the

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44. Haynsworth, note 38 *supra*.

> I would cut off the right to apply to the Supreme Court for certiorari to any petitioner who did not get a single affirmative vote in the new court. Rejected cases of that category are the chaff with which the Supreme Court should not be burdened by formal petitions. I cannot believe that any petitioner who fails to get at least one affirmative vote in the new court could reasonably expect to get four affirmative votes in the Supreme Court. This should not foreclose the use of screening panels provided the panels are instructed to pass on to the full court a petition if its merit or lack of merit is reasonably debatable.

Id. at 843.

45. Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

46. The Arizona Rules provide:

> 19(a) Time for Filing. No later than 10 days after the appeal is at issue, any party to an appeal pending before the Court of Appeals may petition to the Supreme Court to order the transfer of the case to the Supreme Court.
>
> 19(b) Transfer by the Court of Appeals. At any time after the appeal is at issue but before oral argument or submission of the appeal, the chief judge of the division of the Court of Appeals in which the appeal is pending may petition the Supreme Court to order the transfer of the case to the Supreme Court.

ARIZ. R. CIV. APP. P. 19(a), 19(b).

National Court of State Appeals.

B. Upholding the Position of State Courts

A National Court of State Appeals would give speedy and consistent finality to state court decisions. It would avoid the present, demeaning practice of allowing federal trial judges to overturn the state supreme courts in criminal cases.

This concern with the propriety of a trial court overruling an appellate court is not new. The National Advisory Commission on Criminal Justice Standards and Goals, in recommending that challenges to state court convictions be heard only by the United States courts of appeals, stated, "That [recommendation] is based upon the Commission's view that overturning a conviction that has already been upheld by the State's appellate court system is a step of such seriousness that it should not be performed by a single judge of a court with general trial jurisdiction."[47] With the creation of a National Court of State Appeals, only a federal appellate court would be able to review and reverse a state appellate court.

In civil matters the National Court of State Appeals would be able to give greater consideration to the diversity of state court procedures and would not be concerned with *both* federal and state procedures. Although the United States Supreme Court tries to recognize state court procedures, an appellate court with no federal court jurisdiction would be in a better position to recognize the rich diversity of state laws and procedures which, though different, do not violate federal constitutional standards.

C. Expansion of the Federal Judiciary

As can be seen, this proposal would expand the federal judiciary by only nine judges, a de minimus increase in the number of federal judges. While there would be an appellate tier between the state's highest court and the United States Supreme Court, the number of appellate courts between the federal district courts and the United States Supreme Court would remain the same.

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47. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON COURTS 131 (1973) [hereinafter cited as REPORT ON COURTS].

D. The New Court's Ability to Attract Competent Judges

Since the National Court of State Appeals would be authorized to take civil as well as criminal cases, it would not be a specialized court, a factor which should make service on the court more attractive. Service on the National Court of State Appeals would be more desirable than service on a court limited to criminal jurisdiction, as suggested by Judge Haynsworth.[48] The judges should be appointed by the President pursuant to Article III of the United States Constitution. Since the National Court of State Appeals would be a truly national court and not a regional one, the salary should be greater than that of a judge on the United States Court of Appeals to ensure that the highest caliber of judge is attracted to the new court.[49]

E. The Manageability of the New Court's Docket

A most critical question concerns the ability of the new court to handle the volume of cases that will be presented to it.[50] The number of habeas corpus petitions in the federal district courts by state prisoners has remained fairly constant over the last ten years, as shown by the following chart:[51]

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48. Haynsworth, *supra* note 38.

49. The method of selecting the judges of the new court has troubled previous supporters of a National Court of Appeals and seems to have had a chilling effect on past proposals for a national court. This problem could be overcome by providing initially for a form of merit selection as recommended by the American Judicature Society, and as provided in many states and as was followed in the selection of some federal circuit court judges during the Carter administration. There could also be an agreement that there be a balanced selection by the President between the political parties when the court is first appointed.

50. It should be kept in mind that the National Court of State Appeals would *not* have jurisdiction over civil rights petitions even if filed by state prisoners. These suits are independent actions in the federal district courts and would be reviewed by federal courts of appeal, as are all federal cases.

51. These and other statistics have been obtained from the 1980 Annual Report of the Director of the Administrative Office of the United States Courts. It is noted that while the number of habeas corpus petitions in the federal district courts by state prisoners has remained static, the number of civil rights petitions by state prisoners in federal district courts has increased:

1975	1976	1977	1978	1979	1980
6,128	6,958	7,752	9,730	11,195	12,397

Mandamus and other petitions decreased from 289 in 1975 to 146 in 1980. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1980 ANNUAL REPORT OF THE DIRECTOR 62, table 21 [hereinafter cited as 1980 ANNUAL REPORT].

1971	1972	1973	1974	1975
8,372	7,949	7,784	7,626	7,843
1976	1977	1978	1979	1980
7,833	6,866	7,633	7,123	7,031

It should be remembered that very few of these habeas corpus petitions filed by state prisoners are of substance and require more than the briefest attention. These cases have been tried in the state trial court and have gone through a state appellate process and quite often through state postconviction procedures. The issues have been sufficiently refined so that they may be easily identified and quickly decided.[52]

Statistics of the United States Supreme Court are not very helpful in determining the source of that Court's work. They do indicate, however, that the total number of cases docketed between 1976 and 1979 has remained under 5,000:[53]

1976	1977	1978	1979
4,730	4,704	4,731	4,781

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52. A survey of 50 habeas corpus petitions by state prisoners filed in the United States District Court in Phoenix, Arizona, showed the following:

Grounds for Petition (two petitions asserted more than one ground for relief):

1. Attack of underlying conviction	36
2. Probation revocation	4
3. Prison transfer	3
4. Loss of good time credits in prison	3
5. Parole eligibility	2
6. Held in jail after indictment quashed	2
7. Extradition	1
8. Medical mistreatment	1

Thirty of the 50 petitions were dismissed without the court's requiring either a response from the defendants or a hearing. The reasons were:

1. Availability of state remedies	14
2. No habeas corpus claim (i.e., wrong type of action, lack of jurisdiction, or alleged errors not of constitutional dimension)	8
3. Issue correctly decided on direct appeal	2
4. No specific facts alleged	2
5. Claim not related to present confinement	2
6. Moot	1
7. Claim disposed of previously by district court	1
	30

Hearings were required in only three cases out of the remaining 20, and in only one case was relief granted. That case concerned a prisoner who had been sentenced for contempt of court, and that matter was remanded to the state for a new hearing on the contempt.

53. 1980 ANNUAL REPORT, *supra* note 51, at A-1, table A-1.

The Freund Commission provided more detailed information for the 1971-1972 Term.[54] The report showed that out of a total of 4,371 cases docketed, 1,341, or 30.7%, originated in the state courts. Of this number, 445 were civil appeals and 896 were criminal appeals.[55]

If we assume that both the total caseload of the United States Supreme Court (under 5,000 cases a year) and the proportion of state cases to federal cases in the Court have remained substantially constant, approximately 1,500 cases presently heard by United States Supreme Court would be heard instead by the National Court of State Appeals. When this figure is combined with the 7,000 or more habeas corpus petitions presently filed in the federal district courts, the maximum potential caseload for the National Court of State Appeals is 8,500 cases. Such a caseload would, even with excessive resort to staff, be prohibitive. It is submitted, however, that the actual caseload would be much less.

It can be assumed that the present number of civil appeals from state court decisions will remain the same, about 500 a year. The number of criminal cases filed in the National Court of State Appeals will not, however, be as high as the number now filed in the federal district courts. Significantly fewer state prisoners will seek relief in a National Court of State Appeals than now seek relief in the federal district court; it is more difficult and possibly more intimidating to file in a national court than it is to "walk across the street" to the local federal district court. Also, a time limit beyond which a state prisoner could not appeal from the final decision of the state court would significantly reduce the number of prisoners who could file in the national court.

This willingness or unwillingness of a state prisoner to seek relief in a National Court of Appeals cannot be proven conclusively, but an indication of it can be seen in the statistics compiled by the Freund Commission. For the 1971 Term there were 1,721 criminal appeals to the United States Supreme Court from the United States courts of appeals.[56] What proportion of these were state prisoner cases is not known, but the figure indicates the number of prisoners, state and federal, who were willing to

54. Freund Report, *supra* note 39, at 620, table V.

55. The term "appeals" includes both regular appeals and petitions for certiorari or habeas corpus.

56. Freund Report, *supra* note 39, at 620, table V.

pursue an appeal to the United States Supreme Court from the United States courts of appeals.

Another indication of the willingness of the state prisoners to appeal can be obtained from the number of present appeals to the United States courts of appeals from the federal district courts by state prisoners. In 1980, there were 1,090 criminal appeals filed in the United States courts of appeals by state prisoners. In other words, the number of state prisoners who desired to proceed further from the ruling of the federal district courts to the United States courts of appeals was only slightly more than the number of state prisoners (896) who appealed from state courts directly to the United States Supreme Court in 1971. This may reflect the results of *Stone v. Powell*[57] and *Wainwright v. Sykes*[58] as well as the relief now believed to be afforded by the civil rights petition. The figures do indicate the degree of willingness of state prisoners to follow the appellate process from a state court decision. However, the federal district court is somewhat different. The district court is nearer, and, being a trial court, there is more often the hope that the trial court will construe contested facts in the petitioner's favor. This is seldom done, but the hope blooms eternal. Such expectations do not usually extend to appellate courts.

There is, however, another reason a National Court of State Appeals would not have to consider all of the 7,000 cases now filed in the federal district courts. That is the certainty of the law and its even application. Today, a state prisoner lives in the belief that he will find the "right" federal district judge. That this rarely happens is immaterial, as long as the belief remains. No longer will the prisoner be able to shop for the sympathetic judge. The law will be certain, and the prisoner will not file his petition in the National Court of State Appeals in hopes of getting some new or different law. Professor Schuman has stated:

> One reason why such a large percentage of criminal prosecutions are closed on a guilty plea without trial is that in most of these cases there is an extremely visible, rigid, appropriate (valid) statutory rule furnishing a standard to support the claim of the state and an absence of any standards to support the claim of the defendant.[59]

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57. 428 U.S. 465 (1976).

58. 420 U.S. 372 (1977).

59. Schuman, *Justification of Judicial Decisions*, 59 CALIF. L. REV. 715, 725 (1971).

A National Court of State Appeals would apply the federal standards in an even, uniform manner to all state prisoners. The state prisoners would be denied the hope of the "luck of the draw" now available in the federal district courts.

Civil cases may well provide more of a problem for the court because of the substance of the cases. It should be remembered, however, that this would be a discretionary court, and even if it is assumed that 500 civil appeals a year are filed, not all will be heard and decided by written opinion. The number of civil cases that the National Court of State Appeals would have to consider, while sufficient to provide a well-rounded and interesting docket, would not be so large as to overwhelm the new court.[60]

The sum of the three figures discussed above yields an accurate estimate of the number of criminal appeals that would reach the National Court of State Appeals: (1) the number of direct criminal appeals by state prisoners to the United States Supreme Court in 1971 (896); (2) the number of criminal appeals by both state and federal prisoners from the United States courts of appeals to the United States Supreme Court in 1971 (1,721); and (3) the number of criminal appeals by state prisoners to the United States courts of appeals from the roughly 7,000 decisions of the federal district courts in 1980 (1,090). The total number of criminal appeals by state prisoners from the decisions of the states' highest courts would be considerably less than the 7,000 cases now filed in the federal district courts. Giving the benefit of the doubt to the filing of an appeal, the total number of criminal cases appealed to the National Court of State Appeals by state prisoners should be fewer than 3,000, or three times the number of state prisoners who now take the trouble to appeal to the United States courts of appeals from the decisions of the federal district courts. Adding this figure to the estimated

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60. For consideration of the cases taken by the United States Supreme Court, see Hellman, *The Supreme Court and Statutory Law: The Plenary Docket in the 1970's*, 40 U. PITT. L. REV. 1 (1978); Hellman, *The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970's*, 91 HARV. L. REV. 1711 (1978); Levin & Hellman, *The Many Roles of the Supreme Court and the Constraints of Time and Caseload*, 7 U. TOL. L. REV. 399 (1976). The national court should also have sufficient staff to assist in screening the frivolous from the meritorious cases. D. MEADOR, APPELLATE COURTS, STAFF AND PROCESS IN THE CRISIS OF VOLUME 8 (1947); Cameron, *Central Staff—A New Solution to an Old Problem*, 23 U.C.L.A. L. REV. 465 (1976); Lesinski & Stockmeyer, *Prehearing Research and Screening in the Michigan Court of Appeals: One Court's Method for Increasing Judicial Productivity*, 26 VAND. L. REV. 1211, 1213 (1973).

civil appeals of 500, we arrive at a conservative estimate of 3,500 cases, fewer than the United States Supreme Court now processes, and a reduction in the United States Supreme Court's caseload of some 1,400 cases, or 28%. For a pessimistic projection, if we allowed for an appeal to the National Court of State Appeals by half of the 7,000 state prisoners who now file in the federal district courts, the figure of 4,000 (3,500 criminal appeals plus 500 civil appeals) is still less than the United States Supreme Court's present, more substantive caseload.

F. The Constitutionality of the New Court

One of the questions raised in opposition to the National Court of State Appeals is the constitutionality of depriving the federal district courts of the power to issue writs of habeas corpus involving state prisoners.[61] This should not be a stumbling block as long as there is an alternative forum that is reasonably accessible in which petitions for the writs can be heard.

