Interbranch Cooperation in Improving the Administration of Justice: A Major Innovation

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In January of 1978, March of 1979, and January of 1980, small informal conferences devoted to problems of the administration of justice were held in Colonial Williamsburg under the sponsorship of The Brookings Institution's Advanced Study Program. Leaders of the three branches of the federal government attended, including the Chief Justice of the United States, the Attorney General and the Chairmen and Ranking Minority Members of the House and Senate Judiciary Committees. The holding of these meetings signified an innovative and radical departure from the pattern that dominated treatment of the problems of the courts.

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at the federal level through two centuries—that of compartmentalization, bickering, inertia, and drift. These meetings established new channels of communication for the informal exchange of information, ideas, and differing perspectives on questions of common interest. The Brookings Conferences have helped to break down extra-constitutional barriers between the branches, barriers arising out of misunderstanding and lack of information. The conferences have also provided a block of time and an ideal setting in which leaders of the three branches can give their undivided attention to improving the administration of justice in the courts of the nation.

I

Communication among the branches is especially necessary with respect to the administration of justice. Under the Constitution, Congress has vast powers relevant to the federal court system. Congress has the power to "ordain and establish" inferior courts in which the "judicial power" is vested. Congress is also responsible for the creation of judgeships, for setting the salaries of judges, and for the appropriation of funds for the operation of the federal courts. Congress has delegated to the courts the central role in the federal rule-making process, but has retained a veto. Further, Congress has the significant but little used power of impeachment and removal. With the legislatures of the several states, it also shares the power of initiation of the process to alter the effect of decisions of the Supreme Court by constitutional amendment.

The executive branch also has significant responsibilities connected with the operation of the courts. For example, the President formally names judges, subject to the advice and consent of the Senate. Also, as the largest litigator by far in the federal courts, the Department of Justice has a deep interest in the quality of justice in those courts. Until 1939, the Department of Justice was responsible for day-to-day management of the court system, a role then assumed by the Administrative Office of the United States Courts. The Administration, of course, has the authority to propose legislation affecting the organization, jurisdiction, and procedure in the federal courts. In 1977, the Office for Improvements in the Administration of Justice was created with the mission of making justice more effective and accessible, improving research in the field, and reducing those problems resulting from separation of powers and the federal system. The Department thus revived its historic (if not passionate) commitment to concern itself with the administration of the courts.

1 Under the Constitution, Congress cannot diminish judicial salaries. See U.S. Const. art. III, § 1.

2 In addition, if the moral suasion of the courts fails in achieving compliance with particularly volatile decisions, the judiciary must rely on the Executive to enforce the decision.
Questions affecting the administration of justice have often been at the bottom of the agenda of the political branches. Congressional concern with the problems of the judiciary has proven sporadic and tenuous throughout American history. Generally, Congress has acted in the field of judicial administration only when the needs of the courts have gone unremedied for so long as to gather compelling momentum for action. For example, Congress did not create the U.S. Courts of Appeals until a century after the use of intermediate appellate courts to relieve the Supreme Court was first considered, and thirty-five years after they were demonstrably necessary.

Prior inertia is underscored by the developments in American government from the late 1930's until recently. During this period, the executive and congressional branches grew dramatically as the federal government expanded its involvement in international as well as domestic affairs. Yet, although the federal court caseload was rapidly expanding at the same time as courts became more actively involved in traditional legislative areas and in promoting individual rights, none of the growth and necessary reorganization which was occurring in the executive and congressional branches was extended to the judicial branch.

Chief Justice Warren Burger has pressed consistently the need for extensive modernization of federal court procedures since he assumed office in 1969. His efforts at improvement were substantially facilitated by the 1976 Pound Conference on the Popular Causes of Dissatisfaction with the Administration of Justice (organized principally by this article's co-author Dr. Mark Cannon, and Professor Leo Levin) which brought together members of the judiciary (including the Chief Justice and the state chief justices), prominent lawyers, and legal scholars to propose and consider needed changes in judicial administration. Nothing, however, has taken place similar to the Brookings Seminars.

Questions of judicial administration simply lack political salience:

The problems of the courts do not have high visibility. They reach the attention of other branches and the public only if they are pressed forward by someone—and often not even then. The good citizen or the busy Congressman can be excused if he is not very familiar with the need to expand the United States Magistrates' jurisdiction, for example, or to abolish diversity jurisdiction, the need for court administrators, or the need for more judges or changes in the court structure or rules of procedure.... Someone must make these problems real to the busy members of Congress overwhelmed as they are with a host of other more visible problems—pressed on them by skillful lobbyists.3

The time and attention of members of Congress are occupied by a huge

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3 Warren E. Burger, Remarks Accepting the Fordham-Stein Award, New York City, Oct. 25, 1979, p. 4 [hereinafter cited as Fordham-Stein Remarks].
and increasing workload—servicing constituents, responding to mail, overseeing the burgeoning executive bureaucracy, overseeing their own staffs, and the process of consideration of legislation. This increasing workload contributed, until recent years, in congressional inattention to "technical legislation" regarding the federal courts.\footnote{Occasionally, unusually visible litigation has interrupted the apathy toward the administration of justice in the federal courts. Sometimes this interruption takes the form of rage at the Supreme Court or consideration of legislation to hamstring that Court. Conflicts between Congress and the Supreme Court over substantive issues, however, have complicated efficient administration of the court system. James Emmett Hagerty and Thomas Robert Napton, An Empirical Perspective on the Composition of the Committees on the Judiciary in the U.S. House of Representatives and the U.S. Senate and their Relationship with the Federal Courts (Washington, D.C., Dec. 1, 1972) (unpublished internship project in fulfillment of requirement of fellowship program of the Institute of Court Management).}

