Judges and Legislators: A Prospectus for Joint Venture

Address of Circuit Judge Frank M. Coffin
of the United States Court of Appeals for the First Circuit
to the Conference on Legislative-Judicial Relations
Denver, Colorado October 2, 1989

I congratulate the dreamers and sponsors of this Conference for conceiving and carrying out the idea of bringing together the two law-making branches of state government to explore the opportunities for collaboration in a system of separated powers. This harbors a mighty potential for symbiosis. I say "constructive," because "symbiosis" is defined as "the relationship of two or more different organisms in a close association that may be but is not necessarily of benefit to each." I most assuredly distinguish this from "parasitism" in which one organism preys upon the other, and "antibiosis," an association between two or more organisms that is injurious to one of them.

Let me begin with a bit of background. I suspect your organizers chose me to address you because of an article I wrote for the Brookings Review in the Spring of 1986 -- Federalist No. 86. The original Federalist, that amazing collection of essays by Alexander Hamilton, James Madison and John Jay explaining the new Constitution to the people of this country, ended with No. 85. As I reflected on the ecosystem in which I lived, I found it dominated by the state of relations between the Congress and the federal judiciary which left something to be desired. I looked in vain to the Federalist for guidance. I then decided to try to say what Hamilton and company would say if they could observe us after two centuries. In No. 86 I characterized the difficulty, ambiguity, and narrowness of communications between these two branches and the real or fancied adverse impact of one branch's actions on the other as "if not an acute crisis ... a chronic, debilitating fever." I described some of the areas of estrangement which seemed to call for, not massive constitutional overhaul, but more modest fine tuning adjustments. Events subsequent to this article have included a colloquium of judges, Members of Congress and scholars sponsored by the Brookings Institution and the Governance Institute; a book, Judges and Legislators: Toward Institutional Comity," containing the papers prepared for the colloquium; and a workshop sponsored by the Governance Institute on standards and guidelines which should govern interbranch communication. Two more workshops are to follow -- one aimed to elevate the levels of crafting and interpreting legislative history and the other at ways and means to achieve better cooperation in discrete fields.

I now see the need of a sequel to the Federalist No. 86 -- to address the functioning of the federal system as a whole, the similarities and differences in relationships between state and national judges and legislators, and the effect of achievement in one area upon the other. The underlying concept is that the federal system is like a tree, the national branches in the spreading crown being a rough mirror image and dependent upon the nourishment of a vast and varied root structure of fifty state governments.

The essence of this federal formula for symbiosis, as far as our courts are concerned, was concocted just after the Constitutional Convention of 1787. The states under the Articles of Confederation really did not contribute much to our understanding of separation of powers; although state constitutions boldly proclaimed Montesquieu's doctrine, the practice often belied the principle. The Constitution timorously dodged the issue. It said: there shall be "one Supreme Court, and . . . such inferior Courts as the Congress may from time to time ordain and establish."

They could be either the existing state courts or new federal courts. In the cauldron of the campaigning for and against ratification of the Constitution, the arch anti-Federalists, such as Luther Martin of Maryland and the pamphleteer Brutus, painted livid portraits of the dangers of a distant national judiciary riding roughshod over state litigants. Their gospel was the lack of any need for inferior federal courts. Those espousing such were either the greedy larger states or the "monarchy men" who wished to abolish state government.

These volleys were not to be taken lightly. Hamilton, responsible for both Federalist Nos. 81 and 82, responded rather creatively. In No. 81, while underscoring the need for federal courts for reasons of impartiality and independence, he made the interesting proposal that the federal judges "with the aid of the States' judges, . . . hold circuits for the trial of causes in . . . the respective districts." This idea foundered on the variations of tenure and a supposed conflict in judicial oaths. In No. 82, he described the concurrent jurisdiction of state and federal courts in the strongest terms: "[T]he national and state systems are to be regarded as ONE WHOLE. The courts of the latter will of course be national auxiliaries to the execution of the laws of the Union . . . ."