The Judiciary Act of 1789,[62] gave the federal courts the power to issue writs of habeas corpus. The issuance of the writ, however, was limited only to prisoners held in custody by the United States. It would appear that the federal courts at that time limited the inquiry in habeas corpus cases to jurisdiction of the sentencing court.[63] It wasn't until 1867, after the Civil War, that the scope of the writ was expanded to state prisoners, but even then the power was given only to the federal circuit courts and not to the federal district courts.[64] Federal circuit courts were authorized to give relief "in all cases where any person [might] be restrained of his or her liberty in violation of the constitution, or any treaty or law of the United States."[65] The scope of the writ was further expanded in the case of *Frank v. Mangum*[66] to include proceedings in which a state defendant had been convicted in a trial which had been mob dominated. The scope of the writ was again judicially extended in *Brown v. Allen*[67] and in *Fay v. Noia*.[68] The United States Supreme Court

61. *See* note 43 *supra*.
62. *See* note 2 *supra*.
63. *See Ex parte* Watkins, 28 U.S. (3 Pet.) 193 (1830).
64. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385.
65. *Id.*
66. 237 U.S. 309 (1915).
67. 344 U.S. 443 (1953).
68. 372 U.S. 391 (1963).

recently limited the scope of the writ in *Stone v. Powell*,[69] stating, "[W]here the State has provided an opportunity for full and fair litigation of a fourth amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at his trial."[70]

Not only has the scope of the writ as to state prisoners been restricted by United States Supreme Court decisions, the jurisdiction to issue the writ has been restricted by Congress. Section 2255 of the Federal Habeas Corpus Act provides that "an application for writ of habeas corpus . . . , shall not be maintained," if the person has not availed himself of federal postconviction relief or has been denied such relief.[71] The United States Supreme Court case of *Swain v. Pressley*[72] should be persuasive on this question. In that case the Court construed a statute that prohibited federal district courts from considering applications for writs of habeas corpus brought by a person in custody pursuant to sentence imposed by the Superior Court of the District of Columbia. The United States Supreme Court stated:

> Respondent argues (footnote omitted) that § 110(g), if read literally, violates Art. 1, § 9, cl. 2, of the United States Constitution, which provides:
>
> > The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.
>
> His argument is made in two steps: (1) that the substitution of a remedy that is not "exactly commensurate" with habeas corpus relief available in a district court is a suspension of the writ within the meaning of the Clause; and (2) that because the judges of the Superior Court of the District of Columbia do not enjoy the life tenure and salary protection which are guaranteed to district judges by Art. III, § 1, of the Constitution, the collateral-review procedure authorized by § 23-110(g) of the District of Columbia Code is not exactly commensurate with habeas corpus relief in the district courts.[73]

The Supreme Court then held that the federal district court

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69. 428 U.S. 465 (1976).

70. *Id.* at 482.

71. 28 U.S.C. § 2255 (1949). *See* Kaufman v. United States, 394 U.S. 217 (1969); Skinner v. Johnson, 224 F.2d 577 (9th Cir. 1955), *cert. denied*, 351 U.S. 911 (1956).

72. 430 U.S. 372 (1977).

73. *Id.* at 379-80.

could be deprived of habeas corpus jurisdiction as long as alternate relief was available that was neither inadequate nor ineffective.[74]

Others have had no problem in limiting the use of habeas corpus by federal trial courts. The National Advisory Commission on Criminal Justice Standards and Goals stated, in standard 6.5, that "[c]hallenges to state court convictions made in federal courts should be heard by the United States Courts of Appeals."[75] The commentary to standard 6.5 reads:

> The standard also recommends that insofar as defendants convicted in State criminal proceedings have access to Federal courts for further review beyond direct review by the U.S. Supreme Court of the State courts' affirmance of the decision, they should be permitted to challenge their convictions only in the U.S. courts of appeals. This would eliminate further review in the U.S. district courts as is presently available.[76]

The National Court of State Appeals would provide the habeas corpus petitioner the same relief he presently receives. The only practical problem, as the Advisory Commission recognized, would be that the National Court of State Appeals, being an appellate court, could not conveniently hold hearings on issues of fact. Although the federal district courts, in fact, rarely do this now, usually relying upon the state record in the matter, some cases would need a factual determination to ensure that full relief is afforded. The National Advisory Commission on Criminal Justice Standards and Goals recommended that the circuit courts could refer matters to the trial court for factual determination where "[t]he defendant asserts a claim of constitutional violation which, if well-founded, undermines the basis for or the integrity of the entire trial or review proceeding, or impairs the reliability of the factfinding process at the trial."[77]

Since this would be a National Court of State Appeals, any referral for an additional factual determination should be made to the state court rather than the federal district court. One of the problems with collateral attacks upon state court decisions in the federal district courts has been the difference in pleadings

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74. *Id.* at 383-84.

75. REPORT ON COURTS, *supra* note 47, at 128, standard 6.5.

76. *Id.* at 131.

77. *Id.* at 128, standard 6.5. *See also* Sumner v. Mata, 101 S. Ct. 764 (1981), which held that the federal court had to apply a "presumption of correctness" in reviewing factual determinations of the state courts.

and the difference in the testimony upon which factual determinations have been made in the federal court as opposed to those already made in the state court. By referring any factual determination back to the state court, the National Court of State Appeals would be assured that the state court files already in existence would be available and thus allow for a more consistent factual determination.

In summary, there should be no constitutional impediment to taking jurisdiction of habeas corpus petitions by state prisoners away from the federal district courts and giving it to the National Court of State Appeals.

G. The New Court's Ability to Achieve Justice

The thrust of this proposal is to satisfy the primary interest of the states in a system of federal review that will function with reasonable promptness, uniformity, and absolute finality. The cause of justice is served by these same goals.

There must be an end to litigation. The sooner a matter is settled, the sooner the litigants can go on with their business, or the sooner a prisoner can concentrate on rehabilitation instead of dreaming, as he does now, that somewhere, someday he will find a federal district judge who will turn him loose and even recompense him for the violation of his civil rights by the state court. It should be remembered that, in criminal cases, by the time a prisoner reaches the federal courts, he has been given about all of the due process he is entitled to receive. The defendant has been found guilty by a jury or has pleaded guilty, often as a result of a plea agreement approved by the state court. The case has been reviewed by the state's appellate court, and the conviction has been affirmed. Frequently he has also been denied postconviction relief. Chief Justice Burger has noted, in discussing the cost and time involved in extended review of criminal convictions, "The tragic aspect was the waste and futility, since every lawyer, every judge and every juror was fully convinced of defendant's guilt from the beginning to the end."[78] And Chief Justice Schaefer of Illinois has stated, "What bothers me is that almost never do we have a genuine issue of guilt or innocence."[79] If the chance that a defendant has a valid claim of

78. Address by Warren E. Burger, Association of the Bar of City of New York 1 (Feb. 19, 1979); 25 REC. N.Y. CITY B.A. 14, 15-16 (Supp. 1970).

79. Remarks by Walter v. Schaefer, Conference of the Center for the Study of Dem-

reversible error is extremely small, the chance that a defendant will have been convicted of a crime that he did not commit will be even smaller.[80] And the fact that access to the United States Supreme Court would be reduced does not mean that justice will be denied. Justice Jackson stated:

> [R]eversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.[81]

In civil cases, although there are not the same number of frivolous appeals, the facts and issues will likewise have been distilled to the point that the constitutional questions are readily apparent, and the National Court of State Appeals could quickly decide whether to take the case. Here again the litigant has been before the state courts and through the state appellate process. The chance that he has been unjustly treated is small. Federal appellate review of state civil decisions serves more to clarify the law than to prevent injustice in a particular case.

The proposal of a National Court of State Appeals would not be acceptable if, in operation, the court would damage the federal system or detract from the supremacy or prestige of the United States Supreme Court. This proposal would neither harm the federal system nor detract from the position of the United States Supreme Court. It would, however, provide an extra number of authoritative federal law decisions upon which the states and others could rely with a reasonable expectation that they are final and binding.

A National Court of State Appeals could review federal

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ocratic Institutions (June 1968), *cited in* Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 145 n.12 (1970).

80. It has been suggested that no petition for a writ of habeas corpus by a state prisoner in the federal court should be considered unless there is a colorable claim of innocence. There would be, of course, some exceptions to this rule:

1. Lack of jurisdiction in the traditional sense, for example, double jeopardy.
2. Where the error is one that could conceal from the trial court and the court on appeal the extent of the error: for example, inadequate or no representation by counsel, which could not only concern the degree of the crime, but also affect the severity of the sentence.
3. Where there has been a change in basic constitutional law.

See Friendly, *Is Innocence Irrelevant? Collateral Attack On Criminal Judgments*, 38 U. CHI. L. REV. 142, 151-53 (1970).

81. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

questions decided by state courts expeditiously and uniformly with less cost than is incurred under the present structure. Such a court would provide swifter and more consistent justice for the people that both the federal and state courts must serve.

VII. Some Questions

A. Time Limits

There is a question as to what, if any, time limits should be placed upon a person seeking national court review of state court decisions. One of the purposes of a National Court of State Appeals would be to bring litigation to a conclusion within a reasonable time. It is proposed that a person seeking relief from a decision of the state's highest court be required to do so within ninety days of final action by the state court. This should work no hardship on the litigant and would ensure that the court would not be burdened with reviewing stale decisions. In criminal cases, if there is a change in the law or there is newly discovered evidence, these matters can be first litigated in the state courts through state postconviction procedures, and the petition to the National Court of State Appeals would be based upon the denial of relief by the state's highest court.

B. Distance and Increased Costs

Another objection that has been made is the increased costs involved in having to travel to the National Court of State Appeals to argue cases that previously were argued in the local district court or the United States courts of appeals. For some, this would admittedly be a burden. But cost alone should not be the basis for allowing federal trial judges to sit in judgment of state appellate courts. Moreover, there are some solutions to the cost factor. First, the enacting legislation could allow the National Court of State Appeals to travel and hear cases at selected places around the country. This is done by appellate courts in many states and has been beneficial to both the court and the litigants. Second, with the increased use of technology, provisions could be made for oral argument by video phone. Increased use of technology and a willingness on the part of the National Court of State Appeals to travel should eliminate some of the additional costs that may be incurred by the litigants in seeking appeal to a national court rather than a federal district court. Actually, there will be a saving of both time and cost in

most cases in that the litigation route from the state's highest court to the National Court of State Appeals and then to the United States Supreme Court involves one less step than the present procedure from the state's highest court to the Federal District Court, to the United States Court of Appeals, and then to the United States Supreme Court. All of this usually occurs after a prior petition to the United States Supreme Court from the state's highest court has been denied by the United States Supreme Court.

VIII. Conclusion

There will always be some tension between the federal courts and the state courts in the exercise of the supremacy clause by the federal judiciary. Accepting this tension as the logical result of our dual system of courts does not mean that this power and obligation on the part of federal courts to review state court decisions on federal questions should be used to the unnecessary detriment of the state court systems or the litigants. State courts are entitled to prompt and consistent review of their decisions. They are not now receiving such review and indeed cannot receive it under the present procedure. It may be that the burden of multiple review by the federal courts is an even greater burden on the federal judiciary than it is on the state judiciaries. But it is a burden to both, and there exists in both systems a need for reasonably prompt and consistent review of state court decisions involving federal questions. A National Court of State Appeals would satisfy that need.

Whatever the mistakes of the past, state courts are aware that the federal judiciary will step in when federal constitutional law is ignored by the states. Restricting the power of the federal district courts to interfere in state appellate court decisions and transferring that power to a National Court of State Appeals will be a step in ensuring consistency and prompt finality in state court decisions. The system and the litigants deserve nothing less.

APPENDIX

Total Compilation of Questionnaire Results

Number of Questionnaires — 500
Number of Replies — 252

1. Nature of action:

Divorce	79	Contract	74
Tort	71	Other	32

2. If there were no time or jurisdition problems and you had a choice, would have have preferred to file this case in a federal court or in the state court?

Federal court	34	State court	193	No preference	18

3. Would you please list briefly your reasons. [Not all responded; some gave more than one reason.]

   a. Those who prefer to file in federal court (34):

1.	Quicker disposition of cases	11
2.	Superior procedure	8
3.	Quality of judges	8
4.	Quality of federal court system	5
5.	Individual case assignment method	4
6.	Larger damage awards	2
7.	Federal Rules of Evidence	2
8.	Shorter trials	2
9.	More apparent authority	2
10.	Less likelihood of political influence	2

   b. Those who prefer to file in state court (193):

1.	Quicker disposition of cases	48
2.	Familiarity	39
3.	Convenience	38
4.	Cooperation with attorneys and litigants	12
5.	Jurisdiction	11
6.	Jury system (12 jurors and voir dire)	9
7.	Local issues best resolved by state courts	8
8.	Arrogance of federal courts	7
9.	Quality of judges	4
10.	Judges know state law	4
11.	More efficient system	3
12.	Less judicial interference	3
13.	Federal court preference for criminal cases	3
14.	Inflexible procedure of federal courts	3
15.	Small case	2
16.	Inexperience with federal courts	2

   c. Those who gave no preference (18):

1.	Quality of judges equal	3

2. Disposition of cases equally fast 1
3. Procedural rules identical 1
4. Simple action 1
5. Federal judges experienced in state court system 1

4. In general, do you feel that the interest of your client is better served in the federal court or the state court?

Federal court 33 State court 124 No difference 94

5. In general, do you believe that the quality of judges is better in the federal court or the state court?

Federal judges 95 State judges 30 No difference 125

6. Any comments you may wish to make. [Not all responded with comments; some made more than one comment.]

a. Those who thought federal judges were better:

1. Merit selection system 5
2. Preparation 3
3. Law clerks better 2
4. Superior knowledge 2
5. Fairer to out-of-state plaintiffs 1
6. Competence 1
7. State judge quality uneven 1
8. Higher paid 1
9. Lower number of federal judges 1
10. Pressure on state judges 1
11. Dignified 1
12. More compassionate on social matters 1

b. Those who thought state judges were better:

1. Elected, so responsive to needs of community and bar 3
2. More sympathetic to needs of attorneys 2
3. Federal judges arrogant because appointed for life 3
4. Federal judges do not understand state law 1
5. State judges diverse 1
6. State judges allow litigants to litigate 1
7. State courts efficiently administered 1
8. State judges qualified 1

c. Those who found no difference:

1. Quality of judges equal 2
2. Federal judges not responsive to public because not elected 1
3. State judges have more consideration for litigants and atttorneys 1
4. Federal judges not influenced by local pressure 1
5. Federal judges not familiar with local issues 1
6. Trial dates earlier in state system 1
7. Life appointments encourage omnipotent behavior 1
8. Bar is negligent in evaluating judges 1

9. Availability of two court systems is confusing 1
10. Illinois Rules of Evidence superior to federal rules 1
11. Federal Rules of Civil Procedure should be adopted in California 1
12. Federal courts usurp state's control of family matters 1

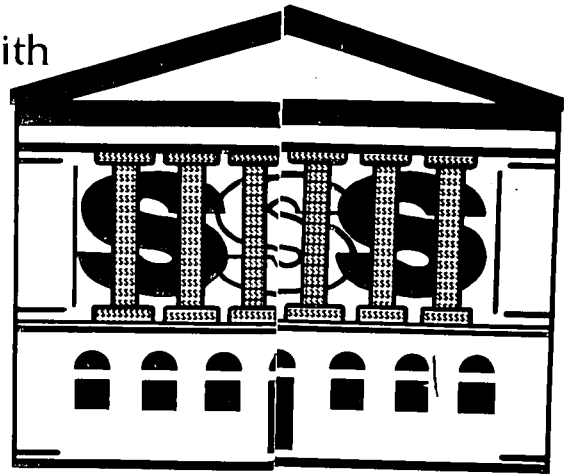
7. Those who thought federal judges were better, but

a. preferred to file in state court 58
b. felt the best interests of the clients were better served by the state court 28

*The results of the survey in each of the counties individually are on file at the editorial offices of the Brigham Young University Law Review.

