Fifty-One Chief Justices

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THE LEGACY OF WILLIAM HOWARD TAFT

If there is a single figure in twentieth century jurisprudence in the United States who may be called the godfather of law reform and modernization, it perhaps would be William Howard Taft. Many would argue that a better claimant for the honor would be Professor Roscoe Pound, not only on the strength of his famous 1906 address to the American Bar Association, "Causes of Popular Dissatisfaction with the Administration of Justice," but for his long and influential career in many areas of law. Others would urge that the credit should be shared with such figures as Chief Justice Arthur Vanderbilt of New Jersey and with that contemporary crusader for improvement, Mr. Justice Tom C. Clark, late of the Supreme Court of the United States.2

The case for Mr. Taft as *primus inter pares* is based upon somewhat fortuitous circumstances—particularly, the fact that he is the only person in the history of the United States to have been both President and Chief Justice. More important is the fact that at those points in time—1909-1913 in the one instance, and 1921-1930 in the other—the man and the opportunity to act upon his interests converged with the public sense of need for reform and modernization. As a result, Mr. Taft as President was closely identified with, and in some instances actively assisted in, the drafting and adoption of the first national criminal code (1909) and a comprehensive revision of the civil code (1911); while as

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1 R. POUND, CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE. This classic has been reprinted many times in many media, but the separate leaflet edition kept in stock by the American Judicature Society is the most readily accessible medium.

2 On Clark, see Frank, Justice Tom Clark and Judicial Administration, 46 Tex. L. Rev. 5 (1967); on Vanderbilt, see Williams, Arthur T. Vanderbilt and Legal Education, 24 N.Y.U. L.Q. 1 (1949).
Chief Justice he organized a judicial lobby for a three-fold program of statutory reform of judicial administration, two parts of which were enacted (1922, 1925) in his tenure.\(^3\)

Added to these considerations is the further fact that Taft was an articulate spokesman for these and other reforms in American judicature. He is remembered in American history as a reluctant President and a constitutional conservative, in a time of constitutional ferment and a demand for executive activism. Thus his administration of the Presidency will doubtless always suffer by comparison with the flamboyant administration of his predecessor, Theodore Roosevelt, and the messianic posture of his successor, Woodrow Wilson. His years between the White House and the Supreme Court were nominally academic—he was offered a professorship at Yale University primarily as a springboard for a continuing series of public addresses and writings, and during this period he served (1913-14) as president of the American Bar Association. It was during this time that he made his principal pilgrimage to the sources of the common law, and returned to the United States confirmed in his earlier conclusions that English procedural and substantive reforms offered many appropriate models for American law.\(^4\)

Thus it was that, in the fall of 1921, William Howard Taft eagerly assumed the administrative responsibilities of the office of Chief Justice of the United States. The law, and particularly the judicial process, had always been his consuming interest, and the office of Chief Justice the goal toward which he had pointed with unabashed ambition. For most of the preceding fifteen years, he had been working, writing and ruminating on the needs and opportunities for modernization in the organization of justice in the United States. Not that he was zealous for change in every quarter; he was convinced that current pressures toward a so-called "broad construction" of the Constitution were wrong, and he injected himself gratuitously into the executive prerogative of selecting nominees for the Supreme Court in order to insure that a majority of constitutional conservatives might result.\(^5\) But


in the matter of administrative modernization of the federal judiciary, he was by all standards in advance of his time.

Judicial administration in the United States is complicated, and doubtless always will be complicated, by the existence of fifty-one judicial systems—one for each of the states and one for the federal government—as well as a scattering of special courts in certain territories. The original theory, of course, was that each state system would concern itself with matters within its specific jurisdiction, and the federal courts would concern themselves with adjudication of inter-state matters, interpretation of federal law and the Constitution of the United States, and questions of international law in which the United States and its citizens might be involved. As a matter of literal truth, of course, practice in the main follows the original theory; but that hardly disposes of the basic problems of administration of justice in the American federal system. From the beginning, diversity jurisdiction—the federal court being the most congenial forum for a suit by a citizen of one state against a citizen of another—brought rights under state law into federal courts for adjudication. Conversely, state courts from the earliest times seldom hesitated to take jurisdiction in certain cases which involved federal law.