Fleshing out the federal system continued. In a special Senate subcommittee, Senator Strong of Massachusetts effectively shot down the anti-Federalist proposal to make the state courts the "inferior courts" called for by the Constitution. His clinching argument, ironically, was to cite Patrick Henry's success in Virginia in getting legislation disqualifying state courts from entertaining causes arising under the laws of the Union. That violent anti-Federalist was hoist by his own petard. But the federal courts were given a sharply circumscribed jurisdiction: admiralty, diversity and treaty rights cases. Not until 1875 did they receive general federal question jurisdiction.

Moreover, the full Senate committee made its first decision the "localization" of the federal judiciary by, first, creating district courts with coterminous state boundaries and giving district judges a role in circuit court decision making, and, second, requiring that the laws of the states be the rules of decision unless they conflict with the Constitution or a federal statute. Professor Goebel says of this: "[T]he solution was brilliant in its conception of bonding federal jurisdiction to extant American law in all its diversity." I might add, not without self interest, that Madison in debate on the subject of judicial salaries, pointed to the need for federal judges to make a "new acquisition of legal knowledge" about the laws of every state as a separate justification for adequate compensation.

In short, a system had been originated which was, as Hamilton wrote, "one whole," each part being bonded to the other, influencing and being influenced by the other. For almost two decades, in over 250 state judicial opinions, we have seen the emerging significance of state court interpretations of state constitutions which have accorded greater protection of individual rights than the minimum requirements set by the Supreme Court. And now you are probing the prospects of improving relations between state statute makers and case law makers. Is this another field where state initiative can lead the way?

It seems to me that the problems faced by federal and state judges and legislators are the same, excepting the special problems associated with the election of judges in many states. The pressures of work in volume and complexity, the increase in stress, the dramatic disparity between the compensation of judges and that of all other sectors of the legal profession, the frequent inadequacy of support services, and a diminution of public respect for the office of judge -- these factors threaten our ability to attract and keep top quality judges in both systems. The recent concern of the California Judges Association over the exodus of judges to the private

rent-a-judge industry is a symptom.

Although the national legislature is a full-time occupation and many state legislatures require only part-time service, lawmakers in both systems constantly face overload of committee assignments and hearings, increased constituent demands, accelerating costs of campaigning in time and money, inevitable delegation to staff, remorseless pressures of single issue lobbying, distorting effects of media coverage, and, of course, the omnipresent budget crunch. And they too suffer perhaps even more than judges a low esteem rating by the general public.

In both systems there is a lack of consensus as to the kind of communications and interrelationships between the two branches that would be at once timely, effective, mutually useful, and yet not constitute an encroachment into the other's domain.

Although all these similarities exist between the federal and the state situations we should not overlook the differences — particularly when the differences may be a source of strength in developing solutions to our problems. One of the instructive papers resulting from our 1986 colloquium, now a chapter in Judges and Legislators, was written by Oregon Supreme Court Justice Hans A. Linde. In "Observations of a State Court Judge," he cautions: "Practices in the states cast doubt on some generalizations and shibboleths about judicial involvement in legislation at the national level." He goes on to identify various reasons accounting for a national and uncontroversial greater participation of state judges in the policy process:

-- the expected broad oversight role of the state judiciary over common law doctrine, the administration of criminal law, and the regulations of the legal profession;
-- the perception of the judiciary as a more professional and permanent institution than the intermittent and relatively less firmly structured legislatures;
-- the fact that the very subjection of judges to the election process gives judges a license to give their views on policy issues;
-- the prior legislative experience of many judges and their heightened comfort level in being with and talking with legislators;
-- the smaller geographic distance of state judges from state capitals;
-- and, finally, two peculiarities of laws of a considerable number of states not found in the national government: item veto and advisory opinions. Both have implications for communications between the branches.

This initial catalogue of differences points up the wisdom of state judges and legislators taking the initiative. In so doing, representatives of both branches must always keep clear the dual nature of their relationships to each other. There is collaboration in their common interest and in that of government as a whole. But there are also adversarial interests because of our very structure, bottomed as it is on separation of powers. Therefore the partnership which this conference seeks must be a limited one. But, as we all know, limited partnerships are today an effective way to do a great deal of business. Perhaps the idea of selectiveness in collaboration is conveyed by the concept of joint venture. Two parties, otherwise independent, may stake out areas of enterprise for joint undertakings.