Propping Up State Courts With Federal Dollars

How to get the most out of the new proposals for restructuring LEAA



By Robert J. Sheran

Programs being formulated within the Carter administration and the Congress soon will provide the basis for a major debate on the issue of federal funding for state court systems.

The debate will not center on the basic questions of whether there should or should not be such federal funding, for it is an established and increasingly obvious fact. Rather, it is likely to center on the important but secondary issues of (1) who will administer the funds, and (2) the purposes they will serve.

It is important to note that the basic question of federal funding has never been the subject of structured debate within the state judicial community. This is because Congress first made significant funds available to us, without our asking, under the Crime Control and Safe Streets Act of 1968. The legislation was, of course, drafted as an anti-crime program and funding for state court projects was incidental, not central, to its major thrust. Federal funding of state judiciaries has, then, come about more by accident than by design.

When the Conference of Chief Justices first confronted the issue of federal funding in 1974, it already had been structured as a problem of the

under-funding of state judicial branch programs by the Law Enforcement Assistance Administration. This underfunding led to an extended effort by the Conference which culminated in 1976 with passage of the "Ken[illegible]" amendments to the Safe Streets Act.

The history and details of these amendments were the subject of an article in *The Judges' Journal* last spring by Howell Heflin, former chief justice of Alabama, and leader in the fight for the amendments.

In summary, the amendments were designed to right an imbalance in the federal anti-crime program which had, in most states, favored funding of projects for executive branch criminal justice agencies, notably the police. In their principal provisions, the amendments sought to right the imbalance by (1) requiring representation of chief justices and state court administrators on the state planning agency boards responsible for allocating LEAA block grant funds; (2) authorizing state judiciaries to create their own planning units to plan for use of both state and federal funds; and (3) establishing criteria to assure "adequate" funding of judicial programs on a priority basis.

The amendments did not become fully effective until the beginning of fiscal 1978, but early indications were that most state judiciaries had established planning units and that judicial programs were slated for a larger share of state block grant funds. The expected benefits of the amendments were substantially reduced, however,



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Minnesota
Supreme Court

by a cut of more than $100 million in LEAA's appropriation for the new fiscal year.

Like it or not, then, federal funds have found their way into *state court programs* and prospects are for an increase in the flow. These prospects stem from a number of current developments in Washington. Foremost among these are pending proposals for restructuring LEAA, for creation of a National Institute of Justice, and for defining a broad new federal policy on the nation's justice system, state as well as federal. Also, legislation is pending which would *fund* state and local programs for the resolution of minor disputes and which would alter existing relationships between state and federal courts. The latter include a bill to abolish federal diversity of citizenship jurisdiction and divert more than 30,000 cases annually to *state court systems*.

In its preliminary response to these and other federal initiatives, the Conference of Chief Justices has adopted broad policy guidelines which it has forwarded to Congress and federal executive officials and against which it will judge specific proposals as they are made public in the coming months. In summary, these policy statements provide that:

(1) State court systems are and will remain the basic system for the administration of justice in the United States.

(2) Improvement of state systems and expansion of their jurisdiction offers the most effective means of *improving* the overall administration of justice and for relieving the increasing burdens of the federal courts.

(3) There is a proper and necessary role for the federal government to play in helping states improve their justice systems.

(4) Congress should enunciate a policy for fulfilling this role and establish procedures for administering it in a manner *which respects* the independence of state judiciaries under the constitutional doctrines of federalism and the separation of powers.

(5) Federal programs should treat state judicial systems as a whole, not just the criminal component.

(6) Federal programs affecting state courts should be designed to assist the responsible state judicial leadership in programs for modernization and *reform* on a statewide basis. They should be administered at the state level by the judicial branch itself and thereby encourage the trend to statewide integration of the courts both as to funding and as to administration.

(7) Federal programs at this time can most appropriately *assist* state courts by funding essential institutions of the state judiciaries which provide national leadership, research, technical assistance, management systems building, training, and coordination functions for which funds are not otherwise available.

(8) The National Center for State Courts, as the national organization of the state judiciaries, offers the vehicle by which *federal funds* can be used to improve the administration of justice in the states in a manner consistent with the integrity and independence of state judiciaries. It also provides the basis, in cooperation with the Federal Judicial Center and the Department of Justice, for administrative coordination and exchange of knowledge between the state and federal systems and can play an essential role in program *and* policy development necessary to the future of our dual court system.

(9) National programs for the collection and analysis of state court statistics should be left in the National Center for State Courts which should be responsible *for coordinating* with federal executive and judicial branch agencies responsible for the collection and analysis of statistics on the justice system.

It is clear from these principles that the Conference has not developed a detailed program of its own on the many complex issues involved in federal funding of state court programs. It also is clear that the Conference is troubled by the issues and is seeking appropriate responses to them. We shall have to move quickly, however, if we are to play a formative role in programs now under development in Washington.

A proposal that would abolish LEAA by name and restructure it as a "National Institute of Justice" within the Department of Justice was made public in mid-December by Attorney General Bell. This proposal, which was forwarded to the President in late November, would leave the present LEAA program largely intact. However, it faces almost certain modification before it emerges as official administration policy.

Additional input will come from the President's Reorganization Project for Justice System Improvement which is conducting its own studies of the National Institute of Justice concept. Legislation already is being drafted by Senator Edward M. Kennedy which is believed to provide for a more radical restructuring of LEAA than that proposed by the Attorney General.

In commenting on proposals to reorganize LEAA, the Conference of Chief Justices has urged:

(1) That the judicial branch receive 30 percent of the funds allocated to each state;

(2) That the funds be administered at the federal level by an agency outside the executive branch; and

(3) That these *funds* go directly to the judicial branch and be administered at the state level by the highest court or judicial council responsible for statewide administration of the courts.

The judiciary could again find itself competing for federal funds in a context favoring the executive branch

The proposal that federal funds go directly to state court systems, bypassing the Department of Justice and state executive agencies and legislative procedures, raises a new issue certain to be controversial. But the Conference viewed this procedure as the most appropriate in keeping with the doctrines of federalism and separation of powers.

The direct funding issue also has been raised in response to a pending Senate bill, S. 957. This bill originally was designed to provide federal grants-in-aid to improve state and local mechanisms for the handling of consumer complaints but was amended by Senator Kennedy to apply to all minor civil disputes. As now structured, the new program would be administered at the national level by the Attorney General and at the state level by an official "appointed in accordance with state law." This official could be the court administrator in some states, but it is expected that he would in most instances be a member of the executive branch.

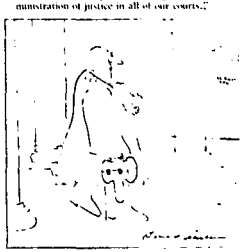
While the state administrator would be required to "consult" with the state Chief Justice, he would have final authority in setting priorities for programs to be funded. These programs could include non-judicial dispute resolution programs and could be conducted by non-profit organizations and executive branch agencies. Thus, the judiciary, as with LEAA, could again find itself competing for federal funds in a context favoring executive branch programs and raising *issues under the separation of powers doctrine.*

The Conference's solution for this problem would again, as with LEAA, be direct funding to the judicial branch. This solution faces resistance and is complicated in both instances, however, by the fact that the federal programs were designed to deal with problems that have major non-judicial components, i.e., crime control and consumer grievances.

This is one of the principal reasons for the Conference's call for a new federal approach to programs involving state judiciaries and for the promise we see in the President's Reorganization Project for Justice System Improvement. The project staff is reviewing all aspects of the nation's justice system, state as well as federal, and soon will make recommendations to the President for federal programs to improve it. Proposals for creation of an independent National Institute of Justice, a concept endorsed by the Conference of Chief Justices, are among those under study.

In responding to a request for comment on the President's Reorganization Project, the Conference of Chief Justices, which represents all the states, said:

> We view the President's new initiative as an unparalleled opportunity to define the complex issues involved in federal assistance to state judiciaries and to begin to fashion appropriate responses.
>
> For our part, we shall increase our efforts to explore the issues through studies and discussions within the judicial community and, we trust, through a continuing dialogue with you and other federal officials sharing our interests and concerns. Initially, we see the need for a statement of federal policy which recognizes the interdependence of our state and federal judicial systems together with a commitment to improvement of the total system in a manner which respects with equal force the integrity and independence of state as well as federal courts. This will not be a simple task, but as we said in a recent statement before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice: "The constitutional structures and procedures by which federal funds can appropriately be used to achieve national goals in the delivery of justice while respecting the independence of the state judicial systems require further study, but difference of opinion as to the methods of achievement of the goals should not obscure the importance and necessity of federal-state cooperation in improving the administration of justice in all of our courts."



WELCOMING REMARKS

OF

WARREN E. BURGER
CHIEF JUSTICE OF THE UNITED STATES

AMERICAN LAW INSTITUTE

HYATT REGENCY HOTEL
WASHINGTON, D. C.

JUNE 10, 1980

This is the eleventh year you have allowed me access to this unique forum of our profession. and on this occasion I will not detain you unduly long. What I hope to do is what Judge Charles Clark suggested in his Cardozo Lecture, that is, I will try, in his words,

> ". . . to suggest problems and raise doubts rather than resolve confusion; to disturb thought, rather than dispense legal or moral truth."

I come not as an advocate, as I have done in some prior years, but rather -- with Charlie Clark -- simply "to raise doubts."

In a sense, it may be symbolic that for the first time in many, many years you meet in June and at the modern Hyatt Regency Hotel rather than in mid-day at the grand old Mayflower. This should remind us that things do change. We know that changes in our society often go virtually unnoticed until they have become a fixed part of the structure and changes in the law exhibit this same characteristic. But changes in the law and litigation patterns do not burst forth like that volcano which recently caused billions of dollars in damage and the loss of many lives. Changes in the law come silently, and, like a glacier, the movement is almost imperceptible, often first emerging in an obscure case that goes unnoticed. We need only recall how long it took for lawyers and scholars to see the meaning of Erie v. Tompkins to remind us that changes are not always perceived immediately.

Fortunately for all of us, scholars, with more time to scan the whole panorama, and more time for reflection than is allowed to lawyers and judges, may discern a new trend or a new concept -- and it is sometimes a new trend that was not intended.

In recent years we have read news reports of what some see as "bizarre cases": a son suing his parents for damages for their negligence in his upbringing; another son suing his parents for a "divorce" -- which I suspect a court might construe as an application for a declaratory judgment of emancipation; students suing teachers demanding judicial review of grades received. Another headline novel case was brought by a lady seeking a division of community property from a gentleman for whom she had been what we lawyers might call a de facto wife, although she made no claim to a common-law marriage. We read of women employees suing their employers for unwelcome attentions, but that is probably an improvement over the self-help of earlier times when ladies used hat pins to deal with such problems.

I am not suggesting by any means that all novel or even bizarre cases are necessarily "bad". Some may be aberrations but others may contain the seeds of future change. The first time someone sued a king, for example, it no doubt provoked gales of mirth in the alehouses or wherever lawyers congregated in those days. And we recall that Lord Coke literally put his head on the block when he told his king that the law was superior to the monarch. Of course, Coke shrewdly softened the blow by adding "just as I am beneath your majesty." Yet Coke's daring statement was probably one of the first breaches in the doctrine of sovereign immunity, even if it was not so perceived at the time. So new is not bad, and we must be prepared to deal with change -- and, if possible, anticipate it.

At the St. Paul Conference in 1976, which has come to be known as "The Pound Revisited Conference", more than 300 representative leaders of the legal profession -- and other disciplines as well -- tried to inquire into the problems that will confront courts in the final quarter of this century. At best, I suspect, we did no more than scratch the surface, but after all that is what Roscoe Pound did in 1906. One of the speakers was Simon Rifkind, who has been an active participant in the law for a half century, on the bench, at the counsel table and as a counselor. His theme was that the federal courts are victims of their own success. I took him to mean that federal courts were thought more likely to provide remedies which could not be achieved by the political processes or in the state courts.

This morning I will try to present a very tentative perception about federal and state jurisdiction, a subject which the Institute has addressed on prior occasions. I can cite no empirical data acceptable to the scientific mind, but numerous conversations with colleagues of the state and federal bench, along with published articles and lectures, suggest that significant changes are taking place in patterns of litigation in both the federal and state courts.

I think I perceive, in dim outline -- but I am not certain -- signs that state court dockets and federal dockets are becoming more and more alike.

It is surely plain by now that both federal and state courts share the burdens of what has been called "the litigation explosion." Some thoughtful observers tell us that this enormous expansion of litigation is a result of the failure of the political processes to meet the peoples'

expectations. This is not the time or place to explore the source or scope of those expectations. But it is reasonably clear that in the past two decades peoples' expectations have indeed been fanned to new heights -- heights which some social scientists, and others, see as beyond what our society can provide. I leave that to the political scientists and economists.

My point this morning is far narrower than these cosmic political and philosophical questions.

What I ask is whether the signs some discern mean that the federal system may be on its way to a de facto merger with the state court systems, with litigants free in most, if not all, cases to choose a federal court or a state court, depending on the condition of the dockets and depending upon what they perceive as to the quality of relief they may obtain? I put that as a question.

