STATE OF JUDICIARY ADDRESS, S. 2483

HEARING

BEFORE THE

SUBCOMMITTEE ON JURISPRUDENCE AND GOVERNMENTAL RELATIONS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SIXTH CONGRESS

SECOND SESSION

ON

A BILL WHICH WOULD REQUEST THE CHIEF JUSTICE TO ADDRESS ON A PERIODIC BASIS A JOINT SESSION OF CONGRESS ON THE STATE OF THE JUDICIARY

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STATE OF THE JUDICIARY ADDRESS, S. 2483

MONDAY, JUNE 23, 1980

U.S. SENATE,
SUBCOMMITTEE ON JURISPRUDENCE
AND GOVERNMENTAL RELATIONS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2228, Dirksen Senate Office Building, Senator Howell Heflin (chairman of the subcommittee) presiding.

Present: Senator Heflin.

Also present: Arthur Briskman, chief counsel; Doug Jones, staff counsel, and Linda Ashley, secretary.

OPENING STATEMENT OF SENATOR HEFLIN

Senator HEFLIN. The meeting will come to order.

Today this subcommittee begins hearings on Senate bill 2483, a bill which would request the Chief Justice of the United States to address on a periodic basis a joint session of Congress on the state of the U.S. Judiciary.

Under the Constitution the responsibilities for governing this Nation are divided among three coequal branches: the legislative branch, the executive branch, and the judicial branch.

Because of our attention to the business and duties of Congress, Members of the Senate and House are familiar with the intricacies and workings of, as well as problems facing, the legislative branch. Moreover, through various means and contacts, including the President's State of the Union message, Members of Congress are informed of the many programs and problems of the executive branch. In my judgment, however, Congress has given insufficient attention to the third coequal branch of government, the U.S. Judiciary.

Although there some numerous points of contact at the committee and subcommittee level with the judicial system, the Congress as a whole largely ignores the third branch until some crisis situation demands that we provide additional Federal judges or implement some reorganization so that the judicial branch may accomplish its constitutional mandate without being overwhelmed with important but time-consuming work.

At least a partial remedy to this situation would be for the leadership of the Congress to periodically invite the Chief Justice of the United States to appear before a joint session of Congress to inform the entire Congress as to the state of the Judiciary. Such address by the Chief Justice would not eliminate the need for congressional hearings

and oversight, but would focus the attention of the Congress and the Nation on the many problems which face our judiciary allowing us to set priorities and provide impetus to programs which require congressional action.

Recognition of the need and importance of a state of the judiciary address by the Chief Justice is not new. As far back as 1953, then Deputy Attorney General William P. Rogers made such a suggestion in an address to the Fourth Circuit Judicial Conference. In stressing the need for emphasizing to the people of this country the great importance of the judicial process in a free nation, Mr. Rogers stated that an address by the Chief Justice would "materially contribute to a better understanding among the three great branches of our government." Also, I would like to have inserted in the record at this point an article written by the Honorable E. Barrett Prettyman, Jr., a distinguished lawyer and author, that appeared in the May 1970, volume of the American Bar Association Journal.

[The article referred to above can be found in the appendix.]

Today's hearing will focus on the advantages and disadvantages of such an address, including the question of whether the address should be mandatory as opposed to the flexible approach taken in S. 2483 that allows a written address to the Congress in those years that the Chief Justice and congressional leadership feel it is appropriate. We also intend to examine today the experience of those State judiciaries whose chief judicial officer delivers a state of the Judiciary message to their respective State legislatures.

We are pleased to have with us today the Honorable Robert McClory, the ranking minority member of the House Judiciary Committee; Dr. Mark Cannon, Administrative Assistant to the Chief Justice of the United States; Prof. Leo Levin, Director of the Federal Judicial Center; Chief Justice Robert J. Sheran of the Supreme Court of Minnesota; and Chief Judge Robert C. Murphy of the Court of Appeals of Maryland. I want to welcome each of you to today's hearing. We are looking forward to your comments.

Our first witness will be the Honorable Robert McClory, Congressman from the State of Illinois, who is the ranking minority member of the House Judiciary Committee, and who has introduced a companion measure in the House of Representatives. I must say that seeing that he had introduced this gave me the idea to introduce it here in the Senate. Congressman McClory, we would be delighted to hear from you at this time.

STATEMENT OF REPRESENTATIVE McCLORY

Mr. McCLORY. Thank you very much, Judge Heflin. First of all, I want to say how important it is that you have brought your leadership and experience on the bench to this body, which is a tremendous advantage to have as far as the Senate of the United States is concerned. My observation of your service to date has been that you are contributing substantially to the work of the Senate and particularly the cause of the administration of justice. This hearing today is but another example of the kind of leadership that you are providing.

Mr. Chairman and members of the subcommittee, I appreciate that you have scheduled these hearings and your invitation to testify

on S. 2483, which is the bill that you have sponsored, to give the Chief Justice an opportunity to provide an annual address to a joint session of the Congress on the state of the judiciary.

As you have indicated, I introduced a similar bill in the House, which would make it mandatory on an annual basis that the Chief Justice would address such a joint session of the House and Senate. I would like to point out that I am not necessarily wedded to the approach of my bill. In fact, when I introduced the similar bill back in the 92d Congress in 1971, it provided for an address by the Chief Justice at his discretion, as your measure does. The important point here is the concept itself, and I will defer to the judgment and expertise of this subcommittee and the House Committee on the Judiciary as to the best manner in which to implement this concept.

Members of Congress are well aware of the criticism and controversy that surround the administration of justice. We have all heard the truism that "Justice delayed is justice denied," but delay and congestion in our Federal courts continue to be a problem.

Delay and backlog have most undesirable effects: witnesses give up in frustration after numerous canceled court appearances; jurors despair waiting endless hours. There is a very interesting article in the Sunday Post on that subject about a New York experience, I believe. Litigants often tire of long delays and elect to settle for less because they cannot wait for the court to act. Too often, congestion and delay become excuses for inaction rather than as focal points for reform.

It is the duty of Congress not only to improve and expedite Federal justice but also to initiate innovative procedures to assist the courts in handling their problems. Our overall purpose must be to quicken the pace of justice without impairing the quality of the judicial output.

This is just one important reason for my introduction of the measure requiring the Chief Justice of the United States to present to the Congress and the country a realistic appraisal of the state of the judiciary. Such an address by the Chief Justice each year would be proper and meaningful from a number of points of view:

First, it would be an effective and appropriate method for the head of one coordinate branch of the Government to report to the branch responsible for both its legislation and appropriations.

Second, it would provide an improved means for informing the public of problems in an area now largely removed from public view, thereby serving as an impetus for appropriate remedies.

Third, it would force the Federal judicial branch represented by the Chief Justice to face the deficiencies of that branch and to advance solutions.

Fourth, it would provide an opportunity to demonstrate the necessity for strengthening our Federal courts and our entire judicial system and their crucial role of maintaining an independent judiciary and in protecting society and human rights.

In addition to the subject of court delays and recommendations for expediting the administration of justice, a report to the joint session of the Congress could touch upon such crucial elements as judicial tenure and discipline, sentencing reform, witness-victim protection, creation of nonjudicial forums for adjudication of minor disputes,

court realinement and reform, adjustments of jurisdiction between State and Federal courts, juvenile justice, pretrial discovery, speedy trial management, and many other subjects.

I see no constitutional problem with the separation of powers between the legislative and judicial branches of Government. On the contrary, article III of the Constitution confers on Congress the authority to "ordain and establish" the lower Federal courts, and each year the Appropriation Committees of Congress consider legislation to fund all the Federal courts.

The Congress has created, by statute, the Judicial Conference of the United States, wherein we require the Chief Justice of the United States to summon annually certain lower court judges to a conference. In this same law we require the Chief Justice to submit to Congress an annual report of the proceedings of the Judicial Conference and its recommendations for legislation.

No one has suggested that this section of the United States Code is in violation of the separation of power doctrine. Indeed, anyone familiar with the function of this particular body realizes its importance to the Congress and to the effective operation of our judicial system. My bill would not, in any way, change what is presently being done under title 29, section 311. It would merely provide an address from the head of one of the coordinate branches of the Government to the branch responsible for its legislation and appropriations. I believe this approach would spotlight current and long-range problems in the administration of justice and motivate the Congress to more effective action.

Mr. Chairman, I urge prompt and careful consideration of this bill by the Senate and House Judiciary Committees. Thereafter, I would hope that the committees and the Congress will express their overwhelming approval.

I know that we have a very distinguished group of witnesses here this morning. I know that you are going to get some expert advice on what, if anything, to do about this subject. But I do feel that it would go a long way toward focusing public attention on what the needs are in the administration of justice. I think it would encourage more constructive action on the part of the Congress.

I am grateful to have the opportunity to testify on this subject.

Senator HEFLIN. Do you foresee any impingment on the independence of the judiciary by having such an address being made to the Congress?

Mr. MCCLORY. No; I do not see that there would be any dilution of its independence. I think that it might provide an opportunity for a closer liaison. There is a great criticism leveled these days of the judiciary in that they do legislate. Frequently we note in judicial decisions that they give as an excuse for nonaction the fact that this subject is not a subject for the judiciary but it is one for the legislative branch. I think that provides another opportunity for this legislation. It would give the judiciary a chance to speak directly to the legislative branch and likewise, in those areas where it is felt that the subject is not justiciable but more readily adapted to legislative action, to be able to report on that as well.

Senator HEFLIN. It is my understanding that we have had some similar bills introduced before. I believe that you recited that you had

introduced in prior years a similar resolution or bill to bring about this message. What, in your opinion, looking at it from a political viewpoint, has been the problem of getting this legislation passed?

Mr. McCLORY. I find that it is just a lack of public interest, a lack of initiative on the part of the members of the legislature, of the Congress. We tend to press forward with things for which there is the greatest public interest.

Like at the present time, we are facing a terrible dilemma with respect to what may happen in this election if the popular election results do not result in the election of a President. If that occurs and we find that the election is thrown into the House of Representatives for action, then there will be a tremendous interest in reforming the electoral college. I have a constitutional amendment proposal in now to reform the electoral college.

I find that many of these subjects just do not catch on at all at particular times. At other times they do. We seem to operate on the basis of crises. We are confronted with a crisis, and then we have to act precipitously; it is unfortunate.

I think this legislation is thoughtful. It is constructive. It can be useful. I think we just have to work on it. The fact that we have so much interest here today and we can generate some interest among the members of the bar shows it can move, and it should.

Senator HEFLIN. There have been voiced some opinions that if we had a state of the judiciary, the first one would be well attended by Members of Congress but there would be a danger that, unless there was something novel that was coming up at the time, you might end up with a great number of Senators and Congressmen being absent other than, say, Judiciary Committee members. This may be one of the reasons why it is felt that, rather than having it mandatory each year, the Chief Justice along with the leadership in the Congress could make a determination as to whether a personal appearance is or is not appropriate at any given time.

Do you foresee any danger that it could be ill attended and therefore embarrassing to the Chief Justice?

Mr. McCLORY. It could be. I agree that the first session probably would be well attended. Then I would judge that succeeding sessions would be well attended or not well attended depending upon how exciting the subjects might be.

For instance, if the Chief Justice were to report on the need for legislation to amend the patent laws with respect to patenting living organisms, I think that it might generate a big attendance. On the other hand, if it has to do with suggesting reforms in the jury system, the chances are that there would not be too much interest in that.

So, I suppose that it depends more or less on the subject. Chief Justice Burger is a very colorful person and I think he would attract a good attendance as long as he is there. He is that kind of a personality. There is a big attendance when he addresses the American Bar Association with his report on the judiciary each year. I would think that an annual address on the state of the judiciary would have substantial interest. I would hope so.

Senator HEFLIN. It has been suggested that, similar to what happens with the state of the Union address, tickets in the gallery are very difficult to obtain. I think Members of Congress are allotted one ticket for their wives for the state of the Union address.

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It could well be that the interested groups like bar associations, the American Law Institute, the American Judicature Society, the Institute of Judicial Administration, and even State organizations like the National Center for State Courts and the National College of State Judiciaries could be allotted certain tickets so that they could come to Washington to hear it. Normally when that sort of people come in, they go to see their Senators and their Congressmen. This would have within it a built-in effort for those Congressmen and Senators to be there.

The other thing is, if it were televised, then the issue of vacant seats might be embarrassing to Members of Congress.