By the end of the nineteenth century, these crossovers between state and federal courts constituted only one of a number of complicating factors in the administration of justice. The original Congressional enactment on the subject—the Judiciary Act of 1789—had created a two-level system of federal trial courts (District Courts and Circuit Courts) as well as the “one Supreme Court” stipulated by the Constitution. Without discussing in detail the conflicts which arose out of this two-level trial system, it is enough to point out that by 1891, when an intermediate appellate court system was engrafted onto the original structure, the volume of business in the federal courts had proliferated. Largely this was a consequence of the steady increase in federal statute law, and particularly the sudden broadening of subject-areas of federal jurisdiction as a result of the post-Civil War amendments to the Constitution.

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7 Id. at 61, 139.
8 Id. at ch. 11.
One result of this proliferation of judicial business in the federal system was the threatened breakdown of the appellate process. In 1891, when Congress created the Circuit Courts of Appeal to offer relief to the Supreme Court, the latter was struggling under a load of fifteen hundred cases a year, but of these, only about five hundred could actually be disposed of. By vesting in the intermediate courts final jurisdiction in certain types of cases, and by limiting the reviewable questions in appeals of right in other cases, it was hoped that the load of appellate business might be efficaciously redistributed. Twenty years later, in the Judicial Code of 1911, a reform of the trial court structure was effected by merging the old District Courts and Circuit Courts into a single level of District Courts of general jurisdiction.

Chief Justice Taft, however, perceived that this reorganization required more before it could be considered efficient. What was needed, he insisted—more strongly than ever after his visit to England—was a unified federal court system. His three basic ingredients in such a reform, as he advocated them upon ascending the high bench, were (1) a system for annual statistical reports on docket loads in all trial courts in the federal judiciary, with concomitant authority to transfer and reassign federal trial judges in accordance with the variations in these loads; (2) a statutory limitation on the appellate responsibilities of the Supreme Court by substantially broadening the final jurisdiction of the intermediate courts and also broadening the subjects over which the Supreme Court could exercise discretionary (certiorari) jurisdiction; and (3) authority in the Supreme Court to draft and promulgate uniform rules of procedure for the entire federal judicial system. Taft prevailed upon Congress to enact his first reform in 1922, and the second in 1925. It was not until the latter years of the Chief Justiceship of Charles Evans Hughes, however, that the third part of Taft's legacy was effectuated by Congress in a legislative struggle which extended from 1933 to 1940.

In addition to completing Taft's program of reform, Chief Justice Hughes contributed the leadership to create a fourth, fundamentally important ingredient of modernization. This was

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9 Taft, *Adequate Machinery for Judicial Business*, 7 A.B.A.J. 453 (1921);

10 SWINDLER, supra note 5, at ch. 16.
the concept of an Administrative Office of the United States Courts, a management agency which Congress established by statute in 1939. With the addition of a research and training agency in the Federal Judicial Center in 1967, and the 1971 legislation providing for court administrators for each of the eleven judicial circuits of the United States, the machinery of a unified federal court system, after fifty years of statutory enactments, may be considered to be assembled in fairly complete form.\footnote{Swindler, \textit{supra} note 3, at 265.}

While the mechanism for judicial efficiency has thus slowly been constructed over this half century, however, two problems of dismaying magnitude have also been developing. One is represented in the great “sunbursts” of Congressional enactments which have created a vast new catalog of litigable issues which the federal courts must attempt to handle; in the New Deal period of the 1930’s and in the “Great Society” period of the 1960’s, literally scores of new federal rights—in labor relations, social welfare, economic benefits, civil liberties, defendants’ remedies—have been created by statute or landmark constitutional decisions. The number of these which are reviewable as of right in the Supreme Court has grown in geometric ratio, so that the relief once thought to have been perpetuated in the broad certiorari legislation of 1925 has all but become neutralized.\footnote{See reports of the Division of Procedural Studies and Statistics of the Judicial Conference of the United States in \textit{Report of the Administrative Office of the United States Courts} (1970).}

The second problem represents a crisis in the fifty-one-jurisdictional aspect of American federalism. It is the problem of the state judicial systems, and the fact that in most instances there has been nothing like the systematic, progressive process of construction of a modern unified court structure which has been carried on over the past half-century at the federal level. This is to say that, in the states, while the volume of judicial business has been proliferating in a degree rather comparable with the volume in the federal courts, the capabilities of the state court systems have not been correspondingly developed. This is to say even more—that with the menacing prospect of a collapse of the state machinery, the burdens upon the federal machinery will
enormously increase. This is so for many reasons, most of which may be summarized in the fact of the centripetal thrust of the political economy of the United States in the past thirty years, which has created what is now described as a "unitary federalism" of interdependent state and federal relationships.¹³