In the past decade Congress has enacted not less than 70 new statutes enlarging the jurisdiction of federal courts. Many of these statutes expand federal jurisdiction to cover relief already available in state courts. It is fair to say that the federal courts, and ultimately the Supreme Court, have tended to give expansive, rather than restricted, interpretation to these statutes, along with a narrowing of the scope of immunity of government officials. A number of thoughtful observers, including our colleague Carl McGowan, have noted, for example, that the federal courts have given new and expanded meaning to the requirements of standing. Writing in The American Bar Journal four years ago, Judge McGowan pointed to another, but related, development:

> "Progressive relaxation of judicially created requirements of standing have enabled almost any person to get into [federal] courts to complain about almost any act, or omission to act, in the whole spectrum of federal activities. But the capacity of the courts to reverse that relaxation is now being impaired by a spectacularly increasing tendency on the part of Congress to provide explicitly for federal court remedies and judicial review . . ."

This is confirmed by my own discovery only a few days ago that New York City is second only to the United States as a litigant in the southern district of New York. And you may be sure New York City is not the plaintiff in very many of those cases.

Judge McGowan concluded with these words:

> The current congressional love affair with federal jurisdiction is heating up rather that cooling."

We have made an effort, but not with extraordinary success, to have the Congress require its committees, in reporting out legislation, to provide the full Congress with an impact statement predicting, or at least making an estimate -- an informed guess -- as to the possible or likely impact of new legislation on the federal courts.

Another colleague, former Attorney General Griffin Bell, stated in a recent interview that he had insisted that the Department of Justice, in sponsoring legislation, provide the Congress with an impact statement. There has been no stampede to emulate Griffin Bell.

I hasten to acknowledge, of course, that it is the Congress under the constitution that defines the jurisdiction of the federal courts.

We know that 50, or 100, or 150 years ago, there was a very marked difference between the litigation in state and federal courts. What I am pointing to is the perception of some that there are signs of a merging of the two judicial systems. We might say these are early warning signals. This perception may be wrong. These observers may be in the position of a small boy looking down a stretch of straight railroad tracks when, by optical illusion, the rails seem to converge. But this perception is not frivolous. Like symptoms of illness, we ignore them at our peril.

For more than a half century The American Law Institute has taken the long view of problems and has contributed immeasurably to the improvement of the law with its model codes, restatements of law and other studies, along with programs of legal education. Certainly one of the most monumental contributions was the 1969 study of allocation of jurisdiction.

That report focused on allocation of jurisdiction between the state and federal courts as to specific and relatively narrow jurisdictional, venue and procedural problems. The introductory statement of that report, you recall, tells the reader that:

"The Institute accepted the thesis that there are basic principles of federalism and that it is essential to allocate judicial business between state and federal courts in the light of those principles."

It goes on:

> "A reappraisal from time to time of the structure of our judicial system is appropriate, but the present inquiry has a special urgency because of the continually expanding workload of the federal courts and the delay of justice resulting therefrom."

The draftsman of that introductory statement must be appalled at what has happened since the day when this statement was drafted.

Progress in implementing the Institute's 1969 recommendation has not been spectacular, but neither has it been static. The Congress substantially eliminated the three-judge district courts, but it has not eliminated diversity jurisdiction, as it has not eliminated the Supreme Court's mandatory appellate jurisdiction, which the Judicial Conference has urged. The latter has met with no objections or opposition, and although unopposed, the corrective legislation is "hostage" to the prayer amendment, whose subject matter relevance eludes even those "professors in New England" Alex Bickel spoke of.

Yet even this minimum progress is not to be disparaged for we remember that Chief Justice Jay advocated the creation of separate federal courts of appeals in 1791 and John Marshall pressed that subject for the entire 34 years of his tenure. Congress finally responded -- in 1891! -- A century of progress no less!

If these perceptions as to a possible merger are accurate, there are at least two consequences, both of which may be upon us before we even discern them fully so as to be able to grapple with them.

First, we may see an irreversible erosion of what the Institute in 1969 called "basic principles of federalism". Federal courts were created to provide a forum for certain, narrow, identifiable disputes involving rights and obligations. Under the genius of our system of federalism, such special and limited cases were thought more likely to receive full protection and review from a national court

system. To assert this is in no sense to disparage state courts, where the overwhelming bulk of cases are litigated.

A second consequence of this almost imperceptible trend toward merger of state and federal jurisdiction -- if indeed such a trend is a reality -- is that the bar may lose interest in its obligation to work for the improvement of state courts and those courts may well atrophy. There are now ten times as many state trial judges of general jurisdiction as there are federal trial judges. Those who wish to open the federal courts for every cause of action, merely out of the self-interest of their clients, may be unwittingly laying foundations for a vast increase in the number of federal judges -- numbers never before contemplated.

If we are disposed to enlarge the federal court system to provide a total, or almost total, concurrence of jurisdiction, the trend, unchecked, is the way to achieve that result. For my part, I would greatly prefer to maintain the federal courts as tribunals of special and limited jurisdiction as the founding fathers contemplated in 1787 and as the Institute confirmed in its seminal 1969 report.

I remind you again of the introductory statement of the 1969 report that:

> "A reappraisal from time to time of the structure of our [whole] judicial system is appropriate . . . "

What I now raise for your consideration is whether the time has come for a broader reappraisal of the allocation of jurisdiction, with special focus on the developments that have emerged since the study was begun two decades ago. It will do us no good in 1999 to look back and conclude that a trend indeed began in the 1950's or 1960's to assimilate the two judicial systems, and that nearly two centuries of tested concepts of allocation of jurisdiction were abandoned without conscious intent.

I have been discussing -- in a serious vein -- differences in jurisdiction which may be disappearing. And now, less seriously, if these random observations have not reminded you of one of Paul Freund's stories they have done so for me. Paul tells of the lady who asked an Anglican bishop about the differences between Cherubim and Seraphim. The Anglican Bishop replied, "Madam, at one time there were indeed differences but the differences have been composed and all is well."

1/28/80

STATEMENT BEFORE ADMINISTRATION OF JUSTICE SEMINAR

Williamsburg, Virginia
January 20, 1980
Frank J. Remington

When I was first contacted over a year ago and asked to assist in the preparation of a proposal for federal financial assistance to state judicial systems, I was hesitant to become involved because I felt not sufficiently well informed with respect to the merits of the issue and I was skeptical whether a persuasive case could ever be made in favor of direct federal financial assistance for the improvement of state judicial systems. I was skeptical for at least four reasons:

(1) First, it has become increasingly apparent that most difficult social and governmental problems cannot be solved merely by spending more money.

(2) Second, federal grant programs have too often been characterized by so great a proliferation of rules and regulations that the time and effort required to obtain a grant could better be spent in other ways.

(3) Third, with federal grant money has come federal control that can create a problem for state government and particularly for state judicial systems

that need to be a separate and largely independent branch of government.

(4) Finally, I was skeptical because I could think of no persuasive reason why the federal Congress should contribute directly to the improvement of state judicial systems.

However, it is difficult to say no to a chief justice--impossible to say no to several chief justices as persuasive as Justices Utter, Sheran of Minnesota, and I'Anson of Virginia.

In the past year I have become better informed with respect to the merits; I have been completely persuaded that there is a principled basis for direct federal financial support of some aspects of the work of state courts; and I have become at least cautiously optimistic that federal funds can be spent by state judicial systems in ways that will make significant contribution to the improvement in the quality of state court justice without sacrificing the independence of the state courts.

I want to direct my remarks to the question of whether there is a principled basis for asking the Congress to make direct financial contribution to the

improvement of state judicial systems. Chief Justice Utter will speak to the question of whether the availability of federal funds will in fact make significant improvement in the quality of justice rendered by state courts.

I hope that it will become clear that the question of whether there is a persuasive basis for federal support of state courts has significance not only for the Congress, but also for the executive and judicial branches of the federal government.

I became convinced that to say that there is an important federal interest in the quality of justice furnished by state courts is to assert the obvious. Nothing is more important to a democratic society than confidence by its citizens that they will receive a high quality of justice in court, state as well as federal. This is particularly true and particularly difficult to achieve in a highly diverse society such as ours. Important as are health and education and a good environment--all recipients of substantial federal financial support--they are no more essential to the nation than to have all citizens confident that they can find fairness and justice and proper concern for

constitutional principles in the state courts where 98 percent of the cases are handled.[1] This reason alone, it seems to me, would justify federal financial assistance to state courts where such assistance can contribute significantly to the quality of justice. But there are other reasons also.

State courts have historically had a responsibility to enforce the requirements of the United States Constitution and the laws of the United States made in pursuance thereof. This is required by the supremacy clause of the Constitution. State courts have concurrent jurisdiction to enforce congressional legislation except where there is a congressional purpose to make federal court jurisdiction exclusive, and this has not often been done. In a real sense, therefore, the effective implementation of federal law requires that state courts have the capacity to know what the federal law is and to understand how it should be applied in a wide variety of cases. This is obviously no easy task for the state court judge, and it seems evident that there is a direct federal interest in assisting the state judge in acquiring the knowledge and other resources necessary to ensure the effective implementation of federal law.

Although the federal interest in state courts has long existed, there have been recent changes that make the federal interest in state courts today more important than ever before.

Actions at the federal level, in recent times, have significantly increased the burden of state courts and significantly increased the direct federal interest in the effectiveness of state judicial systems. These actions have been of three general sorts:

First, the Congress has increasingly relied upon state courts to implement congressional legislation. The nationwide 55-mile-per-hour speed limit is perhaps the most obvious illustration. A large number of additional illustrations can be cited.[2]

Second, federal executive agencies and federal courts have diverted an increasing number of matters to state courts in order to maintain the small, high quality character of the federal justice system.[3] The federal government formerly prosecuted interstate auto theft; it no longer does so, and the trend toward increased reliance upon the states continues and is increasing. The federal government now gives low or no

priority to bank robbery in the view that--as the attorney general said--it is a "state crime dressed in federal clothing." As with the proposal to eliminate diversity jurisdiction, one could say that business that should have been the responsibility of the state courts all along is being returned to the states. But it is not evident that bank robbery is a state responsibility alone--any more than it is that the federal Civil Rights Act is a federal responsibility only, though one state court said, in the past, that this was the case. Cooperation is a two-way street. The reduction of federal prison population from 32,000 to 25,000 (reported to us by Norm Carlson, director of the United States Bureau of Prisons) is encouraging, but at what cost to state courts? Federal courts have decided to no longer review state fourth amendment decisions where the state has given a "full and fair hearing."[4]

Justice Brennan recently said, "[T]hese decisions . . . have significantly altered the work of state court judges . . . . With federal scrutiny diminished, state courts must respond by increasing their own."[5]

As many as forty-one state courts have recently held that the state court has jurisdiction to hear cases brought under 42 U.S.C. §1983 (the federal Civil Rights Act). Yesterday Judge Rubin said federal courts should concentrate on those cases for which there are no other courts available and those where other courts are less capable of doing an adequate job. Control of the volume of federal court business thus requires an increase in the capacity of state courts to handle cases now left to federal courts. If this happens, perhaps exhaustion of state judicial remedies in 1983 cases will be feasible.

I anticipate increased reliance upon state courts in 1983 cases where the decision of the state court is res judicata and cannot be relitigated in a federal court, and thus the enforcement of federal civil rights is left entirely to the state court. The increased reliance upon state courts results in part from the substantial backlog in many federal courts, a problem of delay in the civil docket that is likely to increase (as Maury Rosenblum predicted during this conference) as the sanctions of the Speedy Trial Act

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go into effect on July 1, 1980--sanctions that will require that federal criminal cases be given even greater priority than they are given today.

Third, federal courts have imposed increasing procedural due process requirements on state courts in both criminal[6] and civil cases.[7] There was a time when a plea of guilty could be taken in state court in a couple of minutes. Today compliance with federally imposed requirements results in a much more lengthy and more difficult guilty plea procedure, and it is obviously more important that the requirements of the procedure be understood and complied with by the state court judge. Recent cases, such as Sandstrom v. Montana,[8] require that state jury instructions on the mental state required be rewritten, and it is very likely that all first degree murder cases where the offender is still in prison will have to be retried.

There was a time, not many years ago, when federal court review of state court convictions was resented and resisted by state judges. This is much less true today when there is a much greater willingness to implement federal requirements. The chief justice pointed to the fact that the federal-state councils

have materially reduced the tension between federal and state judges. But the task of applying federal law is difficult, and the burden on the individual state trial judge is an impossible one unless that judge has more help through continuing education, the availability of model jury instructions, and the development of more effective trial and pretrial procedures. Chairman Rodino said in his opening remarks that it is increasingly difficult for the federal judge to keep abreast of the "law explosion." The same difficulty faces the state judge, a difficulty aggravated by the tendency to leave to state courts much of what has--in the past--been handled by federal courts.

I have had the opportunity of meeting for two days a month for about twenty years with a group of Wisconsin trial judges responsible for the preparation of materials that will help the trial judge handle his increasingly complex responsibility. This complexity results in large part from changes required by the federal government.

FOOTNOTES

1. A memorandum dated April 16, 1979, from Nora Blair of the National Center for State Courts to Francis J. Taillefer, Project Director, National Courts Statistics Project (on file at National Center for State Courts) indicates that 98.8 percent of current cases are handled in state courts. See also Sheran and Isaacman, State Cases Belong in State Courts, 12 Creighton L. Rev. 1 (1978); and Meador, The Federal Government and the State Courts, Robert H. Jackson Lecture, National College of the State Judiciary (October 14, 1977): "Our system is still structured on the basic premise that the state courts are the primary forums for deciding the controversies which arise in the great mass of day-to-day dealings among citizens."

See Kastenmeier and Remington, Court Reform and Access to Justice--A Legislative Perspective, 16 Harvard Journal on Legislation --- (1979), in which it is asserted: "The overall federal interest in fair and equal justice at the State level is analogous to Federal interest in quality health care at the State level."

2. See Steward Machine Co. v. Davis, 301 U.S. 548 (1937). Recently, Congress changed the requirements for approval of an unemployment insurance plan. Now state and local public employees must be covered. By using the spending power instead of the commerce power to achieve this goal, Congress has apparently sidestepped the rule of National League of Cities v. Usery, 426 U.S. 833 (1976). See Note, Federal Conditions and Federalism Concerns: Constitutionality of the Unemployment Compensation Amendments of 1976, 58 Boston U. L. Rev. 275 (1978).

See 42 U.S.C. §§1857-1858a (1970). Comment, The Clean Air Act: "Taking a Stick to the States," 26 Cleve. State L. Rev. 371, 374 (1976).