Mr. McCLORY. Not the way we televise in the House.

Senator HEFLIN. Not the way you televise. That's right. I was thinking of it differently.

Mr. McCLORY. We never televise the seats.

Senator HEFLIN. I suppose that you just have to look at it over a period of time. I would think that, if there are certain days of the week when it is arranged and on those certain nights, if it is known and established, competing activities at night could be reduced. It would be calendared on the Senators' and Congressmen's day books as that which is coming up.

I think you would have to give some thought to that. While it might turn out to be embarrassing to the Chief Justice, it could be likewise embarrassing to Senators and Congressmen who were absent.

When the state of the Union is given, there are a number of other people that are invited: the diplomatic corps, the Joint Chiefs of Staff, as well as the Supreme Court and the Cabinet. Would there be an interest in having a corresponding invitation list to come hear the state of the judiciary message?

Mr. McCLORY. I rather doubt it. I think that the joint session would be more in the nature of a joint session such as we had when the astronauts returned from their first moon walk. For instance, former astronaut John Glenn was invited to make an address before a joint session. Or sometimes we have representatives of foreign governments come and address a joint session but in the absence of the foreign diplomats.

I think it would be more in the nature of that kind of joint session. It would just be to address the Congress, the legislative branch.

I think it would lend itself very nicely to television, which of course is one of the advantages. It would get this message out across the country. Of course, the Chief Justice now acquiesces in having his remarks televised, I understand, at the American Bar Association meetings. To the extent that it is covered there, it gets more than just the attention that the bar meeting does. Of course, the entire address would be covered in the joint session proceedings.

There are a lot of other uses for this, too. The televised sessions of the House of Representatives are now gavel to gavel on cable TV. They are preserved also for use on commercial TV and educational TV. I can see many, many advantages that could come from this televised session and the reproduction of it for many, many uses.

Senator HEFLIN. I am dealing more in some practical matters. You would have experience in this. I understand you do have other duties and other responsibilities this morning and are going to have to

leave. I do not mean to set a tone of these practical matters in the beginning. But, since your expertise is available here for the hearing and for the record, I am going into some practical problems which I normally would have deferred until later in the testimony after dealing with some of the issues and primary matters.

I foresee that you could have meetings of the Federal judiciary when, for example, all the chief judges of the various circuits would be present, when the Judicial Conference would be present. There is annually a meeting of the American Law Institute at which the Chief Justice also speaks. There are times when it could be arranged when there would be a number of people interested in the Supreme Court, in the administration of justice, that could attend a state of the judiciary address in addition to the members of Congress. It would be of benefit to them.

You do not have a meeting of all judges, as far as I know, in the United States at one particular time. Perhaps there is no need for it; you have circuit judicial conferences. But it seems to me you could have some sort of an arrangement where, at a particular time, in Washington there would be a constituency of Federal judges, of people interested in the American bar, which are interested in the work of the profession and the administration of justice. It could be arranged at an appropriate time, which could be very helpful in spreading the word and also insuring that a good attendance would be present.

Do you have any other comments or thoughts on this? I know as we go along you will. We want to keep the channels of communication open between the House and Senate.

Mr. McCLORY. I notice that the Supreme Court Historical Society has attracted a broad following from around the country. You and I were in attendance just a week or so ago at the annual meeting. It attracts a great many judges from around the country as well as lawyers and other interested parties. I think that this is just an indication of the attention that would be focused on the Supreme Court and on the entire judicial system through this kind of a presentation.

I suppose we merely have to explore it and perhaps experiment with it.

I would be inclined to feel that your approach to the subject, making the appearance discretionary and not mandatory, would probably be preferable. Then we could judge as to whether or not this would attract the kind of attention and support which I think is essential if it is going to be a successful new move. Then we could judge as to whether or not in a particular year a personal appearance would be better or whether just a report to the Congress would be preferable.

So, I leave it to your good judgment and your experience in the judiciary as well as here in the Senate. I think that is going to be extremely valuable in reaching an ultimate decision.

Senator HEFLIN. I think there is an underlying basic constitutional problem of having it mandatory. You could truly, in effect, establish a precedent by which the Chief Justice would be called to have to appear before Congress and could really undermine the independence of the courts. I think, therefore, it is important that we recognize that. If an unpopular opinion were to be written by the court to construe that Congress would call upon the Chief Justice to appear before Congress to have to explain a decision, it could undermine the true inde-

pendence that we have historically known in this country. It could become involved with the true problems of the separation of power.

I think by not having it mandatory and having it, in effect, at the acceptance would really be the appropriate way: the acceptance of the Chief Justice of an invitation to appear.

We certainly appreciate your testimony and your interest in this matter. Hopefully, we can keep in contact as this matter proceeds.

Mr. McCLORY. Thank you very much, Senator.

Senator HEFLIN. Our next witness is Dr. Mark Cannon, the administrative assistant to the Chief Justice of the United States.

We will have a panel which will include Mr. Leo Levin,Mr. Robert Sheran, Mr. Joseph Spaniol, and Mr. Robert Murphy. A panel allows for interplay and corresponding thoughts rather than we think it is to lump you together because we do not think that you deserve an individual forum. Over the years it has proven to be that sometimes panels can produce interplay without any formality. If someone wants to interrupt or raise a question, we find out that it develops better testimony and better information pertaining to this matter.

We are pleased to have you, Dr. Cannon. You are first on my list here. If you would, proceed with any statement or any thoughts that you might have.

STATEMENT OF MARK W. CANNON, ADMINISTRATIVE ASSISTANT TO THE CHIEF JUSTICE OF THE UNITED STATES

Mr. CANNON. Thank you very much, Chairman Heflin, both for this invitation as well as for the general interest that you have shown in assessing proposals whose intent is to improve the administration of justice.

I accept your invitation as an individual rather than as a representative of any institution or any other official. But, before I testify as an individual, and one who has had about the same number of years experience working in the Congress as in the judiciary, let me say that the Chief Justice has not requested personally to address the Congress and does not make that request at this time. However, he would, of course, cooperate with any invitation that Congress should determine was beneficial and of utility to extend.

During our constitutional history, there has been communication and coordination among the legislative and judicial branches on matters relating to the administration of justice, but communication has been ad hoc; and no mechanism has ever been institutionalized to focus Congress attention on this matter of common and important interest, the administration of justice.

I would like to make five general points.

The first is that your consideration of an innovation in interbranch relations fits in with calls of various scholarly groups in recent years for reexamination of interbranch relations and adoption of appropriate innovations. The National Academy of Public Administration has proposed the need for a new Federalist Papers-type study of the Government.

Several scholarly groups now are working, including Project 1987, relating to the bicentennial of the Constitution. Implicit in most, if not all, of these studies is the idea that not only the functions of but

the appropriate relations among the branches of Government could be reconsidered.

Senator HEFLIN. Dr. Cannon, if you do not mind, since Congressman McClory is still here and has to leave, and since a photographer is here, we will recess shortly to take a picture right now.

[Recess taken.]

Senator HEFLIN. Please proceed.

Mr. CANNON. The second point is that the common responsibility for many aspects of the administration of justice requires communication between the judiciary and Congress on these matters.

There is a backlog of problems that have been multiplying due to the litigious growth of recent years. The concern about these questions is shown not only by the present Chief Justice but his predecessor, Chief Justice Warren, who actually went so far as to say that the most important thing facing the judiciary was the problem of learning how to expedite cases for litigants who were having their rights damaged by delays.

The third point is that the need for interbranch communication does appear to be increasingly recognized by legislators. The first bill to have the Chief Justice address Congress was introduced in 1957 by Congressman Kenneth Keating, but it has been reintroduced on 12 ocassions since then. Senator Kennedy has commented:

> Too often in recent years, Congress has sought legislative solutions to judicial problems without adequate understanding of the complexity of the judicial branch of our government or the intricate relationships between its various parts.

At the State level, Chief Justice Burger recommended addresses by the State chief justices to their respective legislatures. When he made that suggestion to the Conference of Chief Justices in 1969. only Illinois had a written presentation of a message by its chief justice to the State legislature. Since then, about half of the State legislatures have begun to receive some type of message from their chief justice.

Another indication of congressional interest is the congressional response to the effort of the Brookings Institution to bring key figures in the three branches of Government together in three seminars on legislative problems on the administration of justice. They were addressed by people like the Chief Justice, the Attorney General, and other leaders in the field. The total attendance at the three seminars has reached 42 Senators and Congressmen, even though it requires that they spend approximately 3 days of their precious time.

The fourth point is that occasionally a question arises whether direct communication between the legislative and judicial branches on these matters conflicts with the doctrine of separation of powers. There appears, however, to be no authoritative statement nor any historical evidence that indicates that the Founding Fathers ever expected that there would be an absence of communication on matters of common concern to different branches of Government. To the contrary, there are evidences that they did expect communication. As Justice Jackson concluded:

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

From the early days of the Republic until 1935, the opportunity for Congress to hear what the justices thought about problems of judicial administration was fostered by the physical location of the Supreme Court in the Capitol Building.

Chief Justice Taft, who worked actively in the Halls of the Capitol and helped achieve enactment of the invaluable Judges Act of 1925 which expanded discretionary jurisdiction of the Supreme Court, also testified in 1921 before the House Judiciary Committee about the proposal to create what is now the Judicial Conference of the United States. Chief Justice Taft referred to his appearance as an opportunity. He told the House Judiciary Committee that, "I have always been and am now very much interested in rendering the Federal courts more efficient in the dispatch of business."

It is noteworthy that much of Congress rationale in creating the original Judicial Conference was to provide an organized means to obtain the views of the judiciary on legislation affecting the courts.

Chief Justice Taft's testimony was used as a precedent by a successor, Chief Justice Hughes, who also testified.

The fifth point is that, should Congress conclude that formal addresses by Chief Justices to joint sessions are useful, there appear to be three possible benefits that go beyond the existing methods of communication.

The recent increase in communications between the judiciary and Congress appears fruitful. I cannot help believing that the increased legislative activity on matters pertaining to Federal judicial administration has been nurtured by an increase in formal and informal communication. It also appears that the periods of accomplishment of many innovations in the structure and functioning of the Federal judiciary in the past, such as in the 1920's and in the 1930's, were periods of significant interbranch communication.

If these points are agreed upon, the question is whether there is still further benefit to Congress, the judiciary, and the public by adding one more form of communication: occasional personal appearances by the Chief Justice to Congress or, alternatively, written presentations. This is, of course, a question for the judgment of Congress. The potential benefits would include the following.

First, it would bring to the attention of a wider segment of Congress problems about the judiciary which could affect the work of committees other than the Judiciary Committee, which is now quite well informed itself.

Second, by giving problems of the administration of justice higher visibility, it would raise their level of priority. Generally, legislation pertaining to judicial administration only comes when court problems reach a crisis. This is partially because the problems fall between the cracks of sometimes uncommunicative branches.

Third and perhaps most important, it would help make the functioning of the judiciary more open and accessible to the public and bring the public more into the process of modernizing the judiciary by conveying directly the priorities seen by the official with major responsibility for judicial improvement. This would encourage greater debate about and response to proposed changes in judicial administration by individual citizens, editorial writers, and organized groups.

I close by again congratulating you for the serious thought and attention that you are giving to the most appropriate and desirable methods of dealing with the problems of justice in America.

Senator HEFLIN. Rather than going to a question period we will go ahead and call on Chief Justice Robert Sheran of the Supreme Court of Minnesota. I believe you are the president-elect of the National Conference of Chief Justices.

Before we hear from Mr. Sheran, without objection, we will insert Mr. Cannon's entire written testimony into the record.

[The prepared statement of Dr. Cannon follows:]

PREPARED STATEMENT OF MARK W. CANNON

Thank you, Chairman Heflin, for the invitation to testify before the Subcommittee on Jurisprudence and Governmental Relations on the important topic of communication between the Judicial Branch and the Congress. I accept your invitation as an individual, rather than as a representative of any institution or other official. But, before I testify as an individual, let me say that the Chief Justice has not requested to address Congress and does not request that now, although he would, of course, cooperate with any invitation from the Congress.

During our constitutional history there has been communication, and even coordination, between the Legislative and Judicial branches on matters directly relating to the administration of justice. However, although tentative and ad hoc relationships were periodically established for specific matters, no mechanism has ever been institutionalized to focus the Congress' attention upon a matter of important common interest to the Federal Legislature and Judiciary—improving the administration of justice. At the outset may I remind you that the American Bar Association instituted the practice of inviting the present Chief Justice to make an annual address reporting each year on problems of justice. The ABA has described this annual report as the Address on the State of the Judiciary.