There have been those who discerned this developing problem in the state judicial systems over the years. Vanderbilt of New Jersey was the most eloquent voice in the wilderness, and his Minimum Standards of Judicial Administration,¹⁴ published in 1949, represented a guidebook which has been only occasionally followed. The American Judicature Society, the pioneer professional association seeking to educate the public and the bench and bar to the urgency of modernization, has made herculean efforts, but the Augean stables have not yet been cleansed. Under the sponsorship of the Law Enforcement Assistance Administration, a federal agency created in 1968 to direct the flow of Congressional appropriations into state programs for law reform in general, a National Conference on the Judiciary was called in 1970 to invite an assessment of the crisis by the highest judicial officers from all of the fifty states.

It is significant that the present Chief Justice of the United States, Warren E. Burger, as well as the President of the United States, came to this national conference of state court leaders to stress the urgency of action. Mr. Nixon, the first active member of the bar to occupy the White House since Mr. Taft, perceived as well as the Chief Justice how critical to the well-being of the entire federal structure, as much as to the federal judicial structure, was the early and thoroughgoing reform of the state judicial systems. Congress, in its enactment in 1968 of the Omnibus Crime Control and Safe Streets Act, had declared the purpose of the statute to be "to assist State and local governments in reducing the incidence of crime" by promoting greater efficiency in criminal justice systems "at all levels of government."¹⁵ While the early phases of the administration of this act—and the disbursement of several billions of dollars annually to the individual states—

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¹⁴ A. Vanderbilt, Minimum Standards of Judicial Administration passim (1949).
emphasized police training and equipment, by the time of the National Conference on the Judiciary the agency charged with the administration, the Law Enforcement Assistance Administration (LEAA), had come to acknowledge that criminal justice was inseparable from the whole system of justice, and until the whole system was modernized the criminal justice sector would be ineffectively treated.

The National Conference settled upon certain fundamentals in its final consensus statement; in effect, many of these were simply renewed declarations of long familiar principles, given enlarged importance by the general agreement that crisis was at hand.16 Because of the pervasiveness of the crisis, it was evident that a coordinated campaign for reform—rather than reliance on faith in the initiative of fifty individual states—would be necessary. Finally, to devise such a coordinated campaign, two agencies were required: a clearing house for information and programs to serve all fifty jurisdictions among the states; and a single national figure to provide the leadership for the campaign. The first agency was created, as a consequence of the resolutions adopted at the National Conference, and is now in operation as the National Center for State Courts. The second rather obviously could only be one official—the Chief Justice of the United States; for, if state judicial modernization has an intimate bearing upon the efficacy of federal judicial administration, there is only one among the fifty-one chief justices who can command the attention of all.

With this state of affairs in the winter of 1971-72, the role of the Chief Justice of the United States has fundamentally enlarged—and enlarged considerably beyond anything which William Howard Taft had envisioned. Taft, and Hughes who followed him, concerned themselves with establishing the essential powers or offices through which to develop a unified federal court system. Chief Justice Earl Warren developed the Judicial Conference of the United States into an agency of continuing study of basic administrative problems within the unified system.17 But from Taft to Warren, it was only the federal system with which the

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16 Consensus Statement of the National Conference on the Judiciary, Justice in the States 265 (Swindler ed. 1971).
17 See Swindler, supra note 3, at 253.
Chief Justice considered himself obliged to deal. Early in the tenure of the present Chief Justice—and not, rather obviously, from any choice of his—the long-delayed modernization of all or most of the fifty state judicial systems became a cardinal item on the agenda.

The logic of the situation points to the propriety of the Chief Justice of the United States concerning himself with problems of non-federal systems of courts—but the rules of law and politics drastically limit his practical opportunities for leadership. Even if their career toward ultimate breakdown threatens the integrity or even survival of the federal system, the ultimate decision to halt their own deterioration can come only from within each state, acting independently of the federal government as well as independently of each other. Relations between the Chief Justice of the United States and the chief justices of the fifty states have, within recent memory, been strained, to say the least. The current circumstances encourage a sense of mutuality of interest, but the insistence upon total freedom of each state from the federal authority in this area calls for diplomatic virtuosity on the part of the legatee of Chief Justice Taft.

**The Analogy of the Lord Chancellor**

With this trend of events in judicial organization in the United States, there has been some fulminating on the part of critical observers of the Chief Justice and the Supreme Court that circumstances were translating the leadership responsibilities of the Chief Justice into a function analogous to the judicial role of the Lord Chancellor. As one leading American scholar has put it:

> The Lord Chief Justice is confined to judicial tasks. The Lord Chancellor, in fact, has no time for his judicial duties. It is not irrelevant, therefore, that the Lord Chancellor is turned out of office with each change of government, although the Lord Chief Justice holds office for life.