See Lupu, Welfare and Federalism: AFDC Eligibility Policies and the Scope of State Discretion, 57 Boston U. L. Rev. 1 (1977); Note, Nuclear Power Plant Siting: Additional Reductions in State Authority?, 28 Gertrude Brick L. Rev. 439 (1975), reprinted in 28 U. Fla. L. Rev.

439 (1976); Comment, The National School Lunch Act: Statutory Difficulties and the Need for Mandatory Gradual Expansion of State Programs, 125 U. Pa. L. Rev. 415 (1976). Rinn and Schulman, Child Support and the New Federal Legislation, Journal of the Kansas Bar Association 105 (Summer 1977).

3. Frankfurter and Landis, The Business of the Supreme Court 293 (1928). See also The Needs of the Federal Courts, Report of the Department of Justice Committee on Revision of the Federal Judicial System (January 1977) at 7: "Moreover, a powerful judiciary, as Justice Felix Frankfurter once observed, is necessarily a small judiciary." See also Hearings on the State of the Judiciary and Access to Justice before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, 95th Cong., 1st Sess. (1977), statement of Judge Shirley Hufstedler at 149.

4. McGowan, Federal Jurisdiction: Legislative and Judicial Change, 28 Case Western Reserve L. Rev. 517, 537 (1978).

5. Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 491, 503 (1977).

6. Brennan, supra, note 5.

7. There are increased procedural requirements in the field of civil litigation. For example, in Fuentes v. Florida, 407 U.S. 67 (1972), the Court held that where state law creates a property interest the citizen cannot be deprived of that property interest without notice, a hearing, and the other procedural safeguards of the federal due process clause. And in Goldberg v. Kelly, 397 U.S. 254 (1970), the Court held that state welfare benefits cannot be cancelled without a hearing and other protections afforded by federal due process.

In the juvenile field, see In re Gault, 387 U.S. 1 (1967).

In the mental health field, see Lessard v. Schmidt, 349 F. Supp. 1078 (E.D.Wis. 1972), remand 379 F. Supp. 1376 (E.D.Wis. 1974), remand 413 F. Supp. 1318 (E.D. Wis. 1976). The Lessard case held that the State of

Wisconsin must, in order to civilly commit a person as mentally ill: give notice of the factual basis for commitment; hold a hearing within forty-eight hours of initial detention and a later full commitment hearing; base commitment on a finding, beyond a reasonable doubt, of danger to self or others; afford counsel, the privilege against self-incrimination, and other procedural safeguards required in criminal proceedings. As a result, there is increased need for carefully worked out state commitment procedures and improved judicial education to ensure adequate implementation of the new, more complex procedures.

8. 99 S. Ct. 2450 (1979).

The Federal Government and the State Courts

(By Daniel J. Meador*)

THE ROBERT HOUGHWOUT JACKSON LECTURE BEFORE THE NATIONAL COLLEGE OF THE STATE JUDICIARY [1]

To be asked to participate in the Robert H. Jackson Lecture series is a distinct privilege for any lawyer. Justice Jackson was one of the eminent lawyers and judges of our day. He provides an enduring model of professional competence and integrity. Among his many qualities I think most often of his analytical mind and his mastery of the English language. I saw Justice Jackson only twice. In September 1954, shortly after I had arrived to clerk for Justice Hugo Black, he dropped by to chat. A couple of weeks later, I passed him in the corridors of the Supreme Court when he was on the way to a Court conference. Five days later he was dead. The law clerks for all the justices sat together at his funeral in the National Cathedral in Washington. Seventeen years later, almost to the week, I was again at a funeral in National Cathedral, this time for Justice Black. In my memory's eye, these two strong-minded men are linked in this curious way. They had a genuine respect for each other, despite all of the controversy that swirled about them at one time.

It is also a privilege to participate in this Lecture series because it gives me an opportunity to visit the National College of the State Judiciary. Nothing more clearly symbolizes the new era in the American judiciary than does the flourishing activity in judicial education especially as embodied in this institution. Twenty years ago this was unknown. It is now clearly an idea whose time has come. There is a substantial rising interest in formal educational programs for judges at all levels of the judiciary, state and federal. This is one of the most promising signs that the American courts, while beset with troubles of many sorts, are alive and thriving, with the promise of continued vitality. All of you are to be congratulated on participating in this essential aspect of a career on the bench today.

Out of a wide range of subjects which we could usefully discuss, I have chosen to talk about the federal government and the state courts. This is a subject in which you and I presently have a mutual interest, and it is a subject which raises provocative questions about the future shape of American government. Trends are afoot which could lead us to quite a different governmental arrangement from that which we have known in our own time and indeed from the beginning of our constitutional government.

This subject can be put into perspective by starting with a brief review of history. Then we can survey the contemporary scene, underscoring the changes which have come about in the mid-20th century and noting the significant trends. Finally, I shall attempt to peer through the mist of the fuure and suggest some possibilities which may lie ahead.

In many respects the evolution of the state courts' relationship to the federal government is part of the general evolution of government in this country. Most discussions of that subject, however, focus on executive and legislative powers. Little attention has been given specifically to the peculiar relationships of the state judicial systems and the federal government as a whole. It is hardly a secret that the state courts today occupy a radically altered position in relationship to the federal government than that which they occupied originally and for well over a century after the formation of the federal union. But the full dimensions and the ramifications of the changes may not be widely understood. It is my belief that we are in a transition period which could lead to a judicial structure quite different from the original state-federal design.

We begin with some elementary observations. When the members of the Constitutional Convention convened in Philadelphia in 1787, courts already existed in the thirteen newly independent states. Each of the states was an autonomous entity. Each had its own courts, with a structure and a jurisprudence largely inherited from England, though heavily infused with North American frontier customs and conditions. At that time, each state was like England itself, in that each had a unitary government and unitary set of courts. There was no federal overlay or dual governmental structure such as that brought into being by the work of those men in Philadelphia.

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*Assistant Attorney General of the United States.

[1] The views expressed here are those of the lecturer and do not necessarily represent the position of the Department of Justice or of the Attorney General.

The adoption of the Constitution and the passage of the Judiciary Act of 1789 set the stage for all that has followed. The Constitution created a dual sovereignty throughout the United States. Alongside of, or on top of, the state courts, a federal judicial system was erected. But for many decades the position of the state judiciaries was not altered very much. In the beginning, the trial courts of the new federal system were given very little jurisdiction that impinged in any way upon the state courts.

Perhaps the most important element of change at the trial level was the shift of admiralty jurisdiction from the state courts over to the new federal district courts. The Supreme Court was given jurisdiction to review state court judgments, but this power was exercised only scantily for many years. In the first decade of its existence, the Supreme Court reviewed only seven state court decisions, and for the next several decades it reviewed about an average of one state judgment a year. The state judges, by virtue of the Federal Supremacy clause, were compelled to apply federal law whenever it came into play, but federal law was so skimpy in the early decades that this posed little or no added burden on the state judges. There was, of course, no remote hint from the beginning and throughout the 19th century of any federal funding for the state judiciaries. Any suggestion along that line would likely have been thought of as subversive or revolutionary or the product of a deranged mind.

Thus, in an oversimplified way, it might be said that for nearly a century after the creation of the federal union the only impingement of the federal government on the state courts was the occasional review by the U.S. Supreme Court of a State Supreme Court decision. Otherwise, the state courts went their way largely unaffected by the coexistence of the federal government.

The situation began to change—and the seeds for radical alteration were planted—in the wake of that water shed disaster in American history, the War Between the States and Reconstruction. The state judiciaries were directly affected by the great upsurge of national sentiment and increasing assertions of federal authority which occurred during that era. A major development was the opening of the federal trial courts to some business which had always been handled exclusively by the state courts. For example, in the late 1860's Congress broadened removal to the federal courts of diversity of citizenship cases. And, in that same period, Congress for the first time provided writs of habeas corpus for persons detained under state authority. Most significant of all was the adoption of the Fourteenth Amendment in 1868, imposing directly upon the states, as a matter of federal law, the constraints of due process and equal protection. The immediate effect of these measures was not great, but in the long run they have served to channel to the federal district courts a large volume of litigation which would otherwise have been confined to the state courts, subject only to the possibility of U.S. Supreme Court review of the final state judgment.

More was yet to come. In 1875, Congress enacted, for the first time, a general provision authorizing federal trial courts to entertain suits arising under federal law. It is anomalous that up until that time there had been no general federal question jurisdiction in the federal trial courts. The 1875 provision has had enormous consequences on the business of both the state and federal courts. Since that time, plaintiffs with claims based on federal law have been able to initiate actions in the federal courts, rather than in the state courts, and they have done so in vastly increasing numbers in recent decades.

This 1875 jurisdictional grant combined with the Fourteenth Amendment to produce the 1908 Supreme Court's decision in *ex parte Young*. That decision held that federal courts could enjoin state officials from conduct in violation of the Constitution. It worked an enormous shift of authority. In effect, it put the federal district courts in the business of supervising the constitutionality of state official activity. A federal trial court with authority to hear evidence, decide facts, and issue injunctions is armed with a powerful device, one far more potent than U.S. Supreme Court review of a final state supreme court judgment. Constitutional questions which would previously have been decided initially by the state courts are thus channeled instead through the federal system. Not only has this given the federal courts a vastly enhanced amount of business, but it has also shifted ultimate authority over many important economic and social questions into the hands of the federal judiciary.

It was not until the middle of this century that the full fruits of the 1867 habeas corpus statute materialized. That statute, combined with the Fourteenth Amendment, has now been interpreted by the Supreme Court to permit federal

district courts to review state criminal cases in a pervasive way. Any federal Constitutional issue concerning the state criminal process can now be asserted in the federal trial courts following an otherwise final state court conviction. The range of those issues has also been broadened considerably through the Supreme Court's expanded construction of the Fourteenth Amendment, as applied to the state criminal process. Here again is a major reallocation of state-federal authority, about as large as that worked by *ex parte Young*. The federal judiciary has acquired vastly enhanced powers to supervise the state courts in criminal cases.

The last major development I wish to cite is the blossoming of Section 1983. Between 1875 and 1939, there were only 19 reported cases brought in the federal courts under this statute. Last year alone, however, 7,752 were filed in the federal courts. In effect, this statute, as presently construed, converts many state tort and property cases into Constitutional cases thereby opening the way for their litigation in the federal district courts.

These sketchy highlights from our history are enough to underscore a huge growth in federal judicial business, much of which has been diverted from the state courts. These highlights also show a greatly enhanced federal judicial power over all aspects of state activity. The growth and relative power of the federal judiciary is consistent with the general pattern of growth of federal power in other areas over the last hundred years, and particularly in the middle decades of the 20th century.

There have been only two developments inconsistent with this pattern. One was the Supreme Court's decision in 1938 in *Erie R.R.* v. *Tompkins*, holding that state decisional law was to be as binding on federal judges as state statutory law. This meant that in diversity of citizenship cases federal courts were no longer to exercise an independent, creative common law function in formulating decisional rules. The *Erie* decision reallocated power to the state courts; it made the state courts the authoritative expositors of state common law. Federal judges were to follow them in diversity cases, which after all involve essentially state law questions. This holding deprived the federal judges of a large power of creative development of common law doctrine, and shifted responsibility for that back into the state courts.

Diversity jurisdiction itself is the subject of the other development which promises to shift back to the state courts a large amount of business. Bills are now pending in Congress to restrict that jurisdiction in one degree or another and it is likely that this Congress will enact a bill which will limit federal diversity jurisdiction at least to some extent. If so, a significant number of cases will be reallocated to the state courts. However, in no single state will the volume be huge. The Conference of Chief Justices, at their annual meeting last August, adopted a resolution stating that the state courts are prepared and willing to assume whatever increased volume of business results from the restriction of federal diversity jurisdiction.

But even assuming a restriction of federal diversity jurisdiction and considering the *Erie* decision, we are still left with a substantial net gain in federal judicial business and power, compared to the situation which existed a century ago. The state courts, nevertheless, remain with large and ever growing volumes of business. Our system is still structured on the basic premise that the state courts are the primary forums for deciding the controversies which arise in the great mass of day-to-day dealings among citizens. Contract, tort, property, domestic relations, and criminal law matters are all still dealt with largely by the state courts. In sheer volume, the totality of federal court business is enormously greater than the totality of federal court business. Moreover, in numbers of judges, the state court systems far exceed the federal system.

Thus far we have been speaking largely of a net growth of federal jurisdiction. But this does not reveal the full dimensions of the present relationship between the federal and the state courts. At the same time that federal judicial power has increased, the state and federal court systems are drawing closer together. There are now more points of contact between the state and federal court systems. There is also growing uniformity in the law being applied by both and in the rules of procedures being used.

Some forty states have adopted rules of civil procedure which are virtually identical to the Federal Rules of Civil Procedure. Greater uniformity in the law of evidence may likewise follow the adoption of the Federal Rules of Evidence.

Some of the growing uniformity in the law being applied by both systems is the result of decisions under the Fourteenth Amendment. In criminal cases, for example, there has developed a closer relationship between federal and state law enforcement procedures and both state and federal courts decide a large number of identical due process and equal protection questions. Another example is diversity cases, in which federal courts are deciding issues of law identical to those being decided in the state courts. FELA cases may be brought in both state and federal courts so that both systems decide those matters. Litigation involving the legality of state official action takes place in both systems.

In addition, there is growing uniformity of the law among the states. Largely as a result of the work of the National Conference of Commissioners on Uniform State Laws, much state law has been revised resulting in a higher degree of nationwide uniformity. And the American Law Institute continues its work on the restatements thereby encouraging uniformity in development of the common law.

It is fair to say that the courts of the nation, state and federal, are today deciding more legal questions in common than ever before. Also, there is greater possibility now for federal judicial involvement in matters which formerly would have been the exclusive province of the state courts.

There are other developments pulling the systems closer together. The Conference of Chief Justices more and more concerns itself with federal matters and federal-state relationships. This body also serves to pull together the judiciaries of all the states. The state and federal judges in 40 states have formed judicial councils which facilitate continuing contact and dialogue between the two systems at the state level. Also, recognizing an identity of many of their concerns, the appellate judges of the federal courts have joined state appellate judges in a single, voluntary association within the American Bar Association. It has been suggested that state and federal trial judges do the same. The National College of the State Judiciary is a growing and effective force for homogenizing the state judges nationwide.