VARIOUS GOVERNMENT OBSERVERS ARE CALLING FOR INNOVATIONS IN RELATIONSHIPS AMONG THE BRANCHES

In creating the innovative American system of checks and balances the Founding Fathers generally left open the methods by which the branches of Government communicate with and relate to each other on matters of common interest.

Rapid social and economic change has led to several recent initiatives to reexamine the proper roles and the relationships among the branches of our Federal Government. In 1975, the National Academy of Public Administration proposed the creation of a bipartisan "Bicentennial Commission on American Government," which would take a functional look at American Government in the spirit of the Federalist Papers. The Commission would carefully examine desirable relationships among the branches.

Several scholarly programs have already been started to celebrate the Bicentennial of the Constitution, including "Project '87," sponsored by the American Political Science Association and the American Historical Association. Implicit in most, if not all, of the studies being undertaken is the idea that the functions, as well as the appropriate relations among the branches of Government, be reconsidered in light of modern governmental needs along with Constitutional expectations and tradition.

THERE IS A NEED FOR COMMUNICATION BETWEEN THE JUDICIARY AND CONGRESS ON THE ADMINISTRATION OF JUSTICE

The backlog of problems from decades of deferred maintenance along with many new problems in our Federal Court system today suggests the importance of communication between the Congressional and Judicial branches of government. A decade ago, E. Barrett Prettyman, Jr., in an essay entitled, "The Chief Justice Should Address Congress," pointed out:

Not only does the Judiciary need explaining to the country as never before, but a new and frightening set of figures on the growth of litigation in the Federal Courts bears witness to the need for long-range planning and Congressional action.

The litigation explosion in Federal Court caseloads stems in part from the growth of Jurisdiction of the Federal Courts. Since 1969, Congress has passed at least 72 statutes conferring jurisdiction on the Federal Courts. From 1969 to 1979, District Court filings increased 69 percent while judgeships increased 29 percent. Courts of Appeals filings increased by 97 percent while judgeships increased by 36 percent. The increases in judgeships, moreover, were in sudden bursts after long periods of denial, creating logistical problems.

These massive changes led Chief Justice Earl Warren, as long ago as 1958, to say "Interminable and unjustifiable delays are today compromising the basic legal rights of countless thousands of Americans."[1] In 1968, Chief Justice Warren declared: "The most important job of the courts today is not to decide what the substantive law is, but to work out ways to move the cases along and relieve court congestion."[2]

The issue of expanding Federal jurisdiction was thoughtfully addressed in 1977 by the House Subcommittee on Courts, Civil Liberties and the Administration of Justice. Subcommittee Chairman Robert Kastenmeier, in a recent article, stated a conclusion of the Subcommittee: "The Federal Judiciary cannot be expanded indeterminably without impairing its high quality."[3]

The rapid growth of the Federal Judiciary has required modernized technological, organizational and administrative procedures. These sometimes require Congressional enactments and appropriations but, of course, these should not be made in isolation. This suggests that communication between Congressional decision-makers and those most versed with the proposed changes within the Judiciary facilitates effective decision making by Congress in addressing the needs of the consumers of justice.

THE NEED FOR INTERBRANCH COMMUNICATION APPEARS TO BE INCREASINGLY RECOGNIZED BY LEGISLATORS

There appears to be a growing awareness among members of Congress of the importance of increased communication between the Legislative and the Judicial branches.

Legislation to invite the Chief Justice to address the Congress annually was first introduced by Congressman Kenneth Keating in 1947, and has been reintroduced either as a bill or as a Concurrent Resolution on 12 occasions since then, by such legislators as Senators Bayh, Heflin and Kennedy and Congressmen Harris, Lowenstein, McClory, McCulloch, Purcell, and Schwengel. In introducing Senate Concurrent Resolution 22 in 1977, which would have invited the Chief Justice to address the Congress annually, Senator Kennedy commented:

Too often in recent years, Congress has sought legislative solutions to judicial problems without adequate understanding of the complexity of the judicial branch of our Government, or the intricate relationships between its various parts.

In introducing an earlier resolution in 1970, Senator Bayh commented:

An annual address by the Chief Justice might well allow the country its first realistic look at the state of its judiciary, pinpoint current and long-range problems, suggest solutions as well as areas of study, and motivate Congress to effective action. An address by the Chief Justice would tend to focus everyone's attention on the priority items.

Such a formal address—which would necessarily be brief—could be followed with a series of concrete and detailed proposals for consideration by the Congress.

The benefit of this type of formal communication is evidenced by State experience. The first State legislature to request a written State of the Judiciary Message from its Chief Justice was that of Illinois in 1965. State of the Judiciary addresses were urged by Chief Justice Burger to the Conference of Chief Justices in 1969. Since 1971, additional State legislatures have provided for messages from their respective Chief Justices. The number has reached 25, and this does not include addresses that State Chief Justices give to such forums as bar associations. I am sure Chief Justice Sheran of Minnesota and Chief Judge Murphy of Maryland will discuss the value of such communication with us today.

Another indication of Congressional interest in problems of the Judiciary was demonstrated by congressional response to the effort of the Brookings Institution

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[1] Earl Warren, "The Problem of Delay, a Task for Bench and Bar Alike," 44 A.B.A. Journal 1043, (1958).

[2] Fred P. Graham, "Warren, Justice 15 Years, To Seek Speed in Courts," New York Times, Sept. 30, 1968, p. 1.

[3] Robert Kastenmeier and Michael Remington, "Court Reform and Access to Justice: A Legislative Perspective," vol. 16 Harvard Journal on Legislation, p. 307 (1979).

to bring key figures in the three branches of government together in three seminars on legislative problems on the administration of justice. These have been held in 1978, 1979 and 1980. They were addressed by various leaders including the Chief Justice and the Attorney General. Even though the Conferences took two or three days of the scarce time of Senators and Representatives, total congressional attendance at the three Conferences was 42.

Widespread appreciation was expressed. Senator Thurmond wrote that "the sessions were interesting and challenging. I came away with a much better appreciation of problems facing the Federal Judicial system." Congressman Ron Mazzoli said he had never attended a conference where he obtained more useful information, and Chief Justice Burger has stated that he never obtained so much information about Congress problems.

Congressional interest in information about the work of the Court is evident in other forms. The desire for communication about problems relating to the judiciary is indicated by the kinds of questions various Justices have been asked in appearances before the House and Senate Appropriations Subcommittees and when they meet with Congressmen at receptions. These questions about judicial administration sometimes go beyond those pertaining to specific appropriations, evidencing the need for communication.

APPROPRIATENESS OF CONGRESSIONAL ADDRESSES BY CHIEF JUSTICES

Occasionally, a question arises whether direct communication between the legislative and judical branches on these matters conflicts with the doctrine of the separation of powers. However, there appears to be no authoritative statement nor any historical evidence that indicates that the Founding Fathers ever expected that there be an absence of communication on matters of common concern to different branches of Government. Each of our Government's branches must remain independent; but we should keep in mind that they were intended to be coordinate as well as co-equal. In fact, there is much evidence that the Founders expected such communication, as revealed in the debates of the Convention and in the policies of the Government in its early years, when many of the Founders held office. As Justice Jackson concluded:

While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.[4]

The resolution at hand is an expression of the interdependence between the branches of which Justice Jackson spoke. An appearance by the Chief Justice before congressional bodies is not without precedent. History contains varied examples of communication between the legislative and the judicial branches.

In the early days of the Republic, the opportunity for Congress to hear what the Justices thought about problems of judicial administration was fostered by the physical location of the Supreme Court in the Capitol Building. When the Federal City was laid out, the White House was located some distance from Capitol Hill, with a swamp in between. However, the judiciary was not only given four rooms under the Senate chambers, but Congressmen and Justices boarded in the same Capitol Hill boarding houses. The two groups worked in each others presence and socialized together. The Supreme Court chambers were in the Capitol until 1935. Most Justices opposed the move to their own building despite Chief Justice Taft's leadership in creating it. It has been stated that among their concerns was that the move would break down the communication between the Justices and the Congress since the Justices frequently lunched in the Senate Dining Room.

Testifying in 1921 before the House Judiciary Committee about the proposal to create what is now the Judicial Conference of the United States, Chief Justice Taft referred to his appearance as "an opportunity." At that time he told the House Judiciary Committee, that, "I have always been and am now very much interested in rendering the Federal courts more efficient in the dispatch of business." [5] It is noteworthy that much of Congress' rationale for creating the original Judicial Conference was to provide an organized means for the judiciary to establish and communicate to Congress its views on legislation affecting the courts.

Chief Justice Taft's testimony before various congressional committees served as precedent for his successor, Chief Justice Hughes, According to Merlo Pusey,

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[4] *Youngstown Sheet and Tube* v. *Sawyer*, 343 U.S. 579, 634, 635 (1952).

[5] Alpheus Thomas Mason, William Howard Taft: Chief Justice, New York: Simon and Schuster, 1964, p. 99.

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in his prize-winning biography on Hughes, Chief Justice Hughes and Justice Van Devanter had gone before a congressional committee to oppose a bill providing for immediate appeals to the Supreme Court from lower court orders restraining compliance with Federal laws:

While he rigorously eschewed any discussion of politics or policy-making, the Chief Justice felt that, if requested, he should give Congress any information

While he rigorously eschewed any discussion of politics or policy-making, the Chief Justice felt that, if requested, he should give Congress any information the about wor'. of the court that might save it from legislating under misapprehension." [6]

Other communications from Chief Justice Hughes to Congress are even more well known.

ADDRESSES OF THE CHIEF JUSTICES TO JOINT SESSIONS OF CONGRESS COULD PROVIDE THREE BENEFITS

I believe that the recent increase in communications between the judiciary and the Congress has been fruitful, and I cannot help but believe the increased legislative activity on matters pertaining to Federal judicial administration has been nurtured by an increase in formal and informal communication.

It also appears that the periods of accomplishment of many innovations in the structure and functioning of the Federal judiciary in the past, such as in the 1920s and the 1930s, were periods of significant interbranch communication.

If these points are agreed upon, the question is whether there is further benefit to Congress, the judiciary and the public by adding one more form of communication—occasional personal appearances by the Chief Justice to Congress, or, alternatively, written presentations. This is, of course, a question for the judgment of the Congress. It does appear to me, however, that it might enhance what is already being done in three major ways.

First, it would bring to the attention of a wider segment of Congress problems about the judiciary which could affect the work of Committees other than the Judiciary Committees. For example, most issues of Federal court jurisdiction are dealt with by committees other than the Judiciary Committees. Addresses to the entire Congress might lead to an increasingly careful and thoughtful approach to questions of Federal court administration.

Second, by giving problems of the administration of justice higher visibility it would raise their level of priority. Generally, legislation pertaining to judicial administration only comes when court problems reach a crisis. This is partially because the problems fall between the cracks of sometimes uncommunicative branches. Historically, with some exceptions, Congressmen and judges have not dedicated their energies to anticipating judicial problems, seeking advance solutions, speaking out about them and cooperatively resolving problems.

Third, and perhaps most important, it would help make the functioning of the judiciary more open and accessible to the public and bring the public more into the process of modernizing the judiciary by conveying directly the priorities seen by the official with major responsibility for judicial improvement. This would encourage greater debate and response about proposed changes in judicial administration by individual citizens, editorial writers and organized groups.

Thank you again for the invitation to discuss these issues with you, and congratulations for the serious thought and attention you are giving to methods of dealing with the problems of justice in America.

STATEMENT OF HON. ROBERT J. SHERAN, CHIEF JUSTICE, SUPREME COURT OF MINNESOTA

Mr. SHERAN. Mr. Chairman, particularly in my capacity as chairman of the State-Federal Relations Committee of the Conference of Chief Justices, I welcome this opportunity to appear and give testimony in support of the legislation being considered now by this subcommittee.

[6] Merlo J. Pusey, Charles Evans Hughes, New York: The Macmillan Company, 1951, p. 755.

Although we have not had an opportunity to present this matter formally to the Conference, I am confident, based upon 6 years of working closely with chief justices throughout the country, that the views that I am going to express here in support of the legislation would have the consensus support of that group.

