THE NATIONAL CENTER FOR STATE COURTS - A REPORT

Address by the Hon. Paul C. Reardon, President, National Center for State Courts at the annual dinner of the Section of Judicial Administration, American Bar Association, St. Francis Hotel, San Francisco, California, August 14, 1972.
The year was 1791. The place was a back road running behind the town of Freeport, Maine—Maine then being a part of Massachusetts. The day was Sunday. The townspeople were in church. The travelers were the Supreme Judicial Court of Massachusetts, accompanied by the French Consul at Boston. They were employing the traditional day of rest to make their way from a sitting at Portland, where they had been delayed, to a sitting to the east at Pownalborough where they were due the day following.

"The procession would have slipped by unnoticed" had not the consul, being French, "trotted down in the heart of the town in search of the hair dresser with the result that his vehicle broke down, causing a delay which attracted attention. The warden came out, and in the name of the Commonwealth of Massachusetts arrested the whole company" for traveling on the Lord's Day. They were subsequently indicted by the grand jury for Cumberland County. This charge lay heavy on the Court for many months thereafter, and it took in fact an act of the Massachusetts Legislature finally to
free the court from the stigma and consequences of its illegal peregrination. Such were the difficulties of State courts in earlier days. How pleasant it would be now to conduct State courts with vexation no greater than the possibility of apprehension of those judges who chanced to be footloose on Sundays. Such, unfortunately, is not the case. Speaking in the generality which always admits exception, it may be said that the State court systems are in grave trouble and have been for quite a few years now. They have been appropriately prayed over a good many times on occasions such as this. Cauldrons of words have been heated up on their plight. I do not propose to recite the complete litany of their woes once again, but I must make certain unhappy allusions prior to sounding a note of hope.