> There is an inconsistency between the judicial role and the political one that is, in practice, thus recognized by the English Constitution.

> In the United States, we have made no provision for a Lord Chancellor. We have only a Chief Justice. Customarily, the Chief Justice—in his public stance at least—has confined himself to the duties of presiding over the most important
judicial tribunal in the world. That job is itself a challenge
even to the highest capacities of the greatest of lawyers:
witness John Marshall, Roger Taney, and Charles Evans
Hughes.

Occasionally, as was the case with Chief Justice Taft, and
as seems to be the case now with Chief Justice Burger, the
occupant of the Court's center seat regards himself as more
of a Lord Chancellor than a mere Lord Chief Justice. His
self-appointed role then becomes adviser to legislative and
executive branches, sponsor and critic of judicial appoint-
ments, creator of law reforms brought about without either
legislative or judicial authority.18

There are, of course, two sources for such a complaint, stem-
ming from the American insistence upon the most literal and
complete separation of powers in two respects—the separation of
the judicial function from the executive, and the separation of
the federal function from that of the states. If the critics of the
current course of events in American justice are to be taken
literally, there would be an apparent prospect that the Chief
Justice in undertaking to lead both federal and state courts into
a concerted and coordinated program of modernization and
reform would not only be trenching upon the federal executive
and legislative prerogative on the one hand and the independent
position of the states on the other; but he would also be defining
a new function in the federal government which would in fact
enlarge upon the analogy of the Lord Chancellor.

Before exploring the realities of this prospect, it may be
pertinent to establish several introductory propositions, viz.:

(1) Whether or not the analogy of the Lord Chancellor is
apposite, the fact remains that the responsibility for central-
izing the leadership of law reform must lie somewhere within
the structure of federal government in the United States.
(2) The trend toward “unitary federalism” in the United
States in the past thirty-five years—since the forces of the
economic depression of the 1930's and the resultant course of
the New Deal—has established in areas other than the judicial
area a wide range of precedents for developing coordinated
and concerted programs of state-federal activity.

The manifest fact of the existence of fifty-one chief justices in the federal system of the United States insures, as a practical matter, that judicial independence will be preserved. There is also the personal conviction of the present Chief Justice that there should be no federal intervention in the state judicial area, and the practice of the LEAA in placing federal funds with the respective states, to confirm further that this separation of powers shall be preserved.

To return to the analogy of the Lord Chancellor, then, it would appear that the crux of the current criticism of American judicial affairs is the matter of which division of government should undertake reform and modernization. To quote again from the vigorous protest of Professor Kurland:

There is also to be noted the difference between the judicial role and the legislative role that the Chief Justice would seem to disregard as he assumes the woolsack of the Lord Chancellor. The courts, and especially the Supreme Court, may properly be called upon to decide, in the course of resolving a case or controversy—the only power conferred on the judiciary by the Constitution—that Florida need not provide 12-man juries or even unanimous ones.

It is a very big step, one that takes the judiciary beyond its place, for it to decide that juries in federal courts should not have 12 members and need not be unanimous. That choice must be a legislative one, for neither the Constitution nor any federal law says that juries must be less than 12 or less than unanimous.

Again, it may well be in the province of the Court to say that in any particular case the defendant was denied his right to a speedy trial; it is another to say that all cases pending more than six months must be dismissed. 19

What Professor Kurland, and others who have joined in the chorus, are arguing is that (1) law reform and modernization must be effected without jeopardizing “the functions of law in a democratic society”—to insure that improving the efficiency of judicial administration does not negate the basic objective of justice, “to resolve controversies . . . by means of reason based on the values

19 Id.
as expressed by the common will through law."\textsuperscript{20} These critics further assert that (2) for the Chief Justice to undertake to add to his judicial responsibilities the non-judicial, quasi-legislative responsibilities of improving the administration of the courts is to invade the legislative area and to assume for the Chief Justice of the United States the role of the Lord Chancellor of England.