Congress has made the problem more complex by accelerating the use of the federal courts for the achievement of substantive policy goals. This has added to the overall quantity of cases in the courts and to their complexity. Since 1969, Congress has passed seventy-two statutes conferring jurisdiction on the federal courts. Congress has sometimes failed to consult the Judicial Conference on this legislation even when it directly affects the operation of the court system. While adding to the work with this legislation, Congress has greatly delayed in providing the tools to the courts to handle the increase in cases.

All of the responsibility for the apathy toward the administration of justice, however, does not rest with the Congress. Judges have not been visible enough in focusing attention on the problems of the courts. The American tradition of keeping judges out of regular political participation has deterred some judges from speaking out on behalf of the needs of the courts.

While judges should not be involved in the legislative process with respect to substantive legislation, there is a compelling need for their involvement in more technical questions of judicial administration—such as revision of procedures and court management—which come before the Congress. These questions are technical and, on the surface, seem mechanical. In fact, however, their successful resolution can have a profound effect on the judicial system's ability to do substantive justice. There is a statutory directive that the Chief Justice report annually to the Congress on the work of the Judicial Conference, including its views on legislation (28 U.S.C. 331, last paragraph). This directive has been seen by all as a broad mandate for the Conference to communicate recommendations and comments to the Congress, as do executive agencies when legislation affecting them is being considered. The Conference sometimes supplies its views in advance of congressional request. It develops proposals for legislative activity. Members of its committees confer with congressmen and staff on issues affecting the courts. Nonetheless, the Conference is not, in and of itself, an effective vehicle
for cooperation between the branches. This ineffectiveness results from the Conference's infrequent meetings and its lack of a permanent staff.

From time to time Chief Justices have taken an active role in giving voice to the concerns of the courts. William Howard Taft, for example, lobbied Congress for passage of the legislation establishing the Conference of Senior Judges (now the Judicial Conference of the United States), the Judges Bill creating the present certiorari jurisdiction of the Supreme Court, and for appropriation of funds for a building to house the Supreme Court. Indeed, the 1948 legislation revising the Judicial Code mandates that the Chief Justice submit to Congress an annual report of the proceedings of the Judicial Conference and its recommendation for legislation.

In recent years other judges have shown increasing awareness that "[i]t is not only appropriate for judges to comment upon issues which affect the courts but absolutely necessary." Chief Justice Warren Burger holds that participation in legislative and executive issues which affect the judicial system is an absolute obligation of judges. As Chief Judge Harold Stephens wrote, why any congressman "should expect the bill to pass if the judges are not interested in it, I do not know."

One broad problem is that judges—with life tenure and independence—and congressmen—directly responsive to the people—approach problems from different perspectives. That is, the interests of the two branches differ and are not always compatible. For example, from the standpoint of judges, new judgeships are necessary when the caseload is too heavy. Congressmen, aware of the significance of creating new positions whose occupants will have life tenure, are more sensitive to the political ramifications of such action. Congress therefore rarely creates judgeships in a presidential election year. Also, Congress is reluctant to act when the President is not of the prevailing party of the Congress. Thus, Congress passed the Omnibus Judgeship law in 1978, eight years after statistics had documented the need for such legislation.

Further, congressmen, leading a frenetic political life, are skeptical of the "soft" life of tenured federal judges. They see that federal judges can retire at full pay, but do not seem to realize that most judges continue to work with full or substantial workloads. Congressmen, forced to maintain two residences, wonder at the complaints of district court judges trying to live within the same salary. This wonder seemingly ignores the impropriety of judges generating extra income the way congressmen can, and the high incomes most practitioners gave up to become judges.

All of these factors—the heavy congressional workload, lack of judicial involvement, and the sometimes incompatible perspectives of Congress and the judiciary—have combined to create the inaction re-
garding judicial administration. It is against this backdrop that the idea for the Brookings Conferences was conceived and implemented.

II

The Brookings Conferences were a departure from settled ways of doing (or not doing) business and from the more traditional model of the separation of powers. As there might be some who would question the appropriateness of such meetings under the United States Constitution, because of the close interaction between all three branches of government, it is important to lay such concerns to rest before turning to detailed consideration of what actually happened at those meetings.

The Constitution does not bar cooperation between the branches of government. A central objective of the Framers of the Constitution was to build a government which would work. The Framers turned away from the weak Articles of Confederation. Concerned as they were with preventing a dangerous concentration of power in the new government, this concern was at least equaled by the desire to achieve an effective government. As Charles Evans Hughes said in his great speech commemorating the sesquicentennial of the Congress:

[In the great enterprise of making democracy workable we are all partners. One member of our body politic cannot say to another-'I have no need of thee'. We work in successful cooperation by being true, each department to its own function and all to the spirit which pervades our institutions—exalting the processes of reason, seeking through the very limitations of power, and finding the ultimate security of life, liberty and the pursuit of happiness, and the promise of continued stability and a rational progress in the good sense of the American people.]