It is basic in our democracy that the system of justice which we have embraced must work. One needs to be reminded that certain political thinkers of great distinction have from time to time "despaired of democracy as a solution for social problems," as Solicitor-General Beck once observed. Beck made reference to a little known
letter written on May 23, 1857 to Henry S. Randall, the
biographer of Thomas Jefferson, by Lord Macaulay, not an
admirer of Jefferson, in which he said, "I have long been
convinced that institutions purely democratic must, sooner
or later, destroy liberty or civilization, or both."
His thesis was that within a century, when the American
frontier had disappeared and the American population had
expanded to the point at which it is now, our
"institutions would be fairly brought to the test."
Macaulay was convinced that these children of the Constitution
would feed upon themselves to the point of extinction, and said that
although the Huns and Vandals who ravaged the Roman Empire
came from without, "your Huns and Vandals will
have been engendered within your own country by your own
institutions." Stated Macaulay as a clincher, "Your
Constitution is all sail and no anchor." These observations,
shocking as they are, nonetheless are deserving of some
attention as we turn briefly to assess certain problems
in the third branch.
I advert in particular to the relationships between the Federal and State courts. It needs no emphasis that these have a large impact on the proper balance between the Federal and the State governments. They also have an important impact on the minds of our friends, judicial, legal, or whatever, from other lands whose estimate of our performance is not without consequence. Now no one who was at this dinner in Los Angeles in 1958 will ever forget it. It was on that electric evening that a major confrontation between the Federal and State judicial systems erupted, and certain resulting bruises lasted for years. In retrospect it now seems apparent that this was not the way to sort out and resolve the numerous dilemmas of Federal and State judicial relations, although much truth was voiced there. Speaking as a State judge, my belief is that we must work together on those problems which create imbalance. It is not difficult to identify and isolate the major among them.
The first, without question, is the effect of Federal habeas corpus proceedings on State courts. This is, concededly a topic grown old in debate over the years. Its age has not, however, withered its strength. Not too long ago we had a criminal trial in Massachusetts. The defendant was convicted. He appealed to the Massachusetts Supreme Judicial Court. His conviction was upheld. He then applied to the United States Supreme Court which denied certiorari. He next petitioned the United States District Court for habeas corpus which a judge of that court refused him. He next took an appeal to the United States Circuit Court which freed him. The Commonwealth appealed this result to the United States Supreme Court which upheld the action of the Court of Appeals. In the United States Supreme Court, an opinion of the majority was joined in by four Justices. One of these filed a concurring opinion.
Two additional justices filed an opinion concurring in the result but not in the thought processes which led to it. The Chief Justice in a lone dissent stated his view that "these opinions seriously invade the constitutional prerogatives of the states." Two justices took no part in the consideration or decision of the case. Now I intend no adverse criticism of any judicial views expressed during the course of this piece of criminal litigation to its final resting place. But I must in all candor agree with a Boston lawyer of distinction who noted in a recent review of this case what the amazement of any thinking member of the public must be to find that, prior to being entombed in the reports, five courts — two State, two Federal, and the United States Supreme Court — on two occasions engaged in meticulous examination of the possible guilt of the defendant in the light of the statute and the two constitutions involved.
What I have just recited is by no means a unique case or situation. The broad question is, and it bears directly on what I shall shortly say, "How long can we afford this type of judicial activity?" To be parochial for a moment, the Judicial Survey Commission organized by Christian Herter when he was Governor of Massachusetts reported in 1955 that there was no congestion of criminal dockets, that the flow of criminal business was proceeding unhampered, and that trials were taking place promptly and were well conducted. I became Chief Justice of the State trial court about that time, and my present feeling is that by and large defendants' rights were being amply protected. Of one thing I am certain, however: the community was being better served then than it is now in the prompt dispatch of business. For at the end of the court year in 1971, well over 28,000 undisposed of criminal matters lay on the dockets of the Massachusetts jury trial
courts—not the largest complex in the land—and it had become necessary to cut back and even abolish civil sessions in some areas to try to bring this backlog down. Now there are a number of reasons for this development, well known to you who are here this evening, above all people. I respectfully submit that one of them is battledore and shuttlecock between the two judicial systems. With the pressures on the American judiciary as they are, the game has ceased to be merely ridiculous and has in truth in many instances become idiotic. It is impossible to explore further here this vexing question which in the last twenty years has become such a sore subject. Chief Judge Desmond, in his customary down-to-earth and forthright manner, tackled it in company with Paul Freund and others in 1964. I recall his allusion then to the statement of Justice Jackson in Brown v. Allen: "The writ has no enemies as deadly as those who sanction the abuse of it." Professor Paul Bator, in a 1963 Harvard Law Review article,
likewise stressed the need for finality and repose in the
disposition of criminal matters in perhaps the best
analysis of Federal habeas corpus for State prisoners.

Judge Henry Friendly, inquiring in the University of Chicago
Law Review several years ago, "Is Innocence Irrelevant?", performed some exploratory surgery with the scalpel of
his great knowledge and comprehension. He
there advanced the thought of routing appeals from State criminal decisions directly or on collateral attack to a Federal appellate court, either the appropriate circuit court or newly created tribunal established to cure the ills in this field. From the State judges' viewpoint, this at least would curtail the humiliation of review from the full bench of the highest State appellate court to a single United States District Court judge. And presently pending before the Constitutional Rights Subcommittee in the United States Senate is a
measure to revise substantially the Federal habeas corpus statute. Then, too, with the adoption of the Standards for Criminal Justice by the American Bar Association, guides have been established, yet to be tested constitutionally to be sure, which should greatly improve within the States the handling of criminal matters. Thus help is on the way, and it cannot come too soon. My allusion to this troublesome field has been generated entirely by a desire to emphasize that springing from it is a growing denigration of the State courts and their functions in the public mind, and the overwhelming practical burden which failure to resolve up until now the conundrum of habeas corpus procedures has placed upon Federal and State courts alike.