To undertake to meet these criticisms, one should refer again to the preliminary propositions set out above. One may then proceed to consider the facts (1) that since the organization of the judicial and executive and legislative functions is constitutionally different in the United States and Great Britain, one may not expect to insist upon the same division of responsibilities \textit{vis-a-vis} the administration of justice; and (2) that the legislative branch of the government in the United States—Congress, or the individual state assemblies—have in fact had, and continue to have, the final power of determining how broad a responsibility for leadership of the judicial organization should be vested in the Chief Justice of the United States or the Chief Justice of any individual state.\textsuperscript{21}

In quite recent years it had been urged that a periodic "state of the judiciary" report should be requested of the several chief justices, as a "state of the union" report is required of the President and a "state of the commonwealth" report is required or expected in most cases of the governor of a state. Beginning in 1970, Chief Justice Burger has delivered two "state of the judiciary" addresses—to the American Bar Association rather than to Congress; and in at least two instances state chief justices have made "state of the judiciary" addresses to their respective legislatures.\textsuperscript{22} This would suggest that, at least in the case of those states where this practice has become established, the legislative branch affirmatively seeks a report and recommendations from the judicial as well as from the executive branch.

While Congress has not undertaken a formal audience for the Chief Justice, it has, since 1948, provided for the communicating of the business of the federal judiciary, as summarized by the

\textsuperscript{20} Id. at 28.

\textsuperscript{21} Pringle, \textit{The Role of the State Chief Justice}, \textit{Justice in the States} 80 (Swindler ed. 1971).

\textsuperscript{22} See Proc. of 23rd Annual Meeting of the Conf. of Chief Justices 8 (1971).
Administrative Office of the United States Courts and as studied and acted upon by the Judicial Conference of the United States.\(^{23}\) The Chief Justice is the agent for making this communication, which summarizes the rather complex agenda of both the Administrative Office and the Judicial Conference which function under his direction. Indeed, it is through these two agencies—the Conference of Senior Circuit Judges (now the Judicial Conference of the United States), created in 1922, and the Administrative Office of the United States Courts, created in 1939—that the principal administrative work, and the leadership role in improvements in the judicial process, are effectuated by the Chief Justice with reference to the federal courts.\(^{24}\) With a research and training facility available in the Federal Judicial Center, as previously suggested, the instruments for reform and modernization in the federal system are fairly complete.

It remains to inquire what functions of the Lord Chancellor, whose counterpart appears to some American observers to be germinating without constitutional or statutory sanction in the United States, are needed or are performed in various American governmental agencies. As summarized by Professor Kurland and his concerned colleagues, these functions include presiding over the House of Lords in its judicial capacity, over the sittings of the Judicial Committee of the Privy Council, and over the Chancery Division of the High Court, in addition to an *ex officio* function as a member of the Court of Appeal. The Lord Chancellor makes some judicial appointments and recommends others; finally, he is a member of the executive branch of government, the liaison between the judicial and legislative branches, and “major domo for law reform.”\(^{25}\)

Treating these as the primary responsibilities of the Lord Chancellor as head of the judiciary, certain of the functions may be disregarded since there is no apposite function in the judicial system in the United States, at least at the federal court level. Thus the Lord Chancellor’s role in the judicial activity of the House of Lords or the Privy Council can only roughly be analogized with the rare occasions when the Chief Justice of the

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\(^{24}\) See Swindler, *supra* note 3, *passim*.

United States, as provided by the Constitution, sits in impeachment proceedings in the United States Senate. Since law and chancery are merged in the federal system, there is not, of course, any special presiding role which any officer of the government of the United States would have in respect of equity procedures.

The more important functions at which certain American criticisms of the Chief Justice's administrative activities are aimed are those which in Professor Kurland's words involve "adviser to legislative and executive branches, sponsor and critic of judicial appointments, [and] creator of law reforms brought about without either legislative or judicial authority."

The relationship between the Chief Justice of the United States—or in some instances, particularly in the third term of President Franklin D. Roosevelt, between Associate Justices—and the White House has varied with the individual personalities of the Presidents, and sometimes of the jurists. Chief Justice Taft unabashedly intermeddled in White House concerns with respect to Supreme Court appointments, although the manifest intellectual limitations of President Harding all but invited such advising by Taft and others on many subjects. For the most part, however, the invitation for counseling has been initiated by the White House: Franklin D. Roosevelt solicited advice from both Chief Justice Hughes and several of the New Deal appointees as Associate Justices; Woodrow Wilson had occasional recourse to Justice Louis D. Brandeis, both before and after his going onto the bench; Lyndon B. Johnson, as may be recalled, added to the subsequent travail of Justice Abe Fortas by relying on him as virtually private legal counsel in several instances.