Because we are confronted with an unavoidable fact, which is that in the last 10 years the volume of litigation coming into the court systems of this country, particularly into State court systems, has more than doubled, the support is there. We can speculate as to the reasons for the volume increase: The increase in crime, the urbanization of the population, the increased expectancy of people to access to our courts, the emphasis on consumerism, the emphasis on the protection of constitutional rights, and the creation by both the Federal Congress and State legislatures of new rights in such areas as the environment, for example. In the civil field there is the omnipresence of liability insurance and other forms of insurance, which tends to make the opportunity to litigate a practical reality.

Whatever the reason, we are determined to bring to the attention of the public and other institutions of Government the importance of being able to deal with these problems, increased though they may be, in effective ways.

Our view in this regard is buttressed, I think, when we reflect upon the fact that the Declaration of Independence itself declared that all men are created equal and are equally entitled to life, liberty, and the pursuit of happiness. If these noble objectives are to be achieved, the citizens of this country must have access to our courts, both State and Federal.

We have in mind that the preamble to the Constitution itself places in a No. 1 priority position as the purpose of Government in this country the establishment of justice. We cannot establish justice unless all concerned people are kept currently and acutely aware of the needs, the objectives, the aspirations of the judiciary.

What this means then is that both at the Federal and State level we must have a periodic assessment of the condition of the judicial system. For one reason, it helps us identify the problems with which we must deal, to fix the priorities with which we are going to deal with those problems, and to map out practical ways of bringing to bear the available resources on the identified problems and the solutions for them.

Equally important—and this is the subject that brings us together today—it is imperative that this periodic assessment of the needs of the judiciary be brought to the attention of the public, of the profession, and, perhaps most important of all, the legislative branches of government, both Federal and State.

It is significant, I think, that the attempts of the States to deal with the specific problem of whether or not the chief justice of the judicial branch should report at regular intervals to the legislature is of recent origin. Illinois was the first State where the chief justice presented a written report according to a constitutional provision about the state of the judiciary which was enacted in 1965.

The chief justices of Alaska, Colorado, and Michigan started delivering their state of the judiciary messages to their State legislatures in

1971; that is only 9 years ago. Other States—Florida, Georgia, Idaho, Louisiana, Maryland, Missouri, Montana, New Hampshire, North Dakota, South Dakota, Texas, Wisconsin, and Wyoming—followed shortly thereafter.

The chief justice in Connecticut was invited to deliver a message to the legislature in 1973 but, for some reason, the practice there did not continue.

In Texas, a statute enacted in the summer of 1977 constitutes an invitation to the chief justice of that State to deliver a state of the judiciary message at the commencement of each regular session of the legislature. Georgia, Louisiana, South Dakota, and Wyoming started the practice in 1977.

In our State of Minnesota, I have been invited since becoming chief justice, what will soon be 7 years ago, by the house of representatives to deliver a message from time to time but have felt that, when the time comes, it should be a message delivered to a joint session of the Senate and the House. I am hopeful that the joint invitation will be forthcoming in the not too distant future.

In the meantime, in Minnesota as in many other States, the annual message is delivered to the bar association, judicial conferences, and similar groups which tend to represent essentially the legal profession.

What are the comparative advantages and disadvantages of having this periodic assessment of the judiciary delivered to the public or to the profession or, as in the case of the bill under consideration, to the legislative branch?

With respect to the public, it is imperative, of course, that the public be kept informed concerning the needs, the requirements, the aspirations of the judiciary. But I think it is asking too much of the average citizen to address himself to the problems of the judiciary with the kind of care and with the modes of critical analysis that the situation requires.

The public should know but the method of delivering the message must be less amorphous than would be the case if merely a public broadcast from time to time by responsible authorities were to be made.

On the other hand, I think that an address to the legal profession through a bar association, for example, is, as I told the members of our bar association only this past week, too narrow. It is, of course, true that the members of the profession have a keen, constant interest in improving the judicial system. But factors of self-interest, factors of being too close to the problem sometimes, factors of not being adequately critical sometimes make this method less desirable than the perfect one would be.

I am convinced, based upon reflecting on this subject for a number of years, that the appropriate forum for a periodic assessment of a judicial system is in the legislative branch of the Government, because the legislature shares with the judiciary the responsibility of establishing justice as the preamble requires, of providing equal access to the courts, the objectives to which we are committed by the Declaration of Independence.

It is the legislature because, although it is not so great in numbers as to make it impossible to communicate effectively, it is nevertheless and by its nature is intended to be a representative microcosm of the country as a whole. So, when the message is delivered to the

legislative body, it is effectively delivered to the public generally, partly because of the nature of the membership of the legislative body and partly because the process of delivery to the legislative assembly dramatizes and brings quickly to public attention the matters of our joint concern.

Finally, the legislature not only shares a concern for the judiciary, but it has, and the framers of the Constitution intended that it should have, the power to do something about it. The Members of a Congress or a legislature are entrusted by our Constitution with the authority of allocating available resources to the advancement of purposes of government; and, because the power is there, the responsibility must follow with it.

What I have said to this point refers generally to the advisability of presenting a state-of-the-judiciary message to a legislative body, whether it be State or Federal. But there are particular reasons, I feel, why the Chief Justice of the United States should be invited to deliver such a message to the Congress of the United States. The Chief Justice is in truth not only the head of the Federal judiciary, but he is indeed the Chief Justice of the United States. By virtue of his office, he is in a position to bring public attention to focus nationwide on the problems of the judiciary, which are not compartmentalized between Federal and State but which indeed are so closely intertwined as to make the treatment of one aspect of the problem have necessary effect, unavoidable effect, upon the treatment of the other aspects of it as well.

A second reason why it seems to me that the Chief Justice of the United States should receive such an invitation is because the present Chief Justice has demonstrated such a keen interest in improving the judicial system of the country as a whole and the leadership that he has given in so many areas, for example, the Institute for Court Management, the National Judicial College, and the National Center for State Courts. These are indispensable institutions which have developed during the past 15 years to improve the processes of State court systems. They would not have come into existence and reached their present position of usefulness were it not for his leadership.

Finally, it is upon grounds of necessity, necessity that tells us that, unless the Chief Justice of the United States and the leaders of the judiciary generally work in the closest harmony with the leadership of the Congress, we will not be able to deal in effective ways with the problems of dispute resolution.

Until we do find methods of solving the increase of disputes making resolution necessary, we will be losing the creative geniuses the creative capacities of the people of our country who otherwise would be distracted by their inability to achieve justice in our courts.

[The prepared statement of Chief Justice Sheran follows:]

PREPARED STATEMENT OF CHIEF JUSTICE ROBERT J. SHERAN

My appearance before the subcommittee this morning is to express the support of the Conference of Chief Justices for S. 2483. A resolution supporting this bill can be anticipated when the Conference of Chief Justices convenes in Anchorage, Alaska next month. In the meantime, I am confident that, speaking as Chairman of the Federal-State Relations Committee of the Conference, I am expressing views shared generally by the other state chief justices.

In the past ten years, the volume of litigation coming to our courts, both federal and state, has more than doubled. The increase in crime; the movement of population to large urban centers; the heightened expectancy of people that courts will protect constitutional rights and, as well, newly legislated rights of the citizen as, for example, in the environment; and the omnipresence of insurance are factors which we think account for the increase. But whatever the cause, we know as a fact that the judiciary, as a separate and independent branch of the federal government and of the governments of each of the several states, must bring to public attention our concerns for justice.

We have in mind that the preamble to the United States Constitution itself specifies the establishment of justice as a prime reason for government's existence. Equal access to the courts is an imperative in a country which declared its independence upon the principle that all men are created equal and equally entitled to life, liberty and the pursuit of happiness.

At both the federal and state levels, periodic assessment of the condition and needs of the judicial branch of government is needed so that problems can be identified, so that priorities can be established, so that resources can be allocated in the most prudent ways. Through a state of the judiciary message, this periodic assessment must be communicated to the public, to the legal profession and, most important of all, to the legislative and executive branches of our tripartite governments.

In recent years, many state legislatures have invited the chief justice of the state to deliver a periodic message to the legislature. Illinois was the first state where the chief justice presented a written report about the judicial branch of government in conformity with a constitutional provision. This was in 1965. The chief justices of Alaska, Colorado and Michigan started delivering their state of the judiciary messages to their state legislatures in 1971. Since then, similar statements have been delivered to the legislatures of Florida, Georgia, Idaho, Louisiana, Maryland, Missouri, Montana, New Hampshire, North Dakota, South Dakota, Texas, Wisconsin and Wyoming.

The chief justice in Connecticut was invited to deliver a message to the legislature in 1973. In Texas, a statute enacted in the summer of 1977 served to invite the chief justice to deliver a state of the judiciary message at the commencement of each regular session of the legislature. Georgia, Louisiana, South Dakota and Wyoming started this practice in 1977. In other states, messages are presented to state bar associations, judicial conferences and representative civic groups.

In my view, a general public statement does not meet the needs of the situation. The public generally has a legitimate interest in and concern for an effective judicial system, but the "general public" is not in a position to take the action which may be needed to provide effective solutions to articulated problems. The legal profession and organized bar associations have a special interest in and a particular concern for the needs of the judicial branch of government, but while the legal profession can recommend and support measures for improvement, it cannot make the critical decisions for action based upon an objective assessment of the public welfare. Under our system of government, the appropriate body to consider a periodic address by the head of the judicial, as of the executive, department of government is the legislature.

Responsibility for the improvement of the administration of justice is one which the legislature shares with the judiciary. By its nature, a legislative body is a microcosm of the general public and reflects the diverse interests which must be considered where decisions of governmental policy are involved. It is to the legislative bodies of the federal government and the states that the framers of our constitutions have delegated the power and responsibility for resource allocation.

The comments which I have made apply generally to the need for periodic statements to the legislative bodies of the states as well as the federal government. But there are some compelling reasons why the interests of everyone would be advanced were the Chief Justice of the United States to be invited to deliver a message on the state of the judiciary to the Congress in joint session assembled. Under our Constitution, the Chief Justice of the United States has responsibilities which include not only the federal courts but state court systems as well.

Chief Justice Burger, currently serving as Chief Justice of the United States, has recognized this responsibility and has repeatedly demonstrated leadership in the many measures which have made it possible for state judicial systems to operate effectively during this recent period of great stress. He has, for example, given leadership in the establishment and maintenance of such indispensable institutions as the National Center for State Courts, the National Judicial College

and the Institute for Court Management. He is the acknowledged leader in the important national efforts now under way to improve the specialized capacities of the federal courts and to make state courts more available to everyone entitled to access to justice. Finally, the necessities of the situation are so urgent that the United States Congress is the suitable forum for focusing that level of attention to the problems of the judiciary characteristics of the times.

It is of primary importance that the judicial branch of government be preserved as an independent, vital, co-equal partner in government as envisioned by the framers of our Constitution whose wisdom in this regard has been proved by 200 years of experience. The adoption of S. 2483, we believe, will further this important objective.

Senator HEFLIN. Thank you.

The next witness is Mr. Leo Levin, Director of the Federal Judicial Center. Dr. Levin, we are delighted to have you.

STATEMENT OF A. LEO LEVIN, DIRECTOR, FEDERAL JUDICIAL CENTER

Mr. LEVIN. Thank you, Mr. Chairman. I am honored and privileged to be here and to participate in these hearings and to express my views in support of this bill.

As you well know and as I am obligated to note, the Federal Judicial Center speaks only through its Board. Thus, I am here representing only myself and giving my personal views.

After the eloquent, and indeed exceedingly rich, presentations of those who have already given their views, I will make my presentation exceedingly short.

The central point, I think, is simple. The Chief Justice, as the Nation's cheif judicial officer, should be provided opportunities to speak to the Nation about its court system. The major instance of that opportunity should be provided by the elected representatives of the people, the Congress of the United States.

The Congress is the body charged with legislative responsibilities directly affecting the courts and affecting the delivery of justice in this country and indeed, as recent legislative history has demonstrated, both within the Federal system and even more broadly impacting on the State systems as well.

As I try to develop in my statement, there is a long history, going back to President Washington and Chief Justice Jay, of soliciting informal statements of views from the Chief Justice of the United States for presentation to the Congress. This is all to the good.