Another significant development in this unfolding saga of our dual court systems is the creation of a national center for each. In December 1967, the Federal Judicial Center was established followed in 1972 by the National Center for State Courts. These two central, national Centers have many interests in common and they have collaborated on a variety of projects and activities. The existence of these Centers makes it possible for the federal and state judiciaries to interrelate in ways that would not have been possible without them and increasing collaboration is predictable. Moreover, like the Conference of Chief Justices and the National College of the State Judiciary, the National Center for State Courts serves in a new way to unify the 50 state court systems.

The accretion of federal jurisdiction, the growing dominance of the federal judiciary and the drawing together of the two systems are reminiscent of developments in England centuries ago. After the Normans arrived and established the seeds of a central national government, there arose in England for the first time some central, national courts—Common Pleas, King's Bench, and the Exchequer. But at the beginning and for many, many years, these courts had very limited jurisdiction. The great bulk of everyday dispute settlement rested in the local courts of various sorts—county courts, federal courts, and others. Gradually, however, as the centuries passed, the jurisdiction of the central courts increased. By various procedural inventions and fictions they drew unto themselves an ever increasing amount of judicial business which previously had been in the hands of the local courts. Ultimately, the local courts were eclipsed, and the central courts became all embracing in their authority.

Whether the trends which we observe in this country will lead to such a result is one of the fascinating questions to ponder. There are some parallels. For example, one of the instruments used in England by the central royal courts to gather jurisdiction was the writ of habeas corpus. Through that writ, cases could be taken from the local tribunals over into the central courts. As noted above, it is largely through the habeas corpus writ that we have developed what has been characterized as the federalization of the state criminal process. The superimposing of Constitutional doctrine on state tort and property law, through Section 1983 actions, also has some parallels in the English historical development. Of Course, in this country, the state courts represents a much more firmly established and deeply entrenched system than did the local courts in England. Moreover, the federal-state division of authority is much more sharply etched in our system than was the national-local authority in England.

Returning now to the contemporary scene in the United States, I have not yet mentioned the most radical and novel development of all. This is the rise of federal funding for the state judiciaries. There was, of course, no federal funding whatsoever for state courts at the beginning of the American Union or for the next century and three quarters. The first significant step in this direction came with the creation of the Law Enforcement Assistance Administration in 1968. This federal agency was created to assist the states in what was intended to be a massive war on crime. Funds were to be provided to bolster the criminal justice capabilities of the states. While no one previously had specifically considered the courts to be part of the criminal justice system, they quickly came to be so perceived. LEAA money began to be channeled to the state courts, directly and indirectly. At first a trickle, it has grown to sizable sums. Grants to state courts in 1969 from LEAA amounted to $2.5 million; in 1976 the annual figure was $140 million. To date a total of $715 million has been channeled through LEAA to the state judiciaries. Such financing is openly advocated. State judges are appearing before Congressional committees urging federal funding for the state courts. Indeed, the prospect of any diminution in the present level of funding is viewed with dismay by judges and court administrators in many states. Strenuous lobbying and public relation efforts are mounted to ensure that federal funding continues to flow and to increase. Along with this, of course, goes the demand for safeguards around the independence of the state judiciaries. On this federal funding question, there has seldom been a more dramatic turnabout. It was only a few years ago that many voices could be heard resisting any federal money for the state judiciaries. Faced with stringent state budgets, however, the lure of the federal dollar has become irrestible.

The National Center for State Courts has also provided a focal point for federal funding and attention. Since its creation the Center has been largely funded by federal grants from LEAA. And today many people are urging that the Center and its activities be funded by a direct appropriation from Congress. The Attorney General has endorsed this idea, and it is not far-fetched to believe that such arrangements may come about. With direct federal funding going to the State Court Center, it is not a great additional step to contemplate federal funding going directly and expressly to the state courts themselves, rather than indirectly through LEAA. Indeed, this is being urged now.

Unquestionably, federal appropriations are serving to bring the state and federal court systems together in new ways. The federal government is investing over $30 million a year through LEAA in justice research directed primarily at matters of state concern. There is wide agreement that federal funding for justice research should continue, but that it should be broadened to include civil as well as criminal justice matters, state and federal. The newly created Federal Justice Research Fund is a move in that direction. That Fund, administered by the Department of Justice, is to be used to support research in all aspects of the justice system, wtihout the LEAA-type of restrictions. Consideration is being giving to creating a new federal structure to administer justice research funds. Whether such a structure would be modeled on the National Institute of Justice, as recommended by the American Bar Association or be contained within the Department of Justice or elsewhere, is as yet undecided.

Federal funds to improve and support state courts are increasingly viewed as a necessity because state courts are chronically underfinanced by their own legislatures. In a recent letter to the Attorney General, commenting on the proposed restructuring of LEAA, the National Center for State Courts endorsed the position of the Conference of Chief Justices, that federal funding should continue for The National College of the State Judiciary, for the National Center for State Courts and for the state judiciaries themselves. In encouraging such funding the Center and the Conference offer warnings and admonitions that federal money must be supplied to the state courts with few or no strings because of the nature of the recipient institutions. The Conference says, for example, "there is a proper federal role in improving the justice system but it must be performed in a manner that respects the identity and independence of state courts." While those are laudible sentiments, similar admonitions have preceded federal funding in other areas of American life. But inevitably, federal regulation tends to follow federal money at least where the money flows in sub-

stantial amounts over a period of time. The bureaucratic grip of the federal government, through HEW, on the colleges and the universities of this country rests entirely upon the flow of federal money to those institutions, sometimes in relatively small amounts to each. It is not clear that the state courts will be in any stronger position to resist the federal power that follows federal money than the institutions of higher education which, like the state courts, make legitimate and historically well-grounded claims to independence.

Only a modest imagination is needed to foresee the development of federal standards for state courts in order for them to be eligible for federal appropriations. And, of course, once such standards are promulgated, some arrangements must be provided to determine whether they have been met. While this need not in theory impair the independence of state judicial decisions, the appearance of such impairment will be unavoidable. Any similar kind of overseeing of the federal courts by Congress or the Executive would almost certainly be thought unconstitutional. It would be strange indeed for the state judiciaries to be subject to greater federal authority than are the federal courts. Yet that prospect is not far-fetched and may indeed already be happening under present funding arrangements.

The federal Executive Branch has in fact entered the picture in a new and potentially significant way. We have a new Attorney General who has espoused the view that the Department of Justice should increasingly exercise a national leadership role in justice at all levels. He has advocated that the Department take the initiative in creating a "national policy on justice" by bringing together local, state and federal groups to collaborate and develop policies to improve the quality of justice and the courts at all levels. To promote this view, since taking office in January 1977, he has met with groups of state Chief Justices, Governors, state attorneys general, representatives of the National Center for State Courts, and others concerned with justice at the state and local levels. He has established a new office within the Justice Department called the Office for Improvements in the Administration of Justice to develop proposals which will affect state as well as federal courts.

For example, this Office, with LEAA funding, is establishing experimental Neighborhood Justice Centers in three cities with the announced objective of establishing more if these are successful. The disputes which will come to these Centers would otherwise go to state tribunals if they went to court at all. Thus, the Department of Justice seems to be assuming something of the role of a ministry of justice with nationwide, rather than strictly federal, concerns.

There is no doubt at all that we have reached a point now where a jurisdictional and financial interrelationship exists between the state and federal courts and between the state courts and the federal government that was unknown and uncontemplated a century ago.

This situation and its implications for the future require that we rethink the structure of the entire American judiciary. It is possible that the combined effect of all the developments noted here will lead us along the route of the English experience. A plausible argument can be made that the trends point toward the emergence of a unitary, national system of courts. The growth of federal judicial power, the increasing uniformity in legal rules, the blending of functions, and the necessity of federal funding for state courts all could be read to suggest that eventuality. Yet there are substantial practical and Constitutional reasons for believing that that will not happen and that, instead, some other arrangement will emerge.

One possibility would be a quasi-merger of the federal judiciary with the state court systems. Machinery could be developed within the federal judicial branch to administer federal monetary support for the state courts and to integrate those courts more closely with the federal system. This might be done in ways which would not threaten the independence of the state courts, as would federal executive or legislative supervision, but yet would bring about a smoother meshing of the judiciary nationwide. For example, the Administrative Office of the U.S. Courts, which already administers Congressional appropriations for the federal judiciary, could also serve to administer Congressional appropriations for the state judiciaries.

Another possibility, apart from funding considerations, lies in the reallocation of judicial business between the systems. Duplicating and overlapping jurisdictions could be substantially reduced, and the federal appellate structure could be rearranged so as to integrate state and federal business in a more efficient

way. The pending reduction or abolition of diversity jurisdiction is a move in that direction. Another idea along this line is the routing of all state criminal cases, which contain federal issues, to the U.S. Courts of Appeals, thereby bypassing federal trial court review.

Still other ideas may be gleaned from the judicial organizations of other federalisms. In Australia and Canada, for example, all state court decisions are reviewable by a federal tribunal which is empowered to decide, with binding force, all legal questions, state and federal. In the Federal Republic of Germany, there are no federal trial courts at all; the same, with rare exceptions, is true in Australia. The courts of first instance in both countries are provided by the states, and cases flow into a federal forum only at the appellate level.

While these arrangements in other countries may be suggestive, it is unlikely that any one of them furnishes an exact model which would be feasible in the United States. We have our own long-standing Constitutional arrangements and legal habits and customs which are likely to lead us to a uniquely American scheme.

The one thing that does seem clear from the conditions described here is that we are in a time of transition. I think it is important for all of us to recognize that. Actions taken or not taken over the next few years will definitely have an impact on the eventual design of the judicial processes in our country. We can, by steps we take or positions we advocate, either have a hand in shaping the direction of events, or events will control us. It seems preferable to me to try to address our situation rationally, and make an effort to design structures best suited to our society and to the conditions of the late 20th century. Otherwise, we will simply drift into new arrangements which may or may not be desirable.

There are serious values and interests which must be accommodated in any American solution. There are, for example, values in decentralization; but there are also values to be served by a more efficient integration nationwide of our judicial systems. Above all, there is the enormous value to our society of the unique role of the judges, state and federal. Whatever we do, through all the restructuring, reorganizing, financing and streamlining, we must not impair that essential role: the deciding of controversies under law. The courts must be the place where citizens can go to have their disputes with each other or with the ever more intrusive other branches of the government decided by detached, disinterested judges, applying evenhandedly the laws and principles that govern us all. All other functions of government can be performed by other agencies.

As trial judges in the state courts, you are in the front line of the legal system. You are in an excellent position to contribute ideas to the development of new structural and procedural arrangements. The National College of the State Judiciary can also play an important part in this development. If the best minds of the legal order can be put on this problem, we may emerge from this time of transition into a far better judicial system than we have yet had.

APPENDIX IV

FURTHER LEGISLATIVE MATERIALS

I

98TH CONGRESS
1ST SESSION

H. R. 4145

To aid State and local governments in strengthening and improving their judicial systems through the creation of a State Justice Institute.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 18, 1983

Mr. KASTENMEIER (for himself, Mr. RODINO, Mr. MOORHEAD, Mr. FISH, Mr. MAZZOLI, Mr. KINDNESS, Mr. FRANK, Mr. MORRISON of Connecticut, Mrs. SCHROEDER, Mr. SAWYER, Mr. SYNAR, Mr. GLICKMAN, Mr. CROCKETT, Mr. HUGHES, Mr. HYDE, Mr. SAM B. HALL, JR., Mr. SMITH of Florida, Mr. AKAKA, Mr. LOWRY of Washington, Mr. WON PAT, Mr. SOLARZ, Mr. EDGAR, Mr. LEHMAN of Florida, Mr. STOKES, Mr. SUNIA, Mr. LELAND, Mr. AUCOIN, Mr. OBERSTAR, Mr. PRITCHARD, Mr. FEIGHAN, Mr. BONKER, Mr. MITCHELL, Mr. SIMON, Mr. BEVILL, Mr. GONZALEZ, Mr. FRANKLIN, Mr. MORRISON of Washington, Mr. REID, Mr. HAMMERSCHMIDT, Mr. WEISS, Mrs. VUCANOVICH, and Mr. HERTEL of Michigan) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To aid State and local governments in strengthening and improving their judicial systems through the creation of a State Justice Institute.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "State Justice Institute Act of 1983".

DEFINITIONS

SEC. 2. As used in this Act, the term—

(1) "Board" means the Board of Directors of the State Justice Institute;

(2) "Director" means the Executive Director of the State Justice Institute;

(3) "Governor" means the Chief Executive Officer of a State;

(4) "Institute" means the State Justice Institute established under section 3 of this Act;

(5) "recipient" means any grantee, contractor, or recipient of financial assistance under this Act;

(6) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States; and

(7) "Supreme Court" means the highest appellate court within a State unless, for the purposes of this Act, a constitutionally or legislatively established judicial council acts in place of that court.

ESTABLISHMENT OF INSTITUTE; DUTIES

SEC. 3. (a)(1) There is hereby established a private nonprofit corporation which shall be known as the State Justice

Institute. The purpose of the Institute shall be to further the development and adoption of improved judicial administration in State courts in the United States.

(2) The Institute may be incorporated in any State, pursuant to section 4(a)(5) of this Act. To the extent consistent with the provisions of this Act, the Institute may exercise the powers conferred upon a nonprofit corporation by the laws of the State in which it is incorporated.

(b) The Institute shall, in accordance with this Act—

(1) direct a national program of assistance designed to assure each person ready access to a fair and effective system of justice by providing funds to—

(A) State courts;

(B) national organizations which support and are supported by State courts; and

(C) any other nonprofit organization that will support and achieve the purposes of this Act;

(2) foster coordination and cooperation with the Federal judiciary in areas of mutual concern;

(3) promote recognition of the importance of the separation of powers doctrine to an independent judiciary; and

(4) encourage education for judges and support personnel of State court systems through national and State organizations, including universities.

(c) The Institute shall not duplicate functions adequately performed by existing nonprofit organizations and shall promote, on the part of agencies of State judicial administration, responsibility for success and effectiveness of State court improvement programs supported by Federal funding.

(d) The Institute shall maintain its principal offices in the State in which it is incorporated and shall maintain therein a designated agent to accept service of process for the Institute. Notice to or service upon the agent shall be deemed notice to or service upon the Institute.