As for Congress, Taft's overzealousness in lobbying for the so-called "Judges' Bill" which eventually saw piecemeal enactment in 1922 and 1925, generated a reaction which became a contemporary tradition against unsolicited advice from the judiciary. To be sure, when the Chief Justice delivers a "state of the judiciary" address to the American Bar Association, Congress reads about it—as Congress also reads about speeches of the President which are not directly addressed to itself. Yet the judiciary studiously avoids gratuitous comments. The articulate

26 U.S. CONST. art. I, § 3.
role of the present Chief Justice has been dictated by a conviction which is widely held, to judge from the recurrent theme of the National Conference on the Judiciary and the preamble of the Congressional enactment of the Omnibus Crime Control Bill,\textsuperscript{28} that prompt and innovative leadership is needed in the current crisis of justice in the United States.

The alternative to an assumption by the Chief Justice of certain tasks of the Lord Chancellor—assuming \textit{arguendo} that this is in truth the ultimate effect of the sequence of activities which has been described—is to look for a non-judicial officer in the government of the United States who may assume these tasks. Such an officer in the present structure of American government could only be the Attorney General, who is a Cabinet Officer by virtue of his being the head of the Department of Justice.\textsuperscript{29} To suggest such an alternative, however, is unrealistic for several reasons. In the first place, neither the original concept nor the historical experience of this office vests in it the type of authority over the judicial process which would be required. In the second place, the Attorney General is more often than not—and certainly he has been in the case of Mr. John N. Mitchell—a key political lieutenant of the Chief Executive, a circumstance rather different from the fact that the tenure of the Lord Chancellor is coincident with the life of the government of which he is a part.\textsuperscript{30} Most important, however, is the basic fact that neither law nor politics would make this officer of the federal government acceptable as a leader of the modernization programs of the fifty state judiciaries. We come back to the basic truism: if the Chief Justice of the United States cannot enlist the cooperation of fifty other chief justices, no one else can.

**Prospects for a Federalist Judicature**

The present posture of judicature in the American federalist system may thus be described accurately as fifty-one systems, made independent of each other by law and politics, but bonded

\textsuperscript{29} See Comment in \textit{CUMMINGS} \& \textit{McFARLAND, FEDERAL JUSTICE} 25-26, 512-13 (1937).
\textsuperscript{30} Mr. Mitchell, as predicted by political observers, did in fact resign the Attorney Generalship in the spring of 1972 to direct President Nixon's reelection campaign.
together with increasing firmness by socio-economic realities. What affects one affects all, in varying degrees; this has been the consistent history of national affairs for the past four decades in the United States, in contradistinction to the tradition of state independence and limited federal authority in the century of westward settlement. In the economic collapse of the 1930's, only the federal government appeared to have the resources and authority to rescue the states in their distress, while the concerted effort demanded of the nation in the war and postwar period of the 1940's strengthened the reliance upon the central government. The Eisenhower administration of the 1950's protested that it sought a reorientation of state and federal initiatives, but it lacked a persuasive program for bringing this about, and the Kennedy and Johnson administrations of the 1960's adhered to a once and future "Great Society" which essentially implied a centralized surveillance.

It is against this political background that the presumably non-political functions of both state and federal judicial administration have developed in this same period of time. There are several other analogies which are pertinent. There is the uniform laws movement which has been sponsored by the states since the end of the last century, a recognition of the fact that in an increasingly integrated political economy it is essential that the legal regime of the most essential interstate activities be as uniform in all jurisdictions as is possible. Complementing this interstate legislative drafting program is the work toward modernizing and rendering more generally uniform the common law of the several states, which for half a century has been carried on by the American Law Institute.

The moral to all of this is not that federalism, and a vigorous system of state government, is gone beyond recovery; it is simply that the federalism required for the last part of the twentieth century—and most emphatically for the judicial function in a federalist system—is a planned program rather than a theory. The theory degenerated into a shibboleth expressed in catchphrases

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like "state sovereignty" or "states' rights"; to face up to reality in the present, one must speak rather of state responsibility—for it has been largely because of default in respect of manifest responsibility that the states have lost the initiative in much of the politico-economic sphere to the national government. This, too, is part of the background to the current conviction, expressed in the consensus of the National Conference on the Judiciary, that the state judicial systems must be overhauled and modernized in order to redistribute the load of judicial services.  

Thus we come back to the matter of fifty-one chief justices, and the propriety of one exhorting the other fifty to put their houses in order. It may be asked at the outset, what the principal judicial officer in each of these states has been about in recent years. The answer may be found in such imperfect sources as the annual reports of state judicial councils and conferences, or the writings of individual jurists, or the observations of leaders in professional societies and scholarly agencies, or the work of the chief justices themselves in annual convocations.