The Framers intended the branches of government to be co-equal and strong but not totally separate. The branches do not “hibernate in solitary isolation or logic-tight compartments.” What the Constitution provided was not complete separation, but rather the diffusion, the fragmentation, of power. The primary functions of the three branches were separated so that no one branch would be responsible by itself for making, enforcing, and interpreting the laws. Governmental powers, however, are not so rigidly divided. These powers often overlap with two or three branches sharing power in a given area. As Justice Robert H. Jackson wrote, “While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the

8 Fordham-Stein Remarks, supra note 3, at 3.
dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."

It is clear that the Framers contemplated that there would be coordination and consultation in areas of shared responsibility. One of those areas is the administration of justice where power—to make new judges and to run the courts—is split among the three branches. Problems of coordination and cooperation are overcome in Great Britain by the Office of Lord Chancellor—the highest judicial officer, Speaker of the House of Lords, and member of the Cabinet. The United States has no counterpart to a high official with access, communication, and indeed, participation in all three branches of government. Thus, the achievement of cooperation between the branches must be by informal, not structural means. As the Chief Justice stated, "[B]y statutes, history and tradition—and simple common sense—the federal judiciary must work constantly with Congress and the Presidency for improved methods of providing justice."

Historically, cooperation among the branches of government has resulted in the most valuable improvements in judicial machinery. During the nineteenth century, judges were constantly involved with the legislative and executive branches in trying to alter the federal court system. Congress passed the 1801 Judiciary Act, which history regards more fondly than contemporary Jeffersonians, at the urging of President Adams who was responsive to the distaste of justices for circuit riding. Also, creation of the new Tenth Circuit for the inter-mountain western states came after twenty-five years of effort, culminating in the support of all three branches. Consider further the cooperation exhibited in the creation of the Courts of Appeals. The judiciary was particularly anxious for the creation of a separate, intermediate appellate court. The effort to create such a court began as early as 1853 with the support of Attorney General Caleb Cushing and numerous congressmen. The effort ultimately succeeded after two decades because of the vigorous support of presidents (such as Benjamin Harrison), justices (such as Chief Justices Waite and Fuller and Justices Miller and Field), and many congressman.

The twentieth century has also seen some periods of cooperation. The great period of administrative reform in the early 1920's, which resulted in the creation of the Conference of Senior Circuit Judges, the 1925 Judiciary Act, and the Supreme Court Building, was a product of the efforts of Chief Justice Taft, Presidents Harding and Coolidge, Attorney General Daugherty, and the Congress. Taft testified in person before the Senate Judiciary Committee, as did three associate justices who were chosen by Taft for their appeal to the Congress. In fact, three

10 Fordham-Stein Remarks, supra note 3, at 3.
11 The three were McReynolds, a Democrat who knew many Senators, Sutherland, who had been a Senator, and VanDevanter, one of the most forceful justices and learned in questions of jurisdiction.
justices actually drafted the Judges Bill, which became the 1925 Judiciary Act.

Members of all three branches, at one time or another, have proposed devices to overcome barriers so as to gain and keep congressional attention. In 1921, Benjamin Cardozo proposed a Ministry of Justice to bridge gaps and facilitate law reform. Variations of Cardozo's proposal underlie more recent proposals for a National Institute of Justice made by the American Bar Association and by Jimmy Carter (before he became President). As early as 1955, members of Congress proposed that the Chief Justice (then Earl Warren) address a joint session of the Congress in order to provide information to the Congress and to attract public attention to the issues. In 1970, Chief Justice Burger urged the creation of a permanent Federal Judicial Council. It would act as a coordinating body and report to Congress, the President, and the Judicial Conference on the impact of proposed legislation likely to enlarge federal jurisdiction, develop and submit to Congress a proposal for creating temporary judgeships to meet urgent needs, and examine the structure of the federal courts and the allocation of judicial functions between state and federal courts. The main purpose of such a council would be to establish three-way communication. Various ideas for a three-branch council have been put forward in recent years by the Commission on Revision of the Federal Court Appellate System and by the Justice Department Committee on the needs of the Federal Courts. Cooperation between the branches on questions of judicial administration, however, has too often given way to an attitude of drift and crisis management, and none of these proposals have been implemented.

III

Consideration of these proposals to bridge the differences between the branches created the intellectual climate in which the first Brookings Conference was conceived. With none of these solutions immediately practical, a less grandiose channel of communications was devised. The idea first occurred in 1977, during conversations between the authors of this article. One of them, Warren Cikins, a staff member at the Brookings Institution, had been responsible for a four-day seminar for some thirty freshmen House and Senate members on issues pending before the 95th Congress. The success of that seminar stimulated Dr. Mark W. Cannon, Administrative Assistance to the Chief Justice of the United States, to suggest that Brookings might serve as both the catalyst and the neutral ground to bring together the three branches of government. The idea was to give those policymakers whose decisions affect the administration of justice a chance to reflect upon the needs of the courts. It was hoped that such a meeting would gain the attention of members of
Congress and heighten their sensitivity to the problems of judicial administration.\textsuperscript{12}

The timing was propitious for such a gathering. The Chief Justice was well known for his leadership efforts at judicial modernization. In addition, perhaps no Attorney General in American history had come to office as interested in and knowledgeable about judicial administration as Griffin Bell. Bell had appointed other judges—such as Wade McCree and William Webster—to high positions. He had fostered the creation of the Office for Improvements in the Administration of Justice, appointing Daniel J. Meador to head it. There was also a growing interest in the problems of the federal courts on the part of a number of members of the House and the Senate Judiciary Committees.