Informal forums for presentation of a state-of-the-judiciary message are available on the contemporary scene, and they are well known: the ALI, the American Bar Association. I would like to suggest that these are no substitute for a formal presentation, whether in person or in writing, at the option and by arrangement between the leadership and the Chief Justice as a result of the invitation extended. It seems to me that this provides for a recognition of the importance of the problem and of the role of the Congress as well as the role of the Chief Justice in initiating suggestions. The prestige and the impact of such a presentation cannot be overestimated and underscore the significance to the country of problems of administration of justice and the availability of justice in fact to the citizenry of the United States.

In my statement I note one minor technical matter which perhaps may be a cause for a slight amendment in the bill as presented.

As is well known and has been earlier indicated, the Chief Justice serves by statute as Chairman of the Judicial Conference of the United States. In that capacity, he reports annually to the Congress pursuant to statute. But this report is not the same at all as that envisioned by the bill before us.

When he speaks for the Judicial Conference of the United States, a body representative of the whole Federal judiciary, his role is different. The scope and subject matter of the presentation is altogether different. The style, the tone, the impact are totally different.

To avoid any question at all, the addition of a clause, such as I suggest in section IV of my statement, might be useful.

Mr. Chairman, if I may just conclude with a word of appreciation for your leadership in the Senate in this whole field of judicial administration. We count ourselves the beneficiaries of your innovation, of your creativity in this area, and of your devotion to it.

I conclude as I began. I am honored to appear here in support of this bill. I would be pleased to elaborate on any of these points or to respond to any questions which you may have.

Senator HEFLIN. Thank you, sir. I appreciate your kind remarks.

The Chief Judge of the Maryland Court of Appeals, which is the highest court in the State of Maryland, is with us. We are delighted to have Chief Judge Robert Murphy with us.

Before we hear from Judge Murphy, without objection, we will insert into the record the written statement of Mr. Levin.

[The prepared statement of Mr. Levin follows:]

PREPARED STATEMENT OF A. LEO LEVIN

Mr. Chairman, my name is A. Leo Levin. I am the Director of the Federal Judicial Center, the federal judicial system's agency for research development, and continuing education. I am pleased to appear before this subcommittee this morning to present my views on legislation that would provide for an annual address on the state of the judiciary by the Chief Justice to the Congress, a message that could be delivered either in person or in writing.

As you of course know, the judiciary's position on legislation is within the province of the Judicial Conference of the United States. Furthermore, on matters of policy, the Federal Judicial Center speaks only through its Board. Consequently, the views I present to you this morning are my personal views and should not be taken as the official position of either the Judicial Conference or the Federal Judicial Center.

I would appreciate the opportunity to review briefly our national tradition of reports and remarks by the Chief Justice to wider publics other than the judiciary. I shall then turn to certain characteristics of the instant legislation that I find especially desirable. Finally, I would like to add a brief note concerning a technical amendment for your consideration.

I

It is well known and widely applauded that the current Chief Justice has every year since 1970 delivered what has frequently been styled a "report on the state of the judiciary." This address has been given to the American Bar Association, first at its summer meeting, and since 1975 at its mid-year meeting. Chief Justice Burger, like a number of his predecessors, has also taken advantage of other forums offered to him to provide his views as the Chief Justice of the United States on the problems, needs, and opportunities facing the judicial systems of this country. Although he has focused on the federal judicial system, he has also discussed state courts and other related subjects, such as the legal profession and the penal system.

It bears mention, however, if for no other reason than to provide perspective, that it is hardly a new concept that the nation's chief judicial officer should state his views on the needs of the judiciary, for the consideration of the Congress. The tradition goes back to the earliest days of our Republic. Indeed, as President Washington prepared his first State of the Union Message, he invited from Chief Justice Jay specific suggestions of "anything in the judiciary line" that might be relayed to Congress. Jay responded, on this occasion, with a variety of suggestions.

On other occasions, the entire court transmitted letters to Washington about problems with the early judicial machinery, letters that, as they intended, Washington in turn laid before the Congress. (Interestingly enough, this was the same Supreme Court that established the principle that the federal courts would not provide advisory opinions on specific legal problems. And, of course, there is nothing inconsistent about the two positions.) Such opportunities have, obviously, not been consistently available to chief justices throughout history, but these incidents make clear the early recognition of the desirability of some avenue of communication between the Third Branch and the Legislature.

In this century, chief justices have used a wide variety of forums to speak to the other branches of government, the profession, and the public at large about the state of the judiciary. Chief Justice Taft spoke frequently before such groups. In 1922, for example, before the American Bar Association, he urged support for legislation, then under congressional consideration, that established the first rudimentary mechanism for direction and management of the federal courts.

Chief Justices Taft, Hughes, Stone, Vinson, Warren, and Burger have all taken advantage of the American Law Institute's invitation to welcome members to its annual meeting. Chief Justices have used this forum to report on the business of the federal courts, and, more generally, to comment on the state of the American legal system. Earlier this month, for example, in his eleventh such address, Chief Justice Burger alerted us to the possibility that federal and state courts may be moving toward an unwelcome similarity in jurisdiction, even without our full awareness of the trend.

I might add, Mr. Chairman, that the leadership function of the Chief Justice of the United States has in recent years been paralleled by similar periodic reports by the chief judicial officers of various state judiciaries, where as we know, the great bulk of justice in this country is administered. Changes in the last decade in the courts of Alabama, Maryland, and Minnesota—for example—are testimony to the value of such leadership.

II.

I have described a well-established tradition that the Chief Justice of the United States should periodically address the major issues facing the federal judiciary and, more broadly, those facing the state courts and the justice system in general. Given this tradition, it might be thought superfluous to provide an additional, albeit official, forum for another such address by the Chief Justice on the state of the judiciary. I disagree strongly. This brief review of the history of such addresses suggests only that there is a strongly-felt need for a forum. It does not suggest that forums currently available are entirely adequate to the need or appropriate to the function. Such a view is no more plausible than the conclusion that because the President speaks frequently to the country there is no need for him to annually address the Congress on the State of the Union.

Certainly, if the Congress provides an official forum for a state of the judiciary address, this in no way means that the Chief Justice's opportunity to address the American Bar Association, the American Law Institute, or his fellow citizens on other occasions should be curtailed.

The underlying point is clear: The Chief Justice, as the nation's chief judicial officer, should be provided opportunities to speak to the nation about its court system and the major instance of that opportunity should be provided by the elected representatives of the people, the Congress of the United States. The Congress, moreover, is charged with legislative responsibilities directly affecting the courts and the delivery of justice in this country.

Standing alone, this proposition makes eminently good sense and is consistent with our very concept of a tripartite system of government in which the branches not only check one another but reinforce one another as well. There are other reasons, however, for such an address, prescribed by statute and delivered to the Congress as an official body. The most obvious, I think, is that the vagaries of American life mean that we cannot always be sure that appropriate non-official

forums will always be available to the Chief Justice. It is not necessary to recount in any great detail the somewhat strained relationship between the late Chief Justice Warren and the American Bar Association, which developed in the 1950s and culminated in Chief Justice Warren's resignation from that body late in the decade. I might add that his resignation came, purely by coincidence, only shortly after the Chief Justice had delivered to the American Bar Association a forceful appeal to the bench and the bar alike to improve the efficiency and effectiveness of our court system.

Happily, much has happened since 1958, and communication between the Chief Justice and the organized bar is both effective and sustained. It has led to a healthy cooperation, illustrated for example in the so-called "Pound Revisited Conference," sponsored jointly in 1976 by the American Bar Association, the Conference of Chief Justices, and the Judicial Conference of the United States.

Nevertheless, as a basic principle, bolstered by events of recent history, it seems to me quite wise to provide the Chief Justice an official forum, in addition to any others that might be offered, by which he may report publically the state of the judiciary.

III.

The proposal before the subcommittee is justified, foremost, by the soundness of the basic idea. An additional highly meritorious characteristic of the proposal is its flexibility. The demands on the time of our legislators are great, and they vary significantly depending on emergencies, the electoral process, and the like. Moreover, the needs and problems of the judiciary—the main subject matter of the address in question—will vary from year to year in both their intensity and their urgency. S. 2483 wisely directs that the Chief Justice and the congressional leadership confer each year to determine whether or not the address should be delivered in person or as a written address. Requiring an address in person when circumstances make an alternative form of presentation preferable would denigrate the occasion and tend to defeat its purpose.

IV.

As I indicated earlier there is one minor technical amendment that I might suggest for the Subcommittee's consideration.

The Judicial Conference of the United States, chaired by the Chief Justice, is of course the official body of the federal judiciary to initiate legislative recommendations and to respond to Congressional requests for advice concerning proposals put forth by others. The basis for this function is found in 28 U.S.C. § 331, which provides that the "Chief Justice shall submit to Congress an annual report of the proceedings of the Judicial Conference and its recommendations for legislation." The report mentioned presents the views of the Judicial Conference on the many legislative proposals referred regularly to the Conference, as well as those proposals developed by the Conference itself. The quoted provision, in fact, provides the basis for the Conference's day-to-day legislative clearance function, which involves in large measure technical and narrow aspects of the management and administration of the federal courts.

I think it would be wise to amend S. 2483 so as to differentiate the address that it would authorize, from the report required in 28 U.S.C. § 331, which reflects the work of the Judicial Conference of the United States and the Administrative Office on behalf of the entire federal judiciary. Should you think well of this idea, it could be accomplished, I submit, merely by adding to section 1 of S. 2483 the following sentence: "Such address shall be in addition to the annual report of the Chief Justice required by 28 U.S.C. § 331."

This amendment, I think, would be non-controversial and would serve the purpose of clarifying the intent of the statute and avoiding misunderstandings that could otherwise arise in subsequent years.

V.

Mr. Chairman, I have not submitted to you a long or detailed statement, because the legislation before us is relatively simple. The need for it is obvious, and its provisions are wise and prudent.

I should be pleased to answer any questions that you might have at this time.

STATEMENT OF HON. ROBERT C. MURPHY, CHIEF JUDGE, COURT OF APPEALS OF MARYLAND

Judge MURPHY. Thank you, Mr. Chairman. For the record, my name is Robert C. Murphy. I am the chief judge of the Court of Appeals of Maryland and, by virtue of the constitution of Maryland, I am the administrative head of the judicial branch of government in our State.

I am particularly pleased to be here, not only because it gives me another chance to see you in action, Senator Heflin, but to express my wholehearted support for the concept embodied in S. 2483.

In Maryland, we have some 8 years of experience with state of the judiciary addresses to our general assembly. We initiated the practice in 1972. I have delivered these addresses to joint sessions of the Maryland Senate and House of Delegates in 1973, 1975, 1977, and 1979. I am due again in 1981.

Parenthetically, I might say, at the request of the Maryland State Bar Association, I customarily give what I term a mini state of the judiciary message to that body at their annual meeting.

Like my fellow panelists, I think a state of the judiciary address, delivered by the head of the judicial branch of government, is indeed a valuable and most useful procedure.

In our several States, as in the Federal Government, the judicial branch is small and, as you well know, Senator, is not always well funded. While the press is quick to publish complaints about alleged malfunctions of the judicial branch, there seems to be less interest in explaining the needs and objectives of the judiciary and the problems that make the prompt and effective administration of justice more difficult. The public tends to be unaware of such matters, and this is also frequently true of legislative bodies, many of whose members are not lawyers or have no regular dealings with the judiciary.

The state of the judiciary address offers an opportunity to discuss these matters with the legislators who must, of course, provide the basic financial support for the judicial branch who are responsible for furnishing the judges and the supporting personnal for that branch, and whose legislative actions impact upon the judiciary in many other ways. A joint legislative session provides a forum in which a chief judge or a chief justice may define and explain the most pressing and fundamental needs and concerns of the judiciary.

He can, and usually does when afforded the opportunity, paint a broad and comprehensive picture which gives the legislature as a whole an invaluable background as it considers specific budgetary and other legislative proposals. This helps to overcome the somewhat fragmented approach to such matters that is inherent in the legislative committee system.

I have used the state of the judiciary address to emphasize the overall workload of our courts and the effect of this ever-increasing workload on the administration of justice. From this perspective, I have pointed to the need for specific procedural reforms, some of which must be obtained by statute; a sufficient number of judges to handle the caseload; improvements in methods of judicial selection and retention; adequate compensation for the judges and reasonable funding for the system as a whole; structural improvements in our court system; and the like.

Obviously, not all of my proposals are received with standing ovations. Some of them have met and will continue to meet with strong opposition. But at least I have the opportunity on behalf of the 204 judges in my State of giving my views and emphasizing the most critical areas of concern in a way that is far more effective than a written report which may often, and usually is, be put aside for later perusal, perusal that sometimes never occurs.