The Conference of Chief Justices, organized in 1949, was intended to mobilize the common interests of the state judiciaries and integrate them into a systematic campaign for modernization. It is associated with the Council of State Governments, which is itself a clearing-house for information and programs among the several states and financially supported by them. Its godparent was the Section on Judicial Administration of the American Bar Association. Although it thus had auspicious associations from the outset, it has only been in recent years that the Conference has begun to work effectively toward improvement of judicial administration. This is because, from the latter 1950's to the latter 1960's, its energies were dissipated by the virulent ideological disputes which it precipitated among its members with reference to the trends of constitutional decision in the Supreme Court under Chief Justice Warren. In 1958 it adopted the resolution proposed by its special Committee on Federal-State Relationships as Affected by Judicial Decisions, which urged the Supreme Court of the United States to show greater self-restraint "by recognizing and giving effect to the difference between that

33 See Pringle, supra note 21.
which, on the one hand, the Constitution may prescribe or permit, and that which, on the other, a majority of the Supreme Court, as from time to time constituted, may deem desirable or undesirable."\textsuperscript{35}

Both before and after this 1958 resolution, the Conference had been agitated by the tenor of federal Supreme Court decisions on the so-called "Fifth Amendment cases" of the McCarthy era. But the issue which churned the waters into a fury was represented in the series of legislative reapportionment cases which began with \textit{Baker v. Carr} in 1962.\textsuperscript{36} In concert with the Council of State Governments and other affiliates of that agency, the Conference gave comfort and support, and much of its energy, to a surreptitious move to introduce proposals of constitutional amendment into Congress, which in their extreme form would have reduced the federal organization of the United States to a confederation analogous to the ineffective organization which had prevailed from 1781 to 1789. When this maneuver was exposed, the various "states' rights" groups with which the Conference had become thus entangled kept up a clandestine campaign to petition for a new federal constitutional convention, where extremists hoped to accomplish the same purpose.\textsuperscript{37}

This review of recent state-federal politics is pertinent as showing why the Conference of Chief Justices has not moved ahead more quickly on the business for which presumably it was organized. It is also pertinent as indicating the extraordinary tact which now must be demanded of the present Chief Justice in building a new bridge of communication and joint effort for the purpose of court reform. Finally, it is relevant in demonstrating the not-so-latent instinct for resistance to "creeping federalism" which various critics have discerned in the developing role of the Chief Justice as the leader of efforts at court modernization.

Meantime, however, there have been other laborers in the vineyard. Aside from the general professional services of the American Judicature Society, the pioneer organization in the field, there has been the work of a major research agency, founded in 1952 by the late Chief Justice Vanderbilt of New Jersey as the

\textsuperscript{35} See Swindler, supra note 27, at 230, 250.
\textsuperscript{36} 369 U.S. 186 (1961).
\textsuperscript{37} Swindler, supra note 27, at 324.
Institute of Judicial Administration. As this agency now completes its second decade, it can properly point to a long list of informative studies into the court systems of many of the states where it has been invited to work. Early in its history it helped to initiate a series of training seminars for state appellate judges. The National Association of Attorneys General—like the Conference of Chief Justices, an affiliate of the Council of State Governments—has offered a potential complementary program to that of the Conference, although like the Conference it was diverted from its primary purpose during the ideological furor of the 1950's and 1960's. The National Council on Crime and Delinquency is one of a number of special-interest agencies which have also appeared on the scene.

In a sense, the proliferation of these groups has created an obvious problem of coordination. The standard American response to such a problem has been to create yet another agency for that purpose, and this occurred in the early 1960's when the Joint Committee for the Effective Administration of Justice was established, under the chairmanship of that indefatigable and ubiquitous crusader for state and federal reforms, Mr. Justice Tom C. Clark of the Supreme Court of the United States (now retired). It would be fair to say that the piers for that necessary bridge to state-federal understanding were founded on the warm personality and broad practical understanding of Justice Clark; he is manifestly the latest in the line which extends from Pound in 1906 through Taft in 1922-25 to Vanderbilt in 1952. When the plans were first laid for the National Conference on the Judiciary—the largest assemblage of state judicial personnel in the nation's history—all who were responsible agreed that the key to its success lay in Justice Clark's assumption of the national chairmanship.