On June 9, 1977, Cikins, Walter Held, and Brad Patterson (all of Brookings), Alan Parker (then and again now Chief Counsel of the House Judiciary Committee), and Mark W. Cannon met to review a working paper prepared by Cikins. The planners aimed for a gathering that would be small, so that informality and free expression could flourish. The group decided to limit participation to those groups in each branch that were directly concerned with the administration of justice. This "Core Planning Group" agreed that the principals of the first conference should be the Chief Justice, Attorney General, and Chairman of the House Judiciary Committee. All three of these people enthusiastically supported the concept of holding such a meeting.

The primary focus of the first conference was on the House Judiciary Committee. Its Chief Counsel, Alan Parker, played a leading role in the planning and implementation of the Conference.\textsuperscript{13} Fifteen Representatives, including Chairman Peter Rodino and ranking minority member Robert McClory, attended the conference. Though intended to be evaluators rather than actors, the participation of House members in discussions was both welcome and eagerly solicited.

Attorney General Griffin Bell and his top assistants represented the Department of Justice. The Chief Justice, key members of the Judicial Conference, and selected officers of the Federal Judicial Center and the Administrative Office of the United States Court came from the judicial branch. The few other participants included leading legal scholars as well as members of the staff at Brookings.

IV

Perhaps the dominating issue in the 1978 session was the congestion within the federal court system and what to do about it. One way to help

\textsuperscript{12} The Chief Justice explained some time earlier (in 1975) that "members of Congress are overwhelmed with a multitude of problems, and to reach them we've first got to get their attention. Then we've got to try to focus that attention long enough so they can deal with a particular problem and that's where the difficulty comes in."

\textsuperscript{13} Alan Parker was Assistant Attorney General for Legislation under the Carter Administration. He has returned to the House Judiciary Committee as Chief Counsel.
lessen that congestion is to add judges. With passage of an Omnibus Judgeship Bill imminent, there was much discussion about the selection of new judges. Attorney General Bell stressed the commitment of the Carter Administration to merit selection. There was recognition of the need to establish standards for evaluating judicial performance so as to facilitate merit selection. Concern was expressed about the difficulty of absorbing so many judges—152—into the judicial system at one time, and of the need to supply the new judges with courtrooms, staffs, and supporting facilities. The participants realized that while passage of the Omnibus Judgeship Bill would significantly ease the burden on the courts for a few years, it was not a long-run answer. The Chief Justice, for one, emphasized the need for a permanent mechanism for ascertaining and satisfying judgeship needs.

One of the most stimulating discussions occurred over proposals to divide the circuit courts of appeals. Professor Maurice Rosenberg of Columbia University School of Law advocated administrative division of several circuits. Rosenberg argued that administrative division of the circuits would lighten the appellate burden, permit flexible use of judicial manpower, and minimize inter-circuit conflict. Others, however, were worried about the problem of *en banc* hearings and about diluting collegiality. The participants also considered the alternative of permanent circuit division.

The purpose of the conference was not to force consensus where it was unlikely. Disagreement, aired with good will, served to further educate participants as to a broad range of views. Six months after the conference, a compromise provision permitting circuit courts of more than fifteen judges to reorganize into "administrative units" was inserted into the Omnibus Judgeship Act. Such legislation was consistent with viewpoints expressed in the long and somewhat emotional debate at the Williamsburg Conference.

There was considerable support at the conference for legislation which would curtail or eliminate federal diversity jurisdiction. Judge Elmo Hunter of Missouri answered traditional arguments against turning diversity cases over to state courts. Hunter, a former state judge who had become a federal district judge, minimized qualitative differences between federal and state judges, defended the fairness and sensitivity of state courts, and emphasized their ability to adjudicate such disputes. He stressed the tremendous burden which diversity cases impose upon the limited judge-power of the federal courts. Federal courts, according to Judge Hunter, should be kept free for cases that most need the special skills and resources of the federal judiciary and present federal questions. Judge Hunter indicated that the Judicial Conference, the Attorney General, the American Bar Association, and the

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14 Rosenberg has since succeeded Daniel Meador as Assistant Attorney General for Improvements in the Administration of Justice.
Conference of Chief Justices all supported elimination of federal diversity jurisdiction. Chief Justice Sheran of the Minnesota Supreme Court, Chairman of the Conference of State Chief Justices, stated that the state chief justices had gone on record favoring transfer of diversity jurisdiction.

While there was general agreement that Congress should curtail diversity jurisdiction, there were participants who did not agree that it was necessary to abolish or even substantially lessen such jurisdiction. Still, it is very possible to trace House passage in 1978 of H.R. 9622, to abolish the general diversity of citizenship jurisdiction in the district courts, to the impact of the discussion at the Williamsburg Conference upon members of the House Judiciary Committee.\(^1\)

One of the areas of discussion that aroused considerable interest at the conference was minor dispute resolution. In the two years after the 1976 Pound Revisited Conference in St. Paul, considerable strides were made in improving existing forums and creating new alternatives to litigation. Then Assistant Attorney General Daniel Meador presented plans for a comprehensive minor dispute resolution bill to encourage the use of arbitration. The bill, which became law in 1980, provided for the creation of a minor dispute resolution center to serve as a resource center and clearing house for further research. The legislation, still unfunded, allows for the establishment of neighborhood justice centers under state authority with federal "seed money."