(e) The Institute, and any program assisted by the Institute, shall be eligible to be treated as an organization described in section 170(c)(2)(B) of the Internal Revenue Code of 1954 and as an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 which is exempt from taxation under section 501(a) of such Code. If such treatments are conferred in accordance with the provisions of such Code, the Institute, and programs assisted by the Institute, shall be subject to all provisions of such Code relevant to the conduct of organizations exempt from taxation.

(f) The Institute shall afford notice and reasonable opportunity for comment to interested parties prior to issuing any rule, regulation, guideline, or instruction under this Act, and it shall publish any such rule, regulation, guideline, or

instruction in the Federal Register at least thirty days prior to its effective date.

BOARD OF DIRECTORS

SEC. 4. (a)(1) The Institute shall be supervised by a Board of Directors, consisting of eleven voting members to be appointed by the President, by and with the advice and consent of the Senate. The Board shall have both judicial and nonjudicial members, and shall, to the extent practicable, have a membership representing a variety of backgrounds and reflecting participation and interest in the administration of justice.

(2) The Board shall consist of—

(A) six judges, to be appointed in the manner provided in paragraph (3);

(B) one State court administrator, to be appointed in the manner provided in paragraph (3); and

(C) four members from the public sector, to be appointed by the President, no more than two of whom shall be of the same political party.

(3) The President shall make the initial appointments referred to in subparagraphs (A) and (B) from a list of candidates submitted to the President by the Conference of Chief Justices. Such list shall include at least fourteen individuals, including judges and State court administrators, whom the Conference considers best qualified to serve on the Board.

Whenever the term of any of the members of the Board described in subparagraphs (A) and (B) terminates and that member is not to be reappointed to a new term, and whenever a vacancy otherwise occurs among those members, the President shall appoint a new member from a list of three qualified individuals submitted to the President by the Conference of Chief Justices. The President may reject any list of individuals submitted by the Conference under this paragraph and, if such a list is so rejected, the President shall request the Conference to submit to him another list of qualified individuals. Before consulting with or submitting any list to the President under this paragraph, the Conference of Chief Justices shall obtain and consider the recommendations of all interested organizations and individuals concerned with the administration of justice and the objectives of this Act.

(4) The President shall make the initial appointments of members of the Board under this subsection within ninety days after the date of the enactment of this Act. In the case of any other appointment of a member, the President shall make the appointment not later than ninety days after the previous term expires or the vacancy occurs, as the case may be. The Conference of Chief Justices shall submit lists of candidates under paragraph (3) in a timely manner so that the appointments can be made within the time periods specified in this paragraph.

(5) The initial members of the Board of Directors shall be the incorporators of the Institute and shall determine the State in which the Institute is to be incorporated.

(b)(1) Except as provided in paragraph (2), the term of each voting member of the Board shall be three years. Each member of the Board shall continue to serve until the successor to such member has been appointed and qualified.

(2) Five of the members first appointed by the President shall serve for a term of two years. Any member appointed to serve for an unexpired term resulting from the death, disability, retirement, or resignation of a member shall be appointed only for such unexpired term, but shall be eligible for reappointment.

(3) The term of the initial members shall commence from the date of the first meeting of the Board, and the term of each member other than an initial member shall commence from the date of termination of the preceding term.

(c) No member shall be reappointed to more than two consecutive terms immediately following such member's initial term.

(d) Members of the Board shall serve without compensation, but shall be reimbursed for actual and necessary expenses incurred in the performance of their official duties.

(e) The members of the Board shall not, by reason of such membership, be considered officers or employees of the United States.

(f) Each member of the Board shall be entitled to one vote. A simple majority of the membership shall constitute a quorum for the conduct of business. The Board shall act upon the concurrence of a simple majority of the membership present and voting.

(g) The Board shall select a chairman from among the voting members of the Board. The first chairman shall serve for a term of three years, and the Board shall thereafter annually elect a chairman from among its voting members.

(h) A member of the Board may be removed by a vote of seven members for malfeasance in office, persistent neglect of or inability to discharge the duties of the office, or for any offense involving moral turpitude, but for no other cause.

(i) Regular meetings of the Board shall be held quarterly. Special meetings shall be held from time to time upon the call of the chairman, acting at his discretion or pursuant to the petition of any seven members.

(j) All meetings of the Board, any executive committee of the Board, and any council established in connection with this Act, shall be open and subject to the requirements and provisions of section 552b of title 5, United States Code, relating to open meetings.

(k) In its direction and supervision of the activities of the Institute, the Board shall—

(1) establish such policies and develop such programs for the Institute as will further the achievement of its purpose and the performance of its functions;

(2) establish policy and funding priorities and issue rules, regulations, guidelines, and instructions pursuant to such priorities;

(3) appoint and fix the duties of the Executive Director of the Institute, who shall serve at the pleasure of the Board and shall be a nonvoting ex officio member of the Board;

(4) present, to government departments, agencies, and instrumentalities whose programs or activities relate to the administration of justice in the State judiciaries of the United States, the recommendations of the Institute for the improvement of such programs or activities;

(5) consider and recommend to both public and private agencies aspects of the operation of the State courts of the United States considered worthy of special study; and

(6) award grants and enter into cooperative agreements or contracts pursuant to section 6(a) of this Act.

OFFICERS AND EMPLOYEES

SEC. 5. (a)(1) The Director, subject to general policies established by the Board, shall supervise the activities of persons employed by the Institute and may appoint and remove such employees as he determines necessary to carry out the purposes of the Institute. The Director shall be responsible for the executive and administrative operations of the Institute, and shall perform such duties as are delegated to such Director by the Board and the Institute.

(2) No political test or political qualification shall be used in selecting, appointing, promoting, or taking any other personnel action with respect to any officer, agent, or employee of the Institute, or in selecting or monitoring any grantee, contractor, person, or entity receiving financial assistance under this Act.

(b) Officers and employees of the Institute shall be compensated at rates determined by the Board, but not in excess of the rate of level V of the Executive Schedule specified in section 5316 of title 5, United States Code.

(c)(1) Except as otherwise specifically provided in this Act, the Institute shall not be considered a department, agency, or instrumentality of the Federal Government.

(2) This section does not limit the authority of the Office of Management and Budget to review and submit comments

upon the Institute's annual budget request at the time it is transmitted to the Congress.

(d)(1) Except as provided in paragraph (2), officers and employees of the Institute shall not be considered officers or employees of the United States.

(2) Officers and employees of the Institute shall be considered officers and employees of the United States solely for the purposes of the following provisions of title 5, United States Code: subchapter I of chapter 81 (relating to compensation for work injuries); chapter 83 (relating to civil service retirement); chapter 87 (relating to life insurance); and chapter 89 (relating to health insurance). The Institute shall make contributions under the provisions referred to in this subsection at the same rates applicable to agencies of the Federal Government.

(e) The Institute and its officers and employees shall be subject to the provisions of section 552 of title 5, United States Code, relating to freedom of information.

GRANTS AND CONTRACTS

SEC. 6. (a) The Institute is authorized to award grants and enter into cooperative agreements or contracts, in a manner consistent with subsection (b), in order to—

(1) conduct research, demonstrations, or special projects pertaining to the purposes described in this

Act, and provide technical assistance and training in support of tests, demonstrations, and special projects;

(2) serve as a clearinghouse and information center, where not otherwise adequately provided, for the preparation, publication, and dissemination of information with respect to State judicial systems;

(3) participate in joint projects with government agencies, including the Federal Judicial Center, with respect to the purposes of this Act;

(4) evaluate, when appropriate, the programs and projects carried out under this Act to determine their impact upon the quality of criminal, civil, and juvenile justice and the extent to which they have met or failed to meet the purposes and policies of this Act;

(5) encourage and assist in the furtherance of judicial education;

(6) encourage, assist, and serve in a consulting capacity to State and local justice system agencies in the development, maintenance, and coordination of criminal, civil, and juvenile justice programs and services; and

(7) be responsible for the certification of national programs that are intended to aid and improve State judicial systems.

(b) The Institute is empowered to award grants and enter into cooperative agreements or contracts as follows:

(1) The Institute shall give priority to grants, cooperative agreements, or contracts with—

(A) State and local courts and their agencies,

(B) national nonprofit organizations controlled by, operating in conjunction with, and serving the judicial branches of State governments; and

(C) national nonprofit organizations for the education and training of judges and support personnel of the judicial branch of State governments.

(2) The Institute may, if the objective can better be served thereby, award grants or enter into cooperative agreements or contracts with—

(A) other nonprofit organizations with expertise in judicial administration;

(B) institutions of higher education;

(C) individuals, partnerships, firms, or corporations; and

(D) private agencies with expertise in judicial administration.

(3) Upon application by an appropriate Federal, State, or local agency or institution and if the arrange-

ments to be made by such agency or institution will provide services which could not be provided adequately through nongovernmental arrangements, the Institute may award a grant or enter into a cooperative agreement or contract with a unit of Federal, State, or local government other than a court.

(4) Each application for funding by a State or local court shall be approved, consistent with State law, by the State's supreme court, or its designated agency or council, which shall receive, administer, and be accountable for all funds awarded by the Institute to such State or local court.

(c) Funds available pursuant to grants, cooperative agreements, or contracts awarded under this section may be used—

(1) to assist State and local court systems in establishing appropriate procedures for the selection and removal of judges and other court personnel and in determining appropriate levels of compensation;

(2) to support education and training programs for judges and other court personnel, for the performance of their general duties and for specialized functions, and to support national and regional conferences and seminars for the dissemination of information on new developments and innovative techniques;

(3) to conduct research on alternative means for using nonjudicial personnel in court decisionmaking activities, to implement demonstration programs to test innovative approaches, and to conduct evaluations of their effectiveness;

(4) to assist State and local courts in meeting requirements of Federal law applicable to recipients of Federal funds;

(5) to support studies of the appropriateness and efficacy of court organizations and financing structures in particular States, and to enable States to implement plans for improved court organization and finance;

(6) to support State court planning and budgeting staffs and to provide technical assistance in resource allocation and service forecasting techniques;

(7) to support studies of the adequacy of court management systems in State and local courts and to implement and evaluate innovative responses to problems of record management, data processing, court personnel management, reporting and transcription of court proceedings, and juror utilization and management;

(8) to collect and compile statistical data and other information on the work of the courts and on the

work of other agencies which relate to and effect the work of the courts;

(9) to conduct studies of the causes of trial and appellate court delay in resolving cases and to establish and evaluate experimental programs for reducing case processing time;

(10) to develop and test methods for measuring the performance of judges and courts and to conduct experiments in the use of such measures to improve the functioning of such judges and courts;

(11) to support studies of court rules and procedures, discovery devices, and evidentiary standards, to identify problems with the operation of such rules, procedures, devices, and standards, to devise alternative approaches to better reconcile the requirements of due process with the needs for swift and certain justice, and to test the utility of those alternative approaches;

(12) to support studies of the outcomes of cases in selected subject matter areas to identify instances in which the substance of justice meted out by the courts diverges from public expectations of fairness, consistency, or equity, to propose alternative approaches to the resolving of cases in problem areas, and to test and evaluate those alternatives;

(13) to support programs to increase court responsiveness to the needs of citizens through citizen education, improvement of court treatment of witnesses, victims, and jurors, and development of procedures for obtaining and using measures of public satisfaction with court processes to improve court performance;

(14) to test and evaluate experimental approaches to providing increased access by citizens to justice, including processes which reduce the cost of litigating common grievances and alternative techniques and mechanisms for resolving disputes between citizens; and

(15) to carry out such other programs, consistent with the purposes of this Act, as may be considered appropriate by the Institute.

(d) The Institute shall incorporate, in any grant, cooperative agreement, or contract awarded under this section in which a State or local judicial system is the recipient, the requirement that the recipient provide a matching amount, from private or public sources, not less than 25 per centum of the total cost of such grant, cooperative agreement, or contract, except that such requirement may be waived in exceptionally rare circumstances upon the approval of the chief justice of the highest court of the State and a majority of the Board of Directors.

(e) The Institute shall monitor and evaluate, or provide for independent evaluations of, programs supported in whole or in part under this Act to insure that the provisions of this Act, the bylaws of the Institute, and the applicable rules, regulations, and guidelines promulgated pursuant to this Act, are carried out.

(f) The Institute shall provide for an independent study of the financial and technical assistance programs under this Act.

LIMITATIONS ON GRANTS, COOPERATIVE AGREEMENTS, AND CONTRACTS

SEC. 7. (a) With respect to grants made and contracts or cooperative agreements entered into under this Act, the Institute shall—

(1) insure that no funds made available by the Institute to a recipient shall be used at any time, directly or indirectly, to influence the issuance, amendment, or revocation of any Executive order or similar promulgation by any Federal, State, or local agency, or to undertake to influence the passage or defeat of any legislation or constitutional amendment by the Congress of the United States, or by any State or local legislative body, of any State proposal by initiative petition, or of any referendum, unless a governmental agency, legislative body, a committee, or a member thereof—

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(A) requests personnel of the recipient to testify, draft, or review measures or to make representations to such agency, body, committee, or member; or

(B) is considering a measure directly affecting the activities under this Act of the recipient or the Institute;

(2) insure all personnel engaged in grant, cooperative agreement, or contract assistance activities supported in whole or part by the Institute refrain, while so engaged, from any partisan political activity; and

(3) insure that each recipient that files with the Institute a timely application for refunding is provided interim funding necessary to maintain its current level of activities until—

(A) the application for refunding has been approved and funds pursuant thereto received; or

(B) the application for refunding has been finally denied in accordance with section 9 of this Act.

(b) No funds made available by the Institute under this Act, either by grant, cooperative agreement, or contract, may be used to support or conduct training programs for the purpose of advocating particular nonjudicial public policies or encouraging nonjudicial political activities.

(c) The authority to enter into cooperative agreements, contracts, or any other obligations under this Act shall be effective only to such extent, and in such amounts, as are provided in advance in appropriation Acts.

(d) To insure that funds made available under this Act are used to supplement and improve the operation of State courts, rather than to support basic court services, funds shall not be used—

(1) to supplant State or local funds currently supporting a program or activity; or

(2) to construct court facilities or structures, except to remodel existing facilities to demonstrate new architectural or technological techniques, or to provide temporary facilities for new personnel or for personnel involved in a demonstration or experimental program.