Out of that Conference, as has already been pointed out, an even more promising agency for coordination of efforts at state modernization has evolved. This is the National Center for State Courts, created in the summer of 1971 and now operational in several programs. One of its early objectives is the development

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38 Id. at 345.
39 See generally Frank, supra note 2.
of a site and a physical facility where representatives of these various organizations can permanently work together. Again, in the early stages of the National Center’s organization, there has been an articulate policy of avoidance of too-close identification with federalism, at the same time that it has been recognized that this National Center for the fifty states must and should cooperate regularly with its counterpart in the federal judicial system, the Federal Judicial Center.

One may discern, at this point in the evolution of a federal-state program of court modernization, both the things which need to be done in order to effectuate this program and also the hope that it may be possible to see that they are done. The emotional upheaval which resulted from the reapportionment and defendants’ rights decisions of the Supreme Court in the 1960’s has gradually subsided, although there are still some lingering prospects that a twentieth-century constitutional convention may be demanded. The crisis of the spirit which revolved about the Supreme Court from l'affaire Fortas until the disposition of the question of his replacement seems also to have passed, although some Court watchers are grumbling about judicial candor and logic. An olive branch was extended by the Conference of Chief Justices at its summer meeting in 1971, in the form of a resolution which “heartily endorse[d] the efforts of the Chief Justice of the United States to improve the channels of communication between the state and federal courts,” and specifically approved the Chief Justice’s suggestion of the previous year, that joint state-federal judicial councils be established.

In recent years, the Conference of Chief Justices has heard reports from several of its committees on matters of federal-state relations, e.g., the matter of post-conviction remedies, the criteria for establishing a division of jurisdiction between state and federal courts, and the problems of effecting a reform of the criminal law in the United States. In several instances the Conference’s committee has worked in formal or informal relation-

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ship with primary study groups, as in the case of the American Law Institute’s study of diversity jurisdiction, and in the case of the American Bar Association’s draft of Standards for Administration of Criminal Justice.\footnote{AMERICAN LAW INSTITUTE, STUDY OF DIVERSITY JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1968).} The Conference’s annual programs are usually focused upon current issues agitating the American public which have obvious repercussions for the legal system, as in its consideration of the matter of fair trial and freedom of the press in 1970, violence and the right to dissent in 1969, and the consequences for criminal justice of the renowned constitutional cases beginning with \textit{Gideon v. Wainwright}\footnote{372 U.S. 335 (1963).} which were debated in its 1968 meeting.

The agenda of most other national organizations in American judicature would be found to be rather similar to those of the Conference of Chief Justices. They are exchanges of experiences and information, rather than strategy sessions aimed at a specific schedule of concerted action; even the draft statutes agreed upon by the National Conference of Commissioners on Uniform State Laws are only recommendations to the respective states by their authorized representatives on the Commission. There is no requirement or assurance that the state legislatures will thereafter, or ever, take up the recommendations and propose their enactment—and, indeed, there is no assurance that the draft “uniform” law will indeed be uniform when and if it is enacted.\footnote{See Merrill, \textit{Uniformly Correct Construction of Uniform Laws}, 49 A.B.A.J. 545 (1963).}

In the final analysis—as perhaps was evident from the outset—a completely integrated program for court modernization in the fifty-one jurisdictions in the United States has no practical prospect of achievement in the sense that all will agree to undertake the same thing at the same time. Law reform, as Justice Vanderbilt once said (and he has been unfailingly quoted), is not for the short-winded. Persuasion, either by colleagues or by events, is the only hope for success in any particular phase of reform, and the process must be repeated for each succeeding phase. To illustrate: a completely unified court system may be the ideal, as it is for the American Judicature Society, but it may only come about in a specific state by piecemeal enactment—first for full-
time rather than part-time courts at the local level; then for merit selection of judges; then for a procedure for training, discipline, removal or retirement; then for a general plan of management techniques applied at both the trial and statewide levels; and finally, for a chief justice who is truly an effective head of the entire state court system.

It hardly need be added that a unified court system will not necessarily be identical in forms in each of the states in which it may ultimately be developed. Diversity among the states is not a problem—the problem of the twentieth century has been inaction and lethargy in the face of mounting pressures upon the existing judicial system. Even the atomistic tendencies deriving from the fact that fifty-one systems and fifty-one individual chief justices are involved, need not frustrate the efforts at general reform if there is some continuing and attention-commanding plan for such reform. Once more it comes back to the logic of circumstances which makes one out of the fifty-one the individual to command the attention and to focus it upon a continuing plan for reform.