A second and equally perplexing contribution to imbalance between the two systems lies in the current financial conditions of the several States and their effect
upon State judiciaries. Most of the states are operating these days on hand-to-mouth financing, and in many instances the mouth is experiencing overlong delays from the hand. In such a circumstance, the politically weakest branch of the three, and the most remote from the action, executive and legislative, that determines the destination of the budget dollar comes up with the empty dish. I doubt not that the Federal judiciary often experiences hunger pangs also but not, I assure you, to the same degree. It is not a progressive circumstance when a consequent drain builds up from the State to the Federal judiciary of able and dedicated judges of long service in the states simply because their state remuneration does not afford them enough to raise and educate their families. One cannot fault in the least a State Chief Justice of many years' experience for departing the work he knows and loves to become a Federal District Court judge at
a salary about twice that which his State views as his worth, translated in those terms. Yet that has happened. His state is the loser, but so are all the states who need the benefit of his wisdom in retaining that condition of balance which the founding fathers had much in mind. Nor can one be surprised when in another state two Supreme Court judges join the lowest echelon of Federal judges for similar reasons. This trend sprung up in recent years is growing, and it is unhealthy. There is something very wrong, for instance, in the projection that Federal magistrates, lower on the totem pole than State trial judges, may presently receive in annual salaries more than most State supreme court judges. The point hardly calls for emphasis. One readily identifiable result is that the very type of lawyer which the State Courts need so badly is these days refusing in large numbers to enter state judicial service, thereby further aggravating an already serious illness. If I were a thoughtful State legislator,
and there are plenty still around, I would take a long, hard look at what is happening. No one here needs be reminded that certain of our State appellate tribunals, traditionally since the early days of the Republic among the strongest and the best, are for the first time in their history experiencing a sense of deprivation. The men they need are no longer so interested in joining them. One is reminded of the sense of joy with which Holmes came to our court in 1882. This association has in these late years done much in facilitating improvement in the dispensation of justice. With its present prestige and power, to what better cause could it now turn its energies than to a broad scale, fifty-state attack on this disease of judicial financial malnutrition. It is a quiet disease, but it is sinister and could be deadly. Untended much longer it will spread evil effects, serving only to weaken further a governmental structure and plan already subject to great stress.

I promised earlier to sound a note of hope. Speaking to the first problem to which I made allusion,
the flooding resort to Federal habeas corpus procedures, I have stated that help is coming.

The initiative of Chief Justice Burger in recommending in August, 1970, the establishment of State-Federal judicial councils has now borne fruit, and in many areas has proven of sovereign aid in lessening tensions between Federal and State judiciaries.

Chief Justice Snead has within a few days, in his description of the Virginia experience, provided plentiful and pleasing indications that cooperative effort and understanding is worth the trial.

On another front, the strong recommendations made by Chief Justice Pringle of Colorado in February at Baton Rouge, that the State courts consider well the American Bar Association standards relating to post conviction remedies with a view to their effective implementation, are harbingers of improvement. He properly emphasized, "If the state courts are highly competent responsible bodies acting in an efficient and expeditious
manner to adjudicate claims of constitutional irregularity in trials, the State courts will indeed be strengthened and the Federal courts will be less and less into what ought to be exclusively state court business."

In the third place, Federal legislation amending the Federal habeas corpus statutes has been proposed. The changes projected have been under intensive study, and by now the State chief justices will have responded to requests for suggestions directed to them by Senator Ervin. I would think there could be little doubt about the power of Congress to restrict in constitutional fashion the scope of habeas corpus. While, as Judge Friendly and Professor Bator pointed out in the writings to which I have made reference, there may be some difference of opinion on matters of detail, it should be recognized that they are just that, and the prime objective is capable of achievement in a possible and salutary meeting of the many minds which are in employment on this matter.
Not so easy of solution is the financial bind in which the states find themselves and what has happened to the state courts in consequence. There is not unjustified apprehension among many State court judges in the adoption of some method of channeling Federal funds into State court systems. There is fear that with the funds would come concomitant control and resultant further lessening of the influence of State courts. But is this necessarily so? There are those, for instance, who challenge the efficiency of the Law Enforcement Assistance Administration and question the wisdom and application of certain of its grants.