Discussion and debate are generated and because the media usually covers these addresses well, the public as a whole is given some insights into the problems and needs of the judicial branch.

In Maryland, we have not felt the need for an annual address to a joint session. We elect our legislators every 4 years, and I attempt to make an address to the first session of a newly elected legislature and to appear thereafter every other year. The president of the Maryland Senate and the speaker of the house of delegates concur in this approach but have always been remarkably cooperative, and I am sure they would agree to interim presentations if they were particularly important issues requiring such a procedure. To the extent that success indicates the appropriateness of this approach, at least in Maryland, I can report some good results in a number of areas which I will not take the time now to delineate but which are included in my prepared statement.

There is no statutory provision in Maryland for a state of the judiciary address. I might say that this was brought about in 1972 by a joint letter from the speaker and the president to the then chief judge of the court of appeals setting forth their view that a better understanding of problems of courts would provide a background for legislative cooperation in the solution of those problems.

The strong support of the legislative leadership in Maryland has made unnecessary any statutory provision, and I suppose that our 8 years of experience has now made this address some sort of a custom which is likely, I think, to be continued. That is not to say that the legislation that you now seek is undesirable in the Federal system, especially when efforts are being made to initiate the process. In any event, I repeat my support for the concept. It is a most excellent one, of real benefit not only, of course, to the judiciary but more fundamentally to the legislature and to our people.

It allows us to propose legislative initiatives and at least to participate in setting the agenda for legislative improvement of court administration.

Thank you.

Senator HEFLIN. Thank you, sir. I appreciate your testimony.

The Honorable Joseph Spaniol is here. He is Deputy Director of the Administrative Office of the U.S. Courts. I see you do not have any papers before you; but, if you would like to make some comments on this, we would be delighted to hear from you.

STATEMENT OF JOSEPH F. SPANIOL, JR., DEPUTY DIRECTOR, ADMINISTRATIVE OFFICE OF THE U.S. COURTS

Mr. SPANIOL. Thank you very much, Mr. Chairman.

That is correct. I do not have a prepared statement. I did not really expect to be here this morning, but Dr. Cannon asked me to come along in the event there were questions asked that I could be helpful with.

I would like to emphasize just one point, and that is the timeliness of this proposal. Two years ago, you will recall, Congress passed the largest judgeship bill in the history of the Nation. That judgeship bill was designed to make up for deficiencies in judgeship positions brought on primarily by increasing caseloads.

Yet, if you were to scan the many bills introduced in the House and Senate just during this current session of the Congress, I think you would find in a great many of them some provision having to do with judicial review. Sometimes these provisions provide for review in the district courts, sometimes in the courts of appeals.

It is quite obvious from this legislation that there is an interest in having the courts review a great many matters that are under consideration in the Congress. Yet, many of these bills are not before Judiciary Committees; they are before other committees of the Congress, both in the House and Senate.

Occasionally, these committees will request the views of the Judicial Conference or the judiciary on the judicial review provisions, but not always so; and I think it is probably a matter of oversight.

If we are to plan for the future on what the judiciary should look like 5 or 10 years from now, I think a device such as this, of having the Chief Justice address the Congress, would go a long way to helping the other committees of the Congress realize what impact some of these provisions will have on the judiciary and perhaps help the Judiciary Committees themselves plan for the future of the judiciary.

Thank you very much.

Senator HEFLIN. One of my observations as a freshman Member of the Senate, is that it is extremely difficult to communicate. It means to communicate with other Senators and to get somebody, in effect, to give you an audience where they will listen to you. We have debates on the floor and in the Congressional Record but unfortunately, a great number of Senators do not attend.

They have developed what is known as a Dear Colleague letter. The volume of Dear Colleague letters has increased to such an extent that it is almost getting to be a staff function to read Dear Colleague letters.

The media points out matters that are of interest. But, in a technical sense, when there are technical questions and professional matters which are complicated, the area of communication becomes more of a problem. It seems to me that a coequal branch of the Government, as separated from divisions within the executive branch, is entitled to a forum of communication where their problems are better known than the process that we now have.

Someone described the Congress as being a circus in which there were 100 rings and something different was going on in every one of them, and it was extremely difficult to find out and be knowledgeable about these matters.

It could well be that people would say: Well, if you give the Chief Justice an opportunity to speak, then you should also give the head of the Joint Chiefs of Staff; the Secretary of State; the Secretary of Defense, the Secretary of the Treasury, or the Secretary of Agriculture on equal forum.

To me, I go back to the coequal. I thought some of you might want to comment on that issue, the coequal status and the difficulty of communication.

Today we do have tremendous problems or communication in the Senate. In all candor, maybe there are people after you become knowledgeable and conversant. But, I as a freshman feel like that is one of the real difficulties that I have is how to get somebody to listen to me? I may have a point and want to put it over, but it is extremely difficult.

Occasionally on the floor of the Senate, if something happens when there are 50 Senators there, you have a great opportunity, and everybody says you better make your speech at that time.

I do feel that communications is an element that is essential. The coequalness and independence, there is a certain degree of aloofness that has to be practiced by the judiciary.

Those three factors taken together seem to me to make it appropriate for there to be some formalized message where there is an audience and where communications can occur.

If any of you have any comments on those. I think it is more peculiar than the other, than in the executive branch. Certainly the President has his message that he gives.

Maybe I have given my premise and did not ask any question. But if you have any comments on that——

Mr. LEVIN. Mr. Chairman, if I could indicate my agreement with these comments and just note one other thing. There are times when, in terms of the country as a whole—and, I suspect, at times within the Congress—one tends to underestimate the impact of the third branch of Government. Yet, if one stands back and one recognizes the impact on the whole social fabric of life in this country, it is not a function of numbers or a function of the size of the personnel. It is a function of the role.

Simply dramatizing that fact and dramatizing that for the Congress with the significance, the potential significance of even what might be considered in the eyes of some minor adjustments is terribly important.

The other thing is that the third branch of Government by tradition does not have the same opportunities for communication. One does not go out on the hustings. There are certain particular accepted forums, too much so in the professional groups, for the Justices of the Supreme Court, for example. If war is too important to be left to the generals, basic problems of judicial administration and delivery of justice should not be left simply to the legal profession.

So, I am in wholehearted agreement with both points. I think that they both indicate particularly significant reasons why this bill, if enacted, would have, I would like to hope, very salutary impact.

Senator HEFLIN. Dr. Cannon, do you want to comment on any of the remarks of the other witnesses that have testified? Are there any points that you would like to elaborate on about what they have said?

Mr. CANNON. I think the comments of the State chief justice's were particularly interesting. To get a little more flavor of how Chief Judge Murphy feels, this has greatly amplified the knowledge of the State Legislature of Maryland about what he, representing other judges of Maryland, feels are their major problems. That does not mean that in every case they agree, of course.

I agree very strongly with your comments about the difficulties of communication. Chief Justice Burger, when he was asked what

the biggest problem facing the courts was, in a U.S. News & World Report interview a few years back, said the difficulty of communicating the problems of the judiciary. So, he has seen it as you had when you were very successful in your communications in Alabama and were able to achieve major reform of the State courts there.

I was thinking of the time when I was working in Congress and how, in general, we never ever thought of the judiciary. I think this is a general condition. For example, in 1958 I worked on the creation of the Government Employees Training Act, which permitted executive branch employees under certain circumstances to take time off for training, with Government financing. Then, when I came to the judiciary, one of the first things we saw was the need for training of judicial personnel. I recollected that nobody had ever thought at all of even the possibility of including the judicial branch in that original act because nobody was even thinking about the judiciary. They are in a world by themselves, I think, in the minds of the average Congressman and the average staff member. So, we had to work out our own devices.

I just cite that as one illustration of the fact that there is a whole world of activity within the judiciary that, beyond the immediate members of the Senate and House Judiciary Committees, is largely not understood and not appreciated by the average Congressman and Senator. Yet, they have a general curiosity about it. By and large, I think they are interested in knowing more about it.

Senator HEFLIN. There seems to me to be, because of a lack of forum, problems in the judiciary that surface; and they attempt to find solutions. Those solutions run into political problems or they run into other problems, maybe internal problems in the judiciary. Their problems continue and grow worse. The solutions that have been offered did not meet the Congress acceptance, but the problems continues. Maybe a formalized speech which periodically reminds the Congress of these problems is called for.

An illustration of these problems is that a number of years ago people began to worry about the caseload of the U.S. Supreme Court, the number of cases that were selected for certiorari. I think the figures are now close to 5,000 cases filed in the Supreme Court annually. My recollection is that in the last term year 168 were accepted. The Freund Commission studied this and then the Hruska Commission, each coming up with a different solution to the problem.

Neither one of these solutions has thus far been acceptable to Congress. There have been differences. There have been objections, maybe some institutional objections where they perhaps may never be accepted.

The problem of the caseload of the United States continues. I think we can point with certainty that there will be no time in our foreseeable future an increase in the number of justices on the Supreme Court. But the problem of continuing caseload in the Supreme Court continues.

Obviously, with 168 cases selected out of 5,000 that are filed, there are a lot of cases that cry out for consideration.

I point this out as an illustration of a problem that continues, in my judgment, to get worse on caseload. I do not necessarily say that the Hruska Commission or the Freund Commission concepts were the

solutions. But it has now been a number of years since anything has been done about it. It just seems to me that, if you had, periodically, a state of the judiciary address, the problem could continue to be pointed out.

There may be better illustrations. Some of you may have more illustrations of something that has been hanging fire or, in effect, is a continuing and growing problem rather than the illustration that I have given. If you have such illustrations, I would like to hear them.

Mr. CANNON. Senator Heflin, I would like to elaborate on your comment to a certain degree. The Freund Commission, in addition to having the somewhat controversial major proposal that you referred to, also had another proposal; two of them, really. One was to eliminate three-judge courts; that took a long time to get congressional attention on and finally was partially resolved. The second was the elimination of much of the mandatory jurisdiction of the Supreme Court.

The thing that is interesting about this one is that, as far as I am able to ascertain, there is no opposition to it. It does not have controversy. It is one of the few things in which, when we proposed to the Justices of the Supreme Court that they all sign a letter, every one of them signed a letter. There is not one Justice who had any disagreement with the desirability of eliminating the mandatory jurisdiction insofar as possible to allow discretionary or certiorari jurisdiction to govern the court.

It is something that would save a certain amount of time of Justices and staff. It would be an important, modest contribution to letting them deal with their caseload better.

Yet, that was 1972. We are now in 1980 and we still do not have it.

There have been various problems that have arisen. Certain Senators have been gracious in trying to move this along. But it is an illustration of the fact that there are a variety of things that are needed that very often have no controversy or no opposition. But, with an additional dramatization of them by this kind of address, it might be that they would be moved into a higher priority position.

Let me elaborate my own perception on your point also on the question of an intermediate court.

I think it is very appropriate for Congress to move cautiously on a proposal that is that radical. At the same time, you do have a majority of the Justices of the Court who have expressed themselves in favor of this kind of a change; and many bodies of the type you have mentioned, as well as others, have recommended it.

It may well be that, if the problem gets worse and we do not find less radical solutions, this kind of problem would have to be dramatized, as would be potentially the case in a state of the judiciary address at the right moment. That might not be yet for 5 years or so. I think it would be appropriate to move very cautiously before the time really would come when it was important to really call for action in something as significant as that.

That would be an illustration of the device that could give high dramatization to that kind of a question and very possibly create a significant movement toward action.

Senator HEFLIN. Do any of you have any other illustrations of something that has been hanging fire for a long time and where

reminders through a formalized speech would be helpful in directing attention to them?

Mr. LEVIN. The diversity jurisdiction, Mr. Chairman, has been one which goes up and goes down. From the ALI report many years ago, by now well over a decade, it was quiescent for a long time, as you know, I think that may be another illustration.

Judge MURPHY. Prison overcrowding, at least in Maryland, and I am sure in many other States, is a very serious problem. It impacts very severely on the judiciary. It takes facilities to house prisoners.

In our State I pointed out in the last state of the judiciary message and devoted considerable time to the fact that over one-third of our prison capacity was over 100 years of age and had to be replaced. There is a reluctance on the part of many legislators to appropriate money for prisons. But we were under a court order and remain under a court order. We had a very, very serious problem and still do.