The 1978 Conference stimulated interest in the abolition of the obligatory jurisdiction of the Supreme Court. Solicitor General Wade McCree supported abolition of such jurisdiction, arguing that the Supreme Court should have control over its own docket. The issue aroused little controversy but stimulated interest among congressmen.\(^2\)

A contributing factor to the success of the 1978 Conference was its location. The planners sought to remove those participating from the pressures of Washington, permitting them to concentrate upon the business of the seminar. After consideration of a variety of sites, Colonial Williamsburg was selected. The relatively small size of the group generated frankness and informality. The fact that participants were away from their telephones and their staffs, and the special sense of history generated by Williamsburg itself, were also conducive to frank and informal discussion. The few days together may in some way have replicated that bygone time of the early nineteenth century when congressmen and judges lived together, worked together, and socialized in boarding houses on Capitol Hill. Although impossible to measure, this spirit was probably the most valuable achievement of the 1978 Brookings Seminar.

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\(^1\) The bill did not reach the Senate floor.
\(^2\) Among the other topics discussed at the first conference were jury reform, federal magistrates, justice research, impact statements, class actions, the work of the Judicial Conference, and the proposed Federal Justice Council.
There were other results of that first conference. Discussion generated increased familiarity with important issues that had been, or would later be, brought to the floor of the Congress. Speakers at the conference were later called upon to testify at congressional hearings. The knowledge and rapport which resulted from the first Williamsburg Conference surely led to improvements in legislative consideration of court-oriented questions.

There was a consensus that the 1978 Conference was successful. Its objectives were realized. Chairman Rodino captured the enthusiasm of all the participants when at the close of the conference he said, "This is not just an experiment; it is an experience." Maurice Rosenberg wrote, "[T]he overworked word 'historic' is exactly right in estimating the impact of the session."\(^{17}\) The personal relationships formed at the conference led to the expectation that informal contacts among members of the three branches would lead to future cooperation, or at least to more of a dialogue, on issues of judicial reform.

V

Planning a second conference for the following year began at once. The planners again selected Williamsburg as the conference site. A grant from the Florence V. Burden Foundation provided support. Several hours were added to the length of the seminar to provide more time to consider a broader agenda and generally to ease the pressures upon the participants. The major difference from the first conference was the decision to invite the members of the Senate Judiciary Committee.

The 1979 Brookings Conference was held from March 9 to March 11. Fifteen congressmen attended, including Senators Kennedy, Thurmond, Heflin, and Simpson. As in 1978, Brookings staff members welcomed the participants. Then came remarks by the Chief Justice, the Attorney General and the two Judiciary Committee Chairmen. Representative Kastenmeier, who was keenly interested in court legislation as Chairman of the Subcommittee on Courts, Civil Liberties and the Administration of Justice, however, spoke in place of Chairman Rodino, who was unable to attend.

One of the most significant subjects discussed was the restructuring of the federal appellate system. Then Assistant Attorney General Meador spoke in support of a Justice Department proposal intended to reduce congestion and imbalance in the administration of the law. That proposal provided in part for creation of a new United States Court of Appeals for the Federal Circuit. This court would combine the jurisdiction of the existing Court of Claims and the Court of Customs and Patent Appeals with a new U.S. Claims Court to assume the trial functions of the present Court of Claims. Judge Robert Ainsworth, Jr., of the United

\(^{17}\) Letter from Maurice Rosenberg to Mark W. Cannon (Feb. 1, 1978).
States Court of Appeals for the Fifth Circuit, applauded the Justice Department bill, but cautioned against further specialization going beyond the terms of the proposal. Chief Justice Burger stressed the need for a balance between specialized and general jurisdiction courts. He supported the proposed reorganization on a trial basis. Conference consideration of this issue helped to give the Federal Courts Improvement Act, introduced by Senator Edward Kennedy the week after the Williamsburg meeting, a more thoughtful reception.

Judicial tenure and discipline, the subject of several pending bills in the Congress, received a thorough airing. Chief Judge James Browning of the United States Court of Appeals for the Ninth Circuit spoke of the successes of more informal proceedings, successes which are unheralded. He spoke of the unanimous passing the previous day of the Judicial Conference resolution advocating strengthening of the Circuit Judicial Councils. Aware that public and congressional dissatisfaction with the existing situation might require some legislative response, Browning minimized the need for legislative sanctions in almost all cases of improper conduct. He opposed the approach embodied in the proposals of Senators Nunn and DeConcini for a special commission to deal with complaints lodged against judges. There was also discussion of some of the alternative legislative proposals. Though there was no consensus, the participants gained a new appreciation of the effectiveness of the self-policing of the judiciary by the Judicial Councils.

Minor dispute resolution generated special interest at the 1979 Conference. Judge Jon Newman spoke about the court-annexed arbitration in the District of Connecticut, one of three federal courts working with the Department of Justice and Federal Judicial Center in evaluating this innovation for handling certain civil cases; the Eastern District of Pennsylvania and the Northern District of California are the other two districts.