However, the Attorney General of the United States delivered some weeks ago before the National Association of Attorneys General an address in which he outlined what had evolved in general from this activity.

He was able specifically to marshal a large number of testimonials from police chiefs throughout the nation,
each with his own problems, which in sum expressed in no uncertain terms gratitude for the assistance they had received from LEAA. Whatever one may think of the operating effect of some of the grants, I submit it cannot fairly be charged that LEAA has sought or obtained local control by means of them. In fact, when Congress set up the program in 1968 it safeguarded State responsibility in the provision that 85% of the funds dispensed by LEAA would move out to the several states in the form of block grants. Unfortunately only a miniscule amount of the overall sums expended in the program nationally found its way in direct benefits to our state court systems. This was due largely to our lack of experience in applying for, and administering, these benefits at the state level. It is interesting that those court systems which enjoy highly integrated court administrations operating under court administrators were most effective in taking advantage of the availability of these funds. However,
the program has provided us with several years experience with a
form of federal revenue sharing which was not wholly unpalatable, and
it would seem that some approach along these lines might
aid in solving the financial problems of the state courts.
In so stating I do not mean to infer that efforts to persuade
the states to loosen up a very great deal in extending their
own financial help to their courts should cease. The converse
must be true, and I reiterate I can think of no better large
scale project for this association.

I may add that fortunately the financial plight of
our State courts has come to the attention of the American
business community. In June of this year the broadly based
Committee for Economic Development took note of this plight
and made some far reaching suggestions to alleviate it. The
American Bar Association would do well to coordinate any efforts
it may make with this distinguished and influential group.
Furthermore, the report of the Task Force of this association,
appointed to investigate the feasibility of the proposal for
the creation of a National Institute for Justice, will be
viewed with great interest. Such an institute could provide a central source for the funding of State court improvement projects without posing a threat to state judicial independence. In addition, there are a number of measures which have been introduced in the Congress of the United States proposing financial assistance to State court systems. All of these proposals will bear close study and attention by this Section of Judicial Administration, and the court systems of each of the states. Certainly it is possible that a carefully drafted program could be enacted in a manner that would enable us to discharge our responsibilities without the loss of state independence.

I appear here this evening principally in the role of President of the new National Center for State Courts, and briefly, again in the spirit of hope, I wish to report to you what we have been doing. A year ago, at The American Judicature Society annual meeting in New York, I outlined the history of the beginnings of this enterprise and that history need not be repeated here and
now. At that time I was serving as acting director, and we were barely launched. We had reason to believe even then, however, that we had risen to what was asked of us by the President and the Chief Justice at Williamsburg in the preceding March. There, they both called for a national clearinghouse, as the Chief Justice said, "to serve all the states and to cooperate with all the agencies seeking to improve justice at every level." We had already incorporated, and later in the summer, pursuant to our articles, the incorporators met in the ancient courtroom in Plymouth, Massachusetts which long before the Revolution heard the voices of John Adams and James Otis in argument, and there we selected the members of the governing board. In September last we chose Justice Winslow Christian of the California Court of Appeal as the Center's first director. He has been on extended leave of absence from his State court post, with his position temporarily filled by a retired justice of that Court. It is he who with skilled efficiency has since guided
our development and growth. After many months of consideration and debate, by-laws were adopted by the Board of Directors designed to ensure that each State would play its role in determining the government of the Center. The by-laws eventually provided a Council of State court representatives designed to maintain a close liaison between the respective State judicial systems and the National Center and most importantly, to elect the Center's Board of Directors for terms commencing in 197.

By now practically all of the states have named their representatives to the Council. The board itself consists of twelve members who are required to be active judges from State appellate courts and trial courts of general and special jurisdiction. The initial board comprised the incorporators who chose the current board from nominations made by the cooperating organizations named in the Articles of Incorporation including, of course, The American Bar Association.