RESTRICTIONS ON ACTIVITIES OF THE INSTITUTE

SEC. 8. (a) The Institute shall not—

(1) participate in litigation unless the Institute or a recipient of the Institute is a party, and shall not participate on behalf of any client other than itself;

(2) interfere with the independent nature of any State judicial system or allow financial assistance to be used for the funding of regular judicial and administrative activities of any State judicial system other than

pursuant to the terms of any grant, cooperative agreement, or contract with the Institute, consistent with the requirements of this Act; or

(3) undertake to influence the passage or defeat of any legislation by the Congress of the United States or by any State or local legislative body, except that personnel of the Institute may testify or make other appropriate communication—

(A) when formally requested to do so by a legislative body, committee, or a member thereof;

(B) in connection with legislation or appropriations directly affecting the activities of the Institute; or

(C) in connection with legislation or appropriations dealing with improvements in the State judiciary, consistent with the provisions of this Act.

(b)(1) The Institute shall have no power to issue any shares of stock, or to declare or pay any dividends.

(2) No part of the income or assets of the Institute shall inure to the benefit of any director, officer, or employee, except as reasonable compensation for services or reimbursement for expenses.

(3) Neither the Institute nor any recipient shall contribute or make available Institute funds or program personnel or

equipment to any political party or association, or to the campaign of any candidate for public or party office.

(4) The Institute shall not contribute or make available Institute funds or program personnel or equipment for use in advocating or opposing any ballot measure, initiative, or referendum, except that which deals with improvement of the State judiciary, consistent with the purposes of this Act.

(c) Officers and employees of the Institute or of recipients shall not at any time intentionally identify the Institute or the recipient with any partisan or nonpartisan political activity associated with a political party or association, or with the campaign of any candidate for public or party office.

SPECIAL PROCEDURES

SEC. 9. The Institute shall prescribe procedures to insure that—

(1) financial assistance under this Act shall not be suspended unless the grantee, contractor, person, or entity receiving such financial assistance has been given reasonable notice and opportunity to show cause why such actions should not be taken; and

(2) financial assistance under this Act shall not be terminated, an application for refunding shall not be denied, and a suspension of financial assistance shall not be continued for longer than thirty days, unless the grantee, contractor, person, or entity receiving finan-

cial assistance has been afforded reasonable notice and opportunity for a timely, full, and fair hearing. When requested, such hearing shall be conducted by an independent hearing examiner appointed by the Institute in accordance with procedures established in regulations promulgated by the Institute.

PRESIDENTIAL COORDINATION

SEC. 10. The President may, to the extent not inconsistent with any other applicable law, direct that appropriate support functions of the Federal Government may be made available to the Institute in carrying out its functions under this Act.

RECORDS AND REPORTS

SEC. 11. (a) The Institute is authorized to require such reports as it considers necessary from any recipient with respect to activities carried out pursuant to this Act.

(b) The Institute is authorized to prescribe the keeping of records with respect to funds provided under any grant, cooperative agreement, or contract under this Act, and shall have access to such records at all reasonable times for the purpose of insuring compliance with such grant, cooperative agreement, or contract or the terms and conditions upon which the funds were provided.

(c) Copies of all reports pertinent to the evaluation, inspection, or monitoring of any recipient shall be submitted on

a timely basis to such recipient, and shall be maintained in the principal office of the Institute for a period of at least five years after such evaluation, inspection, or monitoring. Such reports shall be available for public inspection during regular business hours, and copies shall be furnished, upon request, to interested parties upon payment of such reasonable fees as the Institute may establish.

(d) Non-Federal funds received by the Institute, and funds received for projects funded in part by the Institute or by any recipient from a source other than the Institute, shall be accounted for and reported as receipts and disbursements separate and distinct from Federal funds.

AUDITS

SEC. 12. (a)(1) The accounts of the Institute shall be audited annually. Such audits shall be conducted in accordance with generally accepted auditing standards by independent certified public accountants who are certified by a regulatory authority of the jurisdiction in which the audit is undertaken.

(2) Any audits under this subsection shall be conducted at the place or places where the accounts of the Institute are normally kept. The person conducting the audit shall have access to all books, accounts, financial records, reports, files, and other papers or property belonging to or in use by the Institute and necessary to facilitate the audit. The full facili-

ties for verifying transactions with the balances and securities held by depositories, fiscal agents, and custodians shall be afforded to any such person.

(3) The report of the annual audit shall be filed with the General Accounting Office and shall be available for public inspection during business hours at the principal office of the Institute.

(b)(1) In addition to the annual audit, the financial transactions of the Institute for any fiscal year during which Federal funds are available to finance any portion of its operations may be audited by the General Accounting Office in accordance with such rules and regulations as may be prescribed by the Comptroller General of the United States.

(2) Any audit under this subsection shall be conducted at the place or places where accounts of the Institute are normally kept. The representatives of the General Accounting Office shall have access to all books, accounts, financial records, reports, files, and other papers or property belonging to or in use by the Institute and necessary to facilitate the audit. The full facilities for verifying transactions with the balances and securities held by depositories, fiscal agents, and custodians shall be afforded to such representatives. All such books, accounts, financial records, reports, files, and other papers or property of the Institute shall remain in the possession and custody of the Institute throughout the period

beginning on the date such possession or custody commences and ending three years after such date, but the General Accounting Office may require the retention of such books, accounts, financial records, reports, files, and other papers or property for a longer period under section 3523(c) of title 31, United States Code.

(3) A report of each audit under this subsection shall be made by the Comptroller General to the Congress and to the Attorney General, together with such recommendations with respect thereto as the Comptroller General considers advisable.

(c)(1) The Institute shall conduct, or require each recipient to provide for, an annual fiscal audit. The report of each such audit shall be maintained for a period of at least five years at the principal office of the Institute.

(2) The Institute shall submit to the Comptroller General of the United States copies of audits conducted under this subsection, and the Comptroller General may, in addition, inspect the books, accounts, financial records, files, and other papers or property belonging to or in use by such grantee, contractor, person, or entity, which relate to the disposition or use of funds received from the Institute. Such audit reports shall be available for public inspection during regular business hours, at the principal office of the Institute.

AUTHORIZATION OF APPROPRIATIONS

SEC. 13. There are authorized to be appropriated to carry out the provisions of this Act not to exceed $20,000,000 for the fiscal year ending September 30, 1985, $25,000,000 for the fiscal year ending September 30, 1986, and $25,000,000 for the fiscal year ending September 30, 1987.

EFFECTIVE DATE

SEC. 14. The provisions of this Act shall take effect on October 1, 1984.

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Congressional Record

United States of America

PROCEEDINGS AND DEBATES OF THE 98th CONGRESS, FIRST SESSION

Vol. 129 WASHINGTON, THURSDAY, JUNE 23, 1983 No. 90

By Mr. KASTENMEIER (for himself, Mr. RODINO, Mr. MAZZOLI, Mr. PEPPER, Mr. MOORHEAD, Mr. KINDNESS, Mr. FRANK, Mr. CROCKETT, Mr. HUGHES, Mr. GLICKMAN, Mr. HYDE, Mrs. SCHROEDER, Mr. SAWYER, Mr. SYNAR, Mr. SAM B. HALL, JR., Mr. ARAKA, Mr. LOWRY of Washington, Mr. WOLF PAT, Mr. SOLARZ, Mr. EDGAR, Mr. LEHMAN of Florida, Mr. STOKES, Mr. SUNIA, Mr. LELAND, Mr. AUCOIN, Mr. ORBERSTAR, Mr. PRITCHARD, Mr. PEIGHAN, Mr. BONKER, Mr. MITCHELL, Mr. HERTEL of Michigan, Mr. SIMON, Mr. BEVILL, Mr. GONZALEZ, Mr. SMITH of Florida, Mr. FRANKLIN, Mr. MORRISON of Washington, Mr. REID, Mr. HAMMERSCHMIDT, Mr. WEISS, and Mrs. VUCANOVICH):

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INTRODUCTION OF THE STATE JUSTICE INSTITUTE ACT OF 1983

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from Wisconsin (Mr. KASTENMEIER) is recognized for 10 minutes.

● Mr. KASTENMEIER. Mr. Speaker, today in a continuing effort to improve the administration of justice in this country, in State as well as Federal courts, I rise to reintroduce the State Justice Institute Act of 1983.

It is with a certain amount of regret that I observe that a State Justice Institute has not already been enacted into law. Passed without dissent by the Senate during the 96th and 97th Congresses and also reported favorably by my subcommittee—the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice—during these two Congresses, final enactment has eluded this deserving legislative project. I optimistically look forward to legislative success in the 98th Congress.

The State Justice Institute Act would create a nonprofit national body to improve the administration and functioning of State courts in the United States. The act would provide to State and local courts a resource comparable to that provided in the correctional area by the National Institute of Corrections. It would be funded at a similar level and would provide a comparable spectrum of national clearinghouse research, technical assistance, demonstration, and training programs. Federal moneys could not be used to interfere with the independent nature of any State judicial system nor allow sums to be used for the funding of regular judicial and administrative activities.

The institute would complement, rather than conflict with, existing Federal programs for State and local justice systems. It also would fill a gap in the President's program to fortify federalism by strengthening the judicial power of the States. Last, the institute would provide meaningful access to justice—by improving the quality of justice—for many ordinary citizens who litigate their disputes in State and local courts.

As summarized in recent congressional testimony by two able representatives of the State court systems:

> The State Justice Institute legislation is premised on the belief that improvement in the quality of justice administered by the states is not only a goal of fundamental importance in itself, but is essential to attainment of important national objectives including a reduced rate of growth in the caseload of the federal courts and preservation of the historic role of state judiciaries in our federal system.

The proposed legislation was drafted by an able task force of the Conference of Chief Justices and the Conference of State Court Administrators. It has been endorsed by, among others, the Chief Justice of the United States, the Judicial Conference of the United States, and the American Bar Association. The chief sponsor of companion legislation (S. 384) in the Senate, Senator HOWELL HEFLIN, has been joined by a solid core of respected cosponsors from both sides of the aisle. The list of cosponsors on my bill is equally impressive.

In my opinion, the State justice institute will succeed as an assistance program because it will:

Place responsibility for improvement of State court systems directly on the judicial officials charged with this responsibility under their own State constitutions and laws;

Be under control, at both the State and National levels, of State officials with first-hand knowledge of the problems facing their courts;

Permit large economies of scale by concentrating on national programs that would serve the needs of all 50 States;

Eliminate the need for a large bureaucracy by operating with a small staff in conjunction with existing judicial agencies of the States and the State courts themselves. (The Institute could support but not duplicate services of existing agencies such as the National Center for State Courts and the National Judicial College);

Permit improvement of courts on a systemwide basis; that is, in a manner recognizing their interrelated civil and criminal functions;

Provide a vehicle by which State courts collectively could communicate and cooperate at the national level with other components of State and local criminal justice systems and such agencies as the Federal Judicial Center, the National Institute of Justice, and the Bureau of Justice Statistics; and

Provide a vehicle for implementation of special criminal justice projects au-

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thorized by Congress or Federal executive agencies as these might involve State courts.

The structure of the State Justice Institute would be as follows. The Institute would be operated by an executive director under the supervision of an 11-member board of directors appointed by the President and confirmed by the Senate. Six board members would be State judges and one a court administrator chosen from a panel or panels of candidates recommended by the Conference of Chief Justices following consultation with appropriate legal and judicial organizations. There would be four public members appointed directly by the President. The Institute would operate through grants and contracts with funding priority going to projects of State and local courts and their national nonprofit support and training organizations. State supreme courts would be the accountable administrative agencies for projects of State and local courts within their jurisdictions. Such projects would require a 25-percent match. The emphasis would be on programs of national scope including national clearinghouse, research, technical assistance, demonstration, education and training programs.

The legislation specifically forbids use of Federal funds to supplant State or local funds or to support basic court services.

The Institute further is restricted from interfering with "the independent nature of any State judicial system."

The proposed legislation authorizes modest funding at up to $20 million in fiscal 1984 and $25 million in fiscal 1985 and 1986.

Mr. Speaker, I would like to quote from the Chief Justice of the United States—a man who has spent a lifetime trying to improve the administration of justice in State and Federal courts:

> There is . . . clearly an overriding national interest in improving access to and confidence in our state court. Important as it is, our concept of federalism is not the only objective requiring their preservation. Our state courts are close to the people and they are the primary safeguard of the rights and privileges of individuals under both state and federal law. Together with our federal courts, they preserve and vindicate those rights guaranteed under the Constitution and federal laws. In recent years, national legislative policies and programs have increased the number of such federal rights adjudicated in state courts. The role our state courts play in evaluating and arbitrating the enforcement of state policies, and the state enforcement of national legislative policies and programs, is most significant.

Chief Justice Burger's words are echoed by law professors, judicial administrators, civil libertarians, Federal and State judges, and ordinary citizens themselves. Indisputably, the Federal judicial system was created to complement our State judicial systems. That complementary relationship creates the resilient fabric of our constitutional concepts of federalism and separation of powers. The bill I am introducing today strengthens, rather than soils, that fabric. It will lead to improvements in the delivery of justice for individuals who litigate in our State courts—where 96 percent of the cases in this country are filed.

Once again, I would like to acknowledge the strong leadership of the principal sponsor of this legislation in the Senate, Senator HOWELL HEFLIN, formerly Chief Justice of the Alabama Supreme Court, has been firm and steadfast in his support for the creation of a State Justice Institute.

I also would like to thank several State court judges who have devoted much time and effort to this legislative endeavor: Justice Robert P. Utter, Supreme Court of Washington; Chief Judge Lawrence Cooke of the State of New York; and Chief Justice Bruce Beilfuss, Supreme Court of Wisconsin. The latter, my own chief justice, is retiring next month and I just wanted my colleagues to know of his lifetime of commitment to improving the delivery of justice in not only my home State but nationwide.

In closing, the creation of a State justice institute will assist all 50 State court systems and the territories to better serve all the people in this country. I urge support and more cosponsorship—in addition to the 41 colleagues already on the bill—for this deserving legislation.

As a final postscript, I would like to announce that my subcommittee will hold one day of hearings on the proposed legislation. On Thursday, July 13, 1983, at 10 a.m., the subcommittee will receive testimony from representatives of the American Bar Association, the Conference of (State) Chief Justices, and the Judicial Conference of the United States.●