The participants discussed the Administration's efforts to provide federal assistance for states, localities, and private agencies in order to improve, or create, institutions that deal with minor disputes. The then pending Minor Dispute Resolution Act would encourage the creation of neighborhood justice centers. The three prototype centers funded by the Law Enforcement Assistance Administration (LEAA) were the subject of a presentation of Atlanta Superior Court Judge Jack Ethridge. Ethridge discussed the center in his city using a television film to show how it functioned. He also discussed the other two neighborhood justice centers supported by LEAA—those in Los Angeles and Kansas City. According to Ethridge, the concept had succeeded because of broad acceptance by the courts and by the citizenry.

Consideration of the Speedy Trial Act of 1974 at the 1979 Conference occurred less than four months before the expiration of the four-year delay allowed for formulating compliance plans. Then Deputy At-
torney General Benjamin Civiletti,\textsuperscript{18} Maryland District Judge Alexander Harvey II, and Ronald Gainer,\textsuperscript{19} led the discussion on this law. Judge Harvey, speaking from the standpoint of a trial judge, talked about the knowledge gained during the four-year "dry run." He hailed the Act for raising to general consciousness the need for a speedy trial, but delineated the burdens imposed by that legislation upon the judicial system. He maintained that experience under the law demonstrated that in its present form it could not achieve its objectives. As a consequence of the law, judges must dangerously neglect their civil case loads as they are forced to expedite criminal proceedings. Judge Harvey echoed the Judicial Conference recommendation of the need for more flexibility in the time requirements under the Act. Civiletti spoke out against "assembly line justice," indicating some of the indirect and often negative consequences of the law, as then written, including the Act's adverse effects upon the preparation of a proper case by the defense.

The 1979 Conference thus served as a valuable opportunity for congressmen to receive feedback regarding the Speedy Trial Act. Members of the judicial and executive branches, on the basis of their experiences during the trial period, were united in advising that there should be more flexibility built into the legislation. Several months after the conference, the Congress passed S. 961 which amended the Speedy Trial Act by establishing a one-year period during which Congress placed a 180-day (rather than a 100-day) time limit on the processing of federal criminal cases. It is fair to say that the 1979 meeting facilitated Congress' ability to explore the consequences of a far-reaching law, permitting it to consider modification from greater knowledge.

There was also discussion of the revision of the Criminal Code. Professor Louis Schwartz of the University of Pennsylvania Law School emphasized that reform in the criminal law was necessary in order to enhance public respect for law. Since it is unrealistic, however, to expect perfection in reform of the Code, Schwartz advised implementation of the new Code. Implementation now would allow amendment, where necessary, based on experience.

Norval Morris, then Dean of the University of Chicago Law School, and Judge Charles Joiner of Michigan, addressed the subject of sentencing. Morris stressed the need to retain judicial discretion. He advocated the employment of sentencing commissions which could provide guidance in minimizing disparities in sentencing without compromising judicial independence.\textsuperscript{20}

\textsuperscript{18} Mr. Civiletti served as the Attorney General under President Carter, following Griffi

\textsuperscript{19} Mr. Gainer is the Deputy Assistant Attorney General for Improvements in the Administration of Justice.

\textsuperscript{20} Among the other subjects discussed at the Second Williamsburg Conference were the future of the Office of Chief Justice, diversity jurisdiction, discovery, magistrates and obligatory jurisdiction.
As one can discern from this brief outline of the agenda of the 1979 Conference, the topics discussed touched upon many of the issues presently important in the administration of justice. This conference, like its predecessor, was deemed a success. Congressman Romano Mazzoli of Kentucky said he had never attended a conference where he used more of the information he had obtained than the First Williamsburg Conference; but that the Second Conference was even better. The discussion generated by bringing representatives from all three branches of government together was proving to be quite productive.

VI

The 1980 Williamsburg Conference was held from January 18 to January 20. The eight representatives and the two senators (Strom Thurmond and Dennis DeConcini) present represented fewer congressmen than were present in 1979. This was possibly due to the fact that the time of the conference, earlier in the year than the 1978 and 1979 Conferences, was less convenient—Congress was out of session and some legislators were heavily involved with political campaigns—and possibly because the agenda contained a greater concentration upon long-run perspectives at the expense of focusing upon immediate legislative issues.

As with the first two conferences, the sessions began with statements by the principals from each branch—in this case, Chief Justice Burger, Attorney General Civiletti, Senator DeConcini (substituting for Senator Edward Kennedy), and Father Robert Drinan (who read a statement from Chairman Rodino, who was absent). Once again, the opening statements touched upon a broad range of subjects. The areas of progress since the First Williamsburg Conference were visible. These areas included the passage of the Omnibus Judgeship Bill and appointment of 135 judges, experiments with court-annexed arbitration and neighborhood justice centers, expansion of magistrate's jurisdiction, and amendments to the Speedy Trial Act. Since 1978, the Senate had passed the Criminal Code and the House had passed a bill curtailing diversity jurisdiction.

The opening statements also touched upon areas of current controversy such as judicial discipline and tenure and the question of specialized courts versus courts of general jurisdiction. They touched as well upon less controversial legislation which had not yet cleared the Congress, such as elimination of the obligatory jurisdiction of the Supreme Court. There were new issues such as the Bumpers Amendment, and new ideas, such as revision of the Civil Code, mentioned for discussion. Old “housekeeping items,” such as the need for district court administrators and an increase in the per diem of judges, were also discussed in the opening statements.