Early on in the general assembly session, we identified the problem. It received a great deal of media attention. I think as a result of that the legislators focused on it.

There is a tendency when, simply in committee hearings, somehow or other it may not be as serious. But, if you use a public forum such as the state of the judiciary address to speak about the problem, somehow or other it seems to take on a special urgency. And it did in that session. I think it was all for the good of the legislators. We are certainly better informed of the real problems, of the nuts and bolts problems. As a result, I think they legislated in light of that and, I think, more effectively.

Senator HEFLIN. Another problem that comes to mind is the question of postconviction remedies. This problem has been hanging fire in relationships between Federal and State judicial centers for a long while. Over the years, I have heard proposals, not to deprive anyone of a right but of a better system by which matters could be determined in an atmosphere of more efficiency than is perhaps used at the present time.

That is one that has been around for 7 or 8 years at least. Some attention to that in a state of the judiciary message could be helpful.

Mr. CANNON. I would just like to say that actually, without listing more specifics personally at this moment, we are just accustomed in the judiciary to having things take a long time, even many things that are not controversial. We always think back to the fact that we are more fortunate than were the justices of the last century, when courts of appeals were proposed in 1791 and enacted by Congress in 1891, exactly one century later.

Senator HEFLIN. Do any of you have any further comments?

[No response.]

Senator HEFLIN. We appreciate your coming and being here. I think we developed a good record on this. A number of staff representatives of the Senators on the Judiciary Committee have been present and listening today. Maybe we will plow some new ground and get something started.

Thank you very much.

The committee is adjourned.

[Whereupon, at 11:01 a.m., the committee was adjourned.]

APPENDIX
Additional Submission of Senator Howell Heflin

The Chief Justice Should Address Congress

by E. Barrett Prettyman, Jr.

Just as the President presents his "State of the Union" message to the Congress, so the Chief Justice should deliver a "State of the Judiciary" message before the same forum. Only in this direct fashion, by the appearance of the head of a co-ordinate branch of government before the Congress, can the vigor and strength of the federal judiciary be demonstrated and its problems and needs brought forcefully to the attention of the Congress and the public.

IN ADDRESSING the Fourth Circuit Judicial Conference in 1953, the then Deputy Attorney General of the United States, our present Secretary of State, William P. Rogers, made a suggestion that received too little attention at the time and deserves re-examination now. Toward the end of his talk, in discussing the necessity of fair treatment by the government of all its citizens, Mr. Rogers said:

> Somehow, we have failed to get this idea across to our people. For this reason, it seems to me it might be well for us to consider here tonight and in the days ahead a method of re-emphasizing to the people of the nation the great importance of the judicial process in a free nation. The work of the federal courts in this country has been outstanding. . . . But I doubt that the Congress and the people of the country fully appreciate the work of the federal judiciary. This might be a good time to consider a new and better way to see that this is done.
>
> With that in mind, I should like to suggest that Congress might well consider extending an invitation to the Chief Justice of the United States to appear each year before a joint session of Congress to report on the state of the federal judiciary. In this way both Congress and the public would be fully informed, from year to year, about the work and the progress of the federal courts of our nation. Such a plan, I think, might materially contribute to a better understanding among the three great branches of our government. For that reason, I believe that the initiation of it should deserve serious consideration.

At the time these remarks were made, there may have been practical —or political—reasons why the suggestion could not be carried out. Events since 1953, however, have proved the wisdom of his idea. Not only does the work of the judiciary need explaining to the country as never before, but a new and frightening set of figures on the growth of litigation in the federal courts bears witness to the need for long-range planning and Congressional action. It is time that the problems of our judicial system be presented, both to Congress and to the country, at the highest level.

As we enter a period of new leadership on the Court, I suggest we use the occasion for a number of innovative reforms and that the first be for the leader of the third co-ordinate branch of government to address a joint session of Congress each year on the "State of the Judiciary" in much the same fashion as the President presents the "State of the Union" to the same body.

Litigants Know Too Well the State of the Judiciary

While it is true that the President's address ranges over a wide variety of topics, from armaments to agriculture, and that the Chief Justice's talk necessarily would be more limited, anyone who imagines that the predicament faced by our federal judicial system is too narrow or unimportant to warrant an address of this kind simply has not become cognizant of the multiplying problems affecting a great mass of litigants in this country.

The caseload in the federal courts has reached an all-time high. Continuing a trend begun ten years ago, new filings in the courts of appeals increased again in fiscal 1969—12.4 per cent over the year before. For the first time, these appeals shoved above the 10,000 level. New cases docketed numbered 10,248, so that even though the number of cases disposed of increased (to 9,014), the pending caseload reached an all-time high of 7,849 on June 30, 1969. Both the number of appeals docketed and the number pend-

ing have more than doubled in just seven years. Although nine additional appellate judgeships were authorized in 1968, four of these were still unfilled at the end of fiscal 1969. Thus, whereas there were ninety appeals docketed per judge in 1967, the number rose to ninety-four in 1968 and 106 in 1969. The heaviest increase was in habeas corpus appeals for federal prisoners, which increased 55 per cent in a single year.

Until fiscal 1969, new filings in the federal district courts had remained fairly constant for a number of years. But that year the combined civil and criminal cases newly docketed rose to 110,778, an increase of 8.4 per cent over the year before. The cases disposed of increased to 103,932 (as compared with 98,365 the year before), but since this was still 6,846 less than the number filed, the volume of pending cases reached 101,091 on June 30, 1969—the highest pending case figure on record. In the criminal area, Selective Service Act cases alone were up 81 per cent, the largest number since World War II.

Of great significance to law and order is the fact that of 17,770 criminal cases pending at the end of the fiscal year, 3,521 had been pending more than six months but less than a year, 2,625 had been pending more than one year but less than two years, and the total number of cases pending more than six months had increased 30 per cent in a single year (although 40 per cent of these involved fugitive defendants).

Over-all, both the courts of appeals and the district courts faced an across-the-board increase in judicial business in fiscal 1969 of approximately 10 per cent. In spite of increased terminations, pending caseloads increased 19 per cent in the courts of appeals and 7 per cent in the district courts.

Myriad problems stem from these extraordinary caseloads. There are too few judges, too few courtrooms, too few supporting personnel. It takes too long to prepare transcripts and records. Delays in criminal cases directly affect the fight against crime as well as the fair administration of justice, and delays in civil cases make the cost and inconvenience of litigation virtually prohibitive in many instances. Jurors by the thousands sit for days with nothing to do. Although probation costs the taxpayer only 99 cents a day compared with $9.17 a day for confinement in federal institutions, far too few probation and parole officers are available to handle the 21,000 persons submitted for supervision each year, much less those additional men under confinement who are potentially available for release. Problems of bail, judicial disability, the protracted case and a hundred other subjects plague our courts.

I do not mean to imply that progress has not been achieved or that substantial changes are not taking place. On the contrary, new appointments and innovations constantly are being made, and dedicated men all over the country are striving for new and better answers. But neither the problems nor the answers are being brought into focus for the country and the Congress, and action has seldom been galvanized even in the face of emergencies.

An annual address to the Congress by the Chief Justice would give the country its first realistic look at the state of its judiciary, pinpoint current and long-range problems, suggest solutions, as well as areas for study, and motivate the Congress to effective action.

Judges Lose Time and Dignity Pleading with Congress

The present system of presenting these matters to Congress is both unbecoming and unproductive. Suggested changes usually emanate from a committee of the Judicial Conference. The conference, which meets in March and September of each year, is made up of the Chief Justice of the United States, the chief judge of each circuit, a district court judge elected from each circuit for a three-year term, the Chief Judge of the Court of Customs and Patent Appeals and the Chief Judge of the Court of Claims. If the committee recommendation is approved by the full conference, it is sent to the Administrative Office of the United States Courts. That office drafts a letter to the Vice President of the United States and the Speaker of the House of Representatives. The letter is signed by the Director of the Administrative Office and begins, "At the direction of the Judicial Conference. . . ." The Administrative Office thus acts as a kind of s retariat to the Judicial Conference.

The requests outlined in the letter are then assigned to the appropriate Senate and House committees. Administrative Office personnel work informally with the appropriate committee staffs in setting up hearings and agreeing upon appropriate witnesses to testify in support of the Judicial Conference's requests. The witnesses usually are the chairmen of the Judicial Conference committees that originated the requests, but the practice varies widely, so that anyone from a Supreme Court Justice to the chairman of a local bar association committee may end up testifying in support of a particular measure. A great deal of judges' time is expended in preparing for and attending these legislati hearings, and yet the testimony is s dom reported in the press unless the issue is one of high controversy.

On judicial matters, Congress needs not only direction but the impetus that comes from public scrutiny, for often the reaction of Congress to a judicial dilemma is too narrow to suit the circumstances. For example, the caseload figures already cited laudably led to a bill, S.952, that would create seventy new district court judgeships.[1] Although the bill would also establish circuit executives and district court executives who are urgently needed, it cannot supply the supporting court personnel—reporters, clerks, bailiffs, law clerks, marshals, probation officers and the rest—so essential to the proper administration of justice. The Judiciary Committee can authorize such personnel, but the funds can come onl from the Appropriations Committee. As noted in a 1967 Senate Report:

> In particular, the record of the 5-year period from 1959 to 1964 belies

1. The bill passed the Senate on June 16, 1969, and hearings have been completed in the House.

the suggestion that the mere creation of additional judgeships is an adequate bulwark against burgeoning judicial backlogs. During that period, a 25-percent increase in the number of Federal district court judges resulted in but a 3-percent increase in the total number of civil cases terminated.[2]

A later committee report brought these figures up to date: "Since 1959 there has been a 40-percent increase in the number of Federal district judges, but only a 9-percent increase in the number of civil and criminal dispositions."[3] Only the clout supplied by national support probably would produce the personnel necessary to dispose of the courts' current backlog and cope with the needs of the future.

Even such a relatively noncontroversial matter as the need for additional Supreme Court law clerks can become mired in the Congressional pond. In 1967 the Supreme Court requested eleven additional law clerks—one for each Associate Justice and two for the Chief Justice. The request was turned down in committee. The request was renewed in 1968. How was the Court forced to handle the matter?

The Chief Justice sent a letter to the appropriate subcommittee of the Senate Committee on Appropriations, and Justices Stewart and White then appeared in person before the subcommittee to plead their cause. They pointed out that the request represented only $97,500 of a $2,207,500 budget. They also noted that while the number of law clerks employed by the Court had remained the same since 1952, the Court's caseload during this period had grown from 1,368 to 3,412, an increase of 149 per cent, or more than double the original figure. The request nevertheless was rejected again in committee.

In 1969 Justices Stewart and White again traveled to Capitol Hill, reducing their plea this time to an additional nine law clerks. By now the Court's budget was up to $3,183,200, of which the added law clerk cost would represent only 3 per cent. The Court's caseload had risen to 3,586. The following is typical of the good-natured colloquies that resulted from the Justices' appearance:

JUSTICE WHITE. . . . The increase in the Court's work is comparable to that experienced in the lower Federal courts where the additional burden has been met through adding judgeships, 20 in the courts of appeals and 98 in the district courts, and through increasing the number of law clerks from 196 in 1952 to 453 at the present time.

MR. ROONEY. Did this committee do that?

JUSTICE WHITE. Yes, sir.

MR. ROONEY. We may be slipping.

JUSTICE WHITE. They probably asked for more. . . .

* * *

MR. ROONEY. I am now beginning to wonder if we did not make a serious mistake last year in giving 55 additional law clerks to the circuit courts.

JUSTICE STEWART. I am not trying to imply for one minute they do not need all the help they have. I don't think you made a mistake at all.

MR. ROONEY. I thought Judge Murrah made a good case last year.

JUSTICE STEWART. I am sure he did.

MR. SMITH. You are not proposing more judges for the Supreme Court?

JUSTICE STEWART. No, sir; because the work is organized differently. That might just add to our problems. We have enough problems with nine members in the Court.

* * *

MR. ROONEY. Few of those jailhouse written appeals and pauper cases ever succeed. Is that not the fact?

JUSTICE STEWART. I think the percentage is quite low, Mr. Chairman.

MR. ROONEY. That is a fair statement.

JUSTICE STEWART. But the work involved is quite high.

MR. ROONEY. It is a matter of reading. Some of those gentlemen are very, very fine penmen.