There is also in the structure of organization an Advisory Council, consisting of one representative from
each of the cooperating organizations. The Council represents
the various conferences of judges in addition to groups
such as the Institute of Judicial Administration and the American
Judicature Society, all of considerable experience and
national influence. In the first months of its existence
the home of the Center has been in Washington where it has
had the unsparing help of Chief Justice Burger and
Judge Alfred Murrah, director of the Federal Judicial Center.
Judge Murrah's advice, which we seek frequently, is of
particular value in that his Center has been operative for
some years now, and we have drawn by our own motion on its
experience to our very great benefit. I wish to emphasize
that our Federal judicial friends have been most aware of
our independence and have taken great pains not to hedge upon it
in any way. Yet at all times they have lent
their aid when we have sought it.

Some fifteen or twenty states have asked that
we locate our headquarters with them. It has, however,
become quite apparent that we will perform most effectively
in a series of regional headquarters and we are now well on the way to their establishment, the board having so voted at its last meeting.

Our clearinghouse function is proceeding well. We are already answering inquiries from State courts and engaging in transmitting helpful information between court structures. We are building a library of publications on judicial administration, court surveys and studies, benchbooks and judicial conference reports and other related printed materials. We are embarked on a project to modernize appellate justice, and participating courts include the Supreme Courts of Virginia and Nebraska, and the intermediate appellate courts in New Jersey and Illinois. This effort has as its project director Professor Daniel Meador of the University of Virginia, and each of the participating courts will be assigned a staff of attorneys to assist in the research to be synthesized and examined at a national conference on appellate courts. The project includes studies
on voice recording systems and recommended uniform procedures on post-conviction remedies.

Separate studies are also in progress relative to those State personnel who comprise the non-judicial staffs of courts, to court library standards, to court financing, and, in company with other court training schools to studies of court training programs. More could be said but what I have just stated should suffice to indicate that the Center has moved forward quickly on positive programs in the year just past. I wish to underline the fact that this is not an organization duplicating the work of other organizations but is, as our purposes mandated, assisting, supplementing and coordinating, but not supplanting, the activities of organizations long in the field of judicial administration.

This then in brief is what we have been doing. There were those at Williamsburg and thereafter who doubted the ability of judges to launch an enterprise such as this,
but it has been accomplished. There are those who may question our ability to grow and grow wisely, but we will. And we will do so since the judicial personalities from the states working in the Center believe in what we are and what can lie ahead for us. Reiterating what I said a year ago, we have the right to conclude that we have met the challenge of Williamsburg and that all of the work that preceded and attended that great conference has a good product in the National Center. There are large tasks ahead, but that that is so only serves to enliven the interest of the ever increasing number of people who are enlisting in the service of the Center.

This Section of Judicial Administration, or Division of Judicial Administration of the American Bar Association as it is to be called under the amendments proposed for increasing the active status of the judiciary in the councils of the ABA, will continue to serve the purpose of bringing lawyers and judges together on common
ground in committees and in annual meetings to study
problems of judicial administration and to support
proposals which without such combined efforts and the
of the Bar and Bench alike would otherwise
stand little chance of success. With such continued
close cooperation much can and will be accomplished.
Certainly the Center intends to cooperate with the Section.

Perhaps we have in all of this a partial answer
to Lord Macaulay.

Many long years ago, on a grey winter's day in
New England, William Bradford wrote as follows of the fledgling
settlement at Plymouth: "Thus out of small beginnings
greater things have been prodused by his hand yt made all
things of nothing, and gives being to all things that are;
and as one small candle may light a thousand, so ye light
here kindled hath shone to many, yea in some sorte to our
whole nation." The candle which is the Center has
been lit, and we are confident in the expectation that it
will illumine and resolve the perplexities of the state
courts. To that end we seek your understanding and support.