Of the presentations at the conference offered to broaden perspectives, two were of special interest—those of Maurice Rosenberg and
Judge Alvin Rubin. Rosenberg addressed the issue of the legal explosion. The Assistant Attorney General for Improvements in the Administration of Justice believes that the appellate courts are now bearing the heavier burdens—"the trouble has moved upstairs." Since 1960, there has been an increase of 419% in filings in the federal appellate courts. The causes are not easy to discern. The increase is surely not only due to the growing resort to the courts to solve social problems. There are a number of other causes, including the economic incentives to attorneys to appeal.

Just as the causes are not easy to discern, the solutions to the problem are not easy to formulate or implement. Trade-offs are terribly difficult and complicated. Increasing support personnel tends to make the judicial process faceless and alters the role of the judge from adjudicator to manager. Aiming for greater efficiency—"more judicial bang for the buck"—could jeopardize values resting at the core of due process, and also inadvertently detract from adequate reflection by judges. Strict application of the final judgment rule might prove counterproductive. Revamping of the federal court structure may solve some problems but will certainly also create others. In short, the problem of increasing litigation is evident but there is presently no adequate solution.

Judge Rubin of the United States Court of Appeals for the Fifth Circuit reflected upon the growing bureaucratization of the federal courts. This is occurring because of the heavy workload. In his circuit, the average judge participates in one and one-half opinions per day. If he read all of the briefs and records before him, he would have to read one and one-half records and three or more briefs each working day, in addition to research and writing. To cope with this workload, federal judges run "a small judicial organization." The average district judge has a secretary, law clerks, docket clerk, court reporter, the services of a probation staff, and the assistance of a magistrate and a magistrate's staff. He reviews the work of magistrates and bankruptcy judges. A judge cannot, no matter how hard he works, review completely what his law clerks do, or learn all that they know. Law clerks are assisting judges not only in routine tasks but there is the risk that an increasing number are perhaps involved in the work of judging itself.

The workload of courts thus is changing their nature from deliberative institutions to processing institutions. Judges have much less time, if any at all, for reflection. They have less time to communicate with each other, to harmonize opinions, and to reach collegial decisions. Judge Rubin reflected on the impact of this workload—"too much work, too little time to do it, the necessity for delegation, inefficient management and ultimately the dilution of responsibility."

Judge Rubin said that there are few easy answers. Among the constructive possibilities are relieving judges from their administrative duties, leaving the setting of priorities for hearing cases to the courts, deinstitutionalizing the demand for scholarly opinions, and consideration
by Congress of the judicial impact of statutes. He called for a redefinition of the most important roles for the federal judiciary followed by the pruning of federal jurisdiction so that it would only include those cases which Article III judges should decide.

Among the more specific subjects attracting interest at the Conference were restructuring several federal courts, judicial discipline and tenure, and a proposal for a State Justice Institute. Major legislative activity formed the background for consideration of restructuring of the federal court system. The 96th Congress considered the Federal Court Improvements Act and amendments to the Customs Court Act of 1974. The Congress also considered, but did not enact, the Tax Court Improvement Act of 1979.

S. 1477 (the original Federal Courts Improvements Act) contained a provision that would have created the United States Court of Appeals for the Federal Circuit by merging the Court of Claims and the Court of Customs and Patent Appeals into a single appellate court with expanded jurisdiction, especially over patent appeals. The Senate adopted the bill but it failed of final passage. S. 1654, designed to expand and define more precisely the jurisdiction of the Customs Court to create a comprehensive system of judicial review of civil actions arising from important transactions, became law. This legislation changed the name and expanded the jurisdiction of the Customs Court to the United States Court of International Trade. S. 1691, which would have created a new United States Court of Tax Appeals with exclusive intermediate appellate jurisdiction of all decisions of the United States Tax Court and civil tax decisions of the United States District Courts, did not obtain favorable congressional action.

Daniel J. Meador, who has returned to his professorship at the University of Virginia School of Law, introduced the subject by stating that while wholesale restructuring of the judiciary is rightly a rare step, the time is ripe for some "judicial architecture" because of the inability of the system to provide definitive resolutions to questions of federal law. What Maurice Rosenberg humorously called "a glitter of Chief Judges" then reacted to the proposed legislation by focusing on the effect it would have on their courts. Chief Judge Daniel J. Friedman of the Court of Claims indicated the support of his court for S. 1477. That legislation would significantly upgrade both courts, producing "a court stronger than the sum of its parts." Judge Friedman warned, however, about eliminating from the jurisdiction of the new court the appellate tax jurisdiction of the Court of Claims. While Chief Judge Howard Markey of the Court of Customs and Patent Appeals took no stand on S. 1477, he indicated that the two courts would "make the marriage work." He stated that the "young couple are good friends," sharing a building and sitting on each others' courts. Markey warned against "shoehorning" the new combined court into the circuit mold rather than treating it as a national court. Chief Judge Edward Re of the United States Customs Court
stated that his court supported S. 1654, that it would cure existing anomalies, and permit the implementation of full justice in important transactions. Chief Judge C. Moxley Featherstone of the United States Tax Court stated that tax cases come next to criminal cases in terms of maintaining public confidence in the fairness of the court system. Featherstone did not take a stand on S. 1691 but carefully discussed the views of its proponents and opponents.