JUSTICE STEWART. Yes, they are, and very imaginative ones, also.

MR. ROONEY. Some of that script is very, very interesting. It would seem as though the gist of this argument is because we have all of these pauper appeals coming out of the jailhouses, very few of which succeed, we should give you nine additional clerks.

JUSTICE STEWART. That was not the gist of my argument, Mr. Chairman. The district courts and courts of appeals are inundated by these pauper cases as well.

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MR. JOELSON. Mr. Justice Stewart, did I hear that the Gideon case originated as one of these miscellaneous cases?

JUSTICE STEWART. Yes, sir. I pointed that out as one that was of great importance in the jurisprudence of the Nation, and that case originated with a half legible scrawl written from a prison in Florida.

While the numbers of meritorious cases are not large in terms of percentages, the importance of some of those cases is very great.

MR. ROONEY. Every once in a while one succeeds, so that encourages all the others to get busy.

JUSTICE STEWART. I am afraid that is true. . . .[4]

A graduate of Yale University (B.A. 1949) and the University of Virginia Law School (LL.B. 1953), E. Barrett Prettyman, Jr., practices law in Washington, D.C. He is a former Special Assistant to the White House, coeditor of Justice Robert Jackson's posthumous volume, *The Supreme Court in the American System of Government*, and the author of *Death and the Supreme Court*, published in 1961, which won awards from both the Mystery Writers of America and Scribes.

Levity for Congress, Three Clerks for the Court

The levity of these remarks—and heaven knows most Congressional hearings need this type of levity—should not obscure the fact that the basic method of proceeding is not ef-

2. S. REP. No. 181, 90th Cong., 1st Sess. 8 (1967).

3. S. REP. No. 262, 91st Cong., 1st Sess. 9 (1969).

4. *Hearings Before a Subcomm. of the House Comm. on Appropriations*, 91st Cong., 1st Sess. 8, 12, 13-14, 15 (1969).

fective. Incidentally, Congress pared the nine law clerks requested by the Court to three. The public is not informed of the Court's problems, nor is the Congress as a whole made sufficiently aware of them. The net result is an embarrassing and frustrating turndown for the Court on what surely should have been a routine request.

The problem of law clerks is not one only for the Supreme Court. As Chief Judge Clement F. Haynsworth, Jr., of the Fourth Circuit pointed out to the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee in 1967, the need for more law clerks in the courts of appeals began to be felt as far back as 1964. The discussion between Judge Haynsworth and Senator Tydings says a great deal about why a presentation to Congress by the Chief Justice would have been very much in order on this and other subjects:

> JUDGE HAYNSWORTH. . . . [I]f we, in the field, recognize the need for more clerks, our request must first go to Judge Levin's committee, and if this request is submitted in the fall, even though his committee approves it and the Conference approves it, it can't get into our budget request until the second fiscal year next after that; there can be a delay of almost 2 years in the process. But what is worst of all, we in the field don't know what to ask for until we are in a condition of extremity. . . .
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> . . . I really think the fault lies as much with the judges, because they haven't known what to ask for and what to insist upon. What we do is to come in and ask for help on the basis of last year's work load. . . . This puts us way behind the present need. . . . As of now, I could say to you that I believe that the trend of the increasing loads will go on, but I can produce no factual data to support a reasonable projection of what the caseload will be next year. And yet I think the courts should come to you on the basis of a reasonably supported projection: this is what we will have next year. . . .
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> SENATOR TYDINGS. It seems to me that the Judicial Conference is approaching Congress on these matters from the wrong position. It should approach the Congress on the basis of what judges require to do the job, and not on the basis of what they think the Appropriations Committee will give them. This timidity on the part of judges, including Justices of the Supreme Court—"don't ask for too much, or you will ruffle the Appropriations Committee"—while the backlog continues to mount is not helpful. I think that the Judicial Conference has the responsibility to the people of the country to attack this problem of backlog.[5]

Chief Justice Could Forecast the Decades Beyond

I would agree with Senator Tydings about the timidity of judicial pleas for help and with Judge Haynsworth about the need for basing requests to Congress on forecasts rather than hindsight. But the answer to both would be a well-constructed, well-supported, forceful and public presentation to the Congress that the country as well as congressmen could evaluate. Nor should the Chief Justice be restricted to the needs and problems of the immediate future; he could forecast the years ahead, the decades beyond, and offer suggestions for basic changes that would help meet the needs and obviate the problems.

The Chief Justice should not restrict himself to such mundane topics as law clerks. His address could range over as broad a field as the courts encompass. The entire problem of criminal sentencing, for example, seems ripe for review. Programs for referees in bankruptcy and probation officers might be proposed. The issue of multidistrict cases still has not been resolved finally. The Chief Justice might support a type of certiorari plan for the courts of appeals in postconviction applications, or the subpoena power for circuit councils. Even a partial list of the table of contents of a recent Senate report indicates the extremely serious and wide-ranging nature of its recommendations, all of which might be commented upon by the Chief Justice: United States commissioner system; federal jury selection legislation; appellate review of sentences; omnibus judgeship bill; a national law foundation; administrative reforms in the federal courts; the Federal Judicial Center; preventive detention; judicial disability, retirement and tenure.

The Extraordinary State of Some Jurisdictions

Not all issues in the address, however, would have to be national in character. In some instances, the Chief Justice might deem it wise to consider extraordinary problems relating to a single jurisdiction. By way of example, in the spring of 1967 it became apparent to Chief Judge Edward M. Curran of the United States District Court for the District of Columbia that, because of a variety of circumstances, the court's criminal caseload had reached epidemic proportions. In January of that year, 1,086 criminal cases were pending, 400 more cases than on the same date the previous year, and by July 1,400 criminal cases were pending, with 1,091 in a triable status. Chief Judge Curran contacted the chief judge of the circuit, who in turn wrote to the chief judges of all the other circuits. The net result was that by May, 1968, ten visiting judges from other circuits had been assigned to the District of Columbia Circuit to sit for various periods, despite the fact that too few courtrooms and quarters were available to them. In that same month, Chief Judge Curran took time from his busy schedule to testify at length on his predicament before a Congressional subcommittee and to recommend the creation of a new felony court for the District of Columbia.

Situations of this sort, unfortunately, are not unique. In Brooklyn during 1968, for example, the time lag between indictment and completion of trial was twenty-two months. Therefore, even though the problem at any one time may appear to involve only a single jurisdiction, the Chief Justice might well want to make his views known to the entire Congress, either in relation to specific situations or concerning the entire predicament.

In some instances, the Chief Justice might even range outside the federal system. For example, Judge Henry N. Graven testified before a Congressional subcommittee:

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5. *Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 213 (1967).

> In some districts there appears to be a connection between State court congestion and Federal court congestion. Where the State courts are particularly congested the attorneys may tend to bring their cases in the Federal court wherever possible. . . . It would seem that relief of congestion in the State courts in the New York City area would tend to relieve the congestion in the southern district of New York.[6]

It was this type of argument that resulted in the introduction by Senator Tydings in both the 89th and 90th Congresses of the National Court Assistance Act, designed to help state courts develop new methods of judicial administration to cope with rising caseloads and backlogs. An amendment was added to allay fears that the Office of Judicial Assistance proposed by the bill would interfere unduly with the states' administration of their own courts. Nevertheless, the bill was rejected by the Conference of Chief Justices and finally was dropped by Senator Tydings's subcommittee. The entire interrelationship between state and federal judicial problems might well be probed by the Chief Justice in his address to the Congress.

The question of which subjects may properly be commented on by the Chief Justice and which should be left for Congressional determination is a delicate one, and some mistakes may be made. But this problem is inherent in the present system, and if the Judicial Conference is going to concern itself with a certain subject, there would seem to be little reason for hiding this fact by not allowing the Chief Justice to report on the results of the conference study. The problem is not whether the Chief Justice should address Congress on the subject but whether the judges should have taken up the subject in the first place.

A Proper Subject for Support That Luckily Stood on Its Own

An example of perfectly proper support for a pending bill would have been the Chief Justice's espousal before Congress of the Federal Judicial Center. In 1966 the Judicial Conference unanimously adopted a resolution authorizing the Chief Justice to appoint a committee to study the possibility of such a center. That committee, under the chairmanship of retired Associate Justice Stanley Reed, reported favorably to the conference in March of 1967, and the conference in turn unanimously approved the report. S. 915 was introduced in Congress to establish the center, which was to go beyond the mere need for judges and act on a wide range of court problems, including methods of docket and calendar control, the expeditious handling of cases on appeals, the geographical organization of our entire federal court system, etc. Fortunately, the bill was passed and became law.[7]

Chief Judge John R. Brown of the Court of Appeals for the Fifth Circuit has described to a Congressional subcommittee the frustrations involved in supporting this type of legislation:

> I know there are four or five [judges] from the Fifth Circuit that have been writing letters every year. We haven't expressed ourselves as forcibly as we should. But this demonstrates the need for a planning agency. We keep talking—the Chief Justice makes speeches to the American Law Institute, and every time he gets up to make a speech he says: "We cannot meet the problem by adding more and more judges." I said it, you said it, and I think the President said it. But it is like Mark Twain and the weather, nobody does much about it.[8]

If the need for the Federal Judicial Center was so pressing—and it clearly was—the Chief Justice should have been addressing his support to the Congress rather than to the American Law Institute. That such support, properly presented, can be meaningful is demonstrated by the fact that without it, the National Court Assistance Act and the proposal for a National Law Foundation both died in the 90th Congress and have not been revived in the 91st.

An address by the Chief Justice would not eliminate the necessity for Congressional hearings or do away with the appearance of witnesses or the presentation of supporting data. But in much the same way that a prehearing conference can eliminate some issues and narrow others, an address by the Chief Justice would tend to focus everyone's attention on the priority items and provide an impetus for Congressional action. It would, in short, turn the flashlight into a spotlight.

When I originally made this suggestion in a brief article in *The Washington Post* of January 4, 1970, the paper editorialized that the idea was a "useful" one and that the judiciary needs more of a voice than it has had in th past. The newspaper thought, however, that without waiting for Congress to issue an invitation to the Chief Justice, the Judicial Conference itself should submit an annual "State of the Judiciary" report that would be as influential as the Joint Economic Report or the findings of top-flight Presidential commissions.

But this sort of annual report is already in existence and has been for many years. It is issued by the Administrative Office and ran to 319 pages in fiscal 1968; it deals with many of the problems I have discussed, and most of the figures I have cited were derived from it. Yet the fact is that the report is virtually ignored by everyone except one or two Congressional subcommittees and those who are already pressing for reform.

A Report Must Bask in Someone's Sun

A report does not become "influential" simply by being designated as such. It becomes influential by the nature and quality of the people who present it, the people who receive it and the forum in which the presentation is made. If influence is what is needed—and I think it is—surely an address by the Chief Justice is the more direct and natural way to achieve it.

Some congressmen agree. Following publication of the *Washington Post*

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6. *Hearings Before a Subcomm. of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. 188 (1968).

7. 28 U.S.C. §§ 620-629. The center, of which former Justice Tom C. Clark is the director, already has had a favorable impact on the administration of justice. For example, it has induced five federal district courts in large metropolitan areas to change from the master calendar to the individual calendar.

8. *Hearings on S. 915 and H.R. 6111 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 219 (1967).

article, Senators Birch Bayh and Edward Kennedy and Congressman Allard Lowenstein introduced concurrent resolutions inviting the Chief Justice to address a joint session of Congress. In addition, the American Bar Association has asked the Chief Justice (and he has accepted) to speak at the annual meeting of its House of Delegates on the needs of the judiciary. This latter course, although helpful and much to be recommended over no forum at all, will not receive the wide attention that would necessarily attend a speech presented to Congress.

An address by the Chief Justice to the Congress each year, or at the commencement of each new Congress every two years, would be proper and meaningful from a number of standpoints. It would be a dignified approach from the head of one co-ordinate branch of government to the branch responsible for both legislation and appropriations. It would inform the public of problems in an area now largely hidden from public view, and so it would furnish impetus for appropriate remedies. It would force the judges to face the failings of their system and to evolve new ideas for dealing with them, and then provide them with an appropriate forum for the expression of those ideas. And, as Mr. Rogers pointed out sixteen years ago, it would provide an opportunity to demonstrate the extraordinary vigor and strength of our federal courts, the absolute necessity for an independent judiciary and the all-important role of the judicial branch in protecting society and human rights.

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