Chief Judge James R. Browning of the United States Court of Appeals for the Ninth Circuit reviewed developments in the area of judicial accountability. Since the last Williamsburg meeting, in response to the Nunn-DeConcini bill and a March 1979 Judicial Conference resolution, all eleven circuits had published procedures for use by the Judicial Councils to deal with complaints against judges. The rules, widely disseminated, are short and simple.

Browning stated his belief that the Judicial Councils had done an outstanding job in handling complaints. He referred to his own experience in the Ninth Circuit to indicate the paucity and triviality of complaints so far. Browning was concerned by the potential for abuse of the complaint procedures by cranks, by prisoners, by the anonymous, and by attorneys using it as an adjunct to litigation. In one year, in both the Ninth Circuit and nationally, complaints have been fewer in number and less serious in nature than anticipated. While Browning did not believe that there was a need for elaborate procedures, given what he saw as the small number of insignificant complaints, he did support some kind of legislation—the Judicial Conference Bill as amended somewhat by certain provisions of the original S. 1873—in order to fix the role of the Judicial Councils in the area of discipline to settle the doubts of a few judges, and to take heed of public concern. Congress eventually passed a bill very close to the proposal of the Judicial Conference and, in effect, statutorily created, to a degree, what Judge Browning outlined. This bill, unlike the original S. 1873, provided for a review of complaints by existing judicial bodies, rather than a newly created court.

Chief Justice Robert F. Utter of the Supreme Court of Washington, Chairman of the Conference of Chief Justices, and Professor Frank Remington of the University of Wisconsin Law School, argued the case for a State Justice Institute, an umbrella organization which would accommodate and treat the needs and concerns of state court systems. The State Justice Institute would be an independent organization, chartered in the District of Columbia, whose goal would be direct a national program for improving the administration of justice in state courts and fostering better state-federal communication. Its functions would include funding research, judicial education, and training programs.

Remington contended that there is a persuasive basis for federal funding of state court systems. State courts are responsible under the Supremacy Clause of the United States Constitution for applying federal laws. Congress has relied upon state courts for the enforcement of some
federal laws. Cases have been diverted to state courts to protect the quality of the federal courts. Moreover, federal government actions, especially Supreme Court decisions in the area of due process, have greatly increased the demands for expertise and judicial skills and temperament from state judges faced with more complex and difficult tasks.

If the reaction of the congressmen present is any measure, the proposal for a State Justice Institute might well run into "tough sledding." In a lively discussion, members of Congress wondered about whether there is a federal interest in this area, expressed their concerns about cost, suggested that existing entities could perform the job, and argued that maintaining financial independence best protects the independence of the states.

This discussion was brought to a close by Attorney General Civiletti who stated that while few doubted the wisdom of creating a State Justice Institute, the cost, control, and imposition on the federal bureaucracy represented a formidable set of hurdles. Civiletti suggested a possible compromise—the creation of a modest group designed to draw upon the expertise of existing entities. This organization could approach the federal government only with specific, acute problems where there might be assistance without federal control. Later consideration of the proposal by both House and Senate did indicate that the concept had considerable support.21

Once again, a great deal was achieved in the informal discussions among Williamsburg Conference participants—discussions held over meals at Cascades II, coffee breaks, at the reception in the new home of the National Center for State Courts, and over Saturday night dinner in the historic Christiana Campbell Tavern. For the third year, participants reacted enthusiastically. Chief Judge Featherstone called the Third Conference "one of the most exhilarating experiences I have had in a long time."22 The head of the National Center for State Courts, Edward B. McConnell, wrote, "From every standpoint, it must be considered one of the most significant seminars that anyone conducts."23 Senator Thurmond wrote, "The sessions were interesting and challenging. I came away with a much better appreciation of problems facing the federal judicial system."24 Maurice Rosenberg called the sessions "a fair substitute for a justice council."

VII

The first three Williamsburg Conferences have been successful. The

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21 Among the other subjects discussed at the Third Williamsburg Conference were regulatory reform and the courts (including the Bumpers Amendment), sentencing reform, the final judgment rule and appealability, and the protracted case.
22 Letter from Chief Judge Moxley Featherstone to Warren Cikins (Jan. 21, 1980).
24 Letter from Senator Thurmond to Warren Cikins (Jan. 21, 1980).
experimental stage has been surmounted. The new attorney general, William French Smith, shortly after taking office, committed to participate in, and support, a new conference in 1981. The existence of the seminars is in itself a major achievement. Without compromising the integrity of any branch, the conferences have brought representatives from the branches together and established new channels of communication. In the recent past, informal exchange of information, ideas, and differing perspectives among the representatives of the three branches had been virtually non-existent. The conferences have provided constructive off-the-record consideration of significant problems and issues. The meetings have increased the understanding of influential leaders on specific legislative proposals and on broader questions of the administration of justice. They have helped to reduce or eliminate misunderstandings regarding proposed and past legislation. After the meetings, the new channels of communication have been employed to facilitate formulation and implementation of policy. Different approaches and perspectives to problems are inevitable under the Constitution, which makes such conflicts a dynamic force for better government. The bridging of these differences is easier, however, with the barriers between the branches lowered. The Williamsburg Conferences, where the free exchange of views has permitted the clash and reconciliation of differences, have reduced the needless conflicts arising from misunderstandings or inadequate or insufficient information—conflicts which are not essential to the working out of the constitutional scheme. Thus, the Brookings Conferences on the Administration of Justice have helped to break down barriers impeding free exchange and may well have initiated a new era of harmonious interbranch relations.