It is entirely fitting that your conference program focus on the areas where joint problem-solving can be initiated or enhanced. The early and informed input of judges into new legislative proposals, the early and informed assessment of implications of proposal legislation on the court system, early and clear signals of legislative intent together with improved legislative drafting and effective statutory housekeeping after enactment, based on judicial comment in reported cases, are obvious areas for exploration. You are also addressing the vital areas of lawmaking affecting the judicial establishment and laws affecting both civil and criminal litigation. All of

these will plumb the possibilities of collaboration.

But there remains the basic constitutional fact that judges' and legislators' powers and responsibilities are separate and different. Neither branch can rely on the other or even joint agreement to achieve all desired ends. A third party, difficult to reach, educate and persuade, holds the swing vote on many key issues -- the people. As budgetary constraints increase the competition for limited funds, legislators whose respect for the judiciary and understanding of their needs are unquestioned nevertheless may be forced by public pressure to accord other needs a higher priority.

I speak from past and present experience. For five years, as Chair of the United States Judicial Conference Committee on the Judicial Branch, I have had the special responsibility to try to obtain a restoration of the erosion in compensation of the federal judiciary -- not a restoration of what has been lost over two decades but a restoration of a compensation level that would put an end to continuing losses. Most of the leadership of both houses of Congress have shared our objective. But when the flood gates of invective are let open by media representatives and simplistic populists appealing to the low and time-tested theme of loving our system but hating those who have been elected to make it work, the most effective collaboration conceivable goes down the drain.

Yet for the judiciary to sit back and accept a result dedicated by the perceived power at the polls of other, sometimes very narrow, interests, may well be to condemn the third branch of government to an inexorable erosion in its quality and independence. The bleak possibility raises the question: have we come to the point where the judiciary, to preserve the basic conditions for its effective functioning, needs a surrogate whose objectivity, prestige, and political influence can carry the day when judges cannot and should not?

Last May, in addressing the Federal Judges Association, I read from a letter I had recently received from U.S. District Judge William Schwarzer in San Francisco:

> [Similar to Paul Volcker's National Commission on the Public Service], I envision a ... National Commission for the Federal Courts, representative of the entire political and philosophical spectrum, with sufficient clout so that it can get in to see the president and that Congress will listen to it. Its membership would be large enough to raise funds to maintain a modest staff to carry on appropriate education and advocacy activities.
>
> I believe that there will be no shortage of public-spirited citizens who would want to enlist in this cause, if properly motivated.

This led me to suggest that the American Bar Association, as close a surrogate as we presently have, take the initiative to "explore the appropriateness, feasibility, and desirability, as well as the hazards and disadvantages, of a permanent, broad-based coalition or commission of citizens and organizations pledged to support the independence of the Third Branch."

This conference has opened my eyes to a more practicable alternative. Such a search for a broad-based citizen surrogate is probably best commenced on a smaller scale and on an experimental basis. This kind of venture seems ideally suited to the laboratories of the various states. State bar associations would seem to be a starting point. But they obviously need to be supplemented by representatives of industry, labor, secondary and higher education, and the media in order to achieve the necessary credibility and impact. Informal coalitions of public spirited citizens have on occasion in the past rallied to the defense of the courts. What I see as our need for the future is an ongoing structure to the extent that such a structure makes politically viable legislative action in support of courts' legitimate needs, it also would ease the task of

legislation and strengthen the fabric of state government itself.

This suggests also that state judges have a ready opportunity to draw upon their own strength in pioneering in speaking for themselves to the citizenry. One U.S. appellate judge, Kenneth Ripple of the Seventh Circuit, in writing to me on the subject of relations between judges and law makers, commented, "I sometimes feel we forget that lawmakers tend to set their priorities as they see the public setting its priorities. Maybe we should talk more to the public." In talking to the public, I do not suggest that judges talk only about the courts, the administration of justice, and themselves. They may serve a large purpose in talking about the complexities and challenges faced by legislators. And, similarly, legislators may help strengthen the fabric of government by talking about the burdens and contributions of the judiciary. The experience of state judges in assessing the effectiveness of various forums and themes, the bounds of propriety -- how to be educational without being political, the hazards to be avoided cannot fail to be of immense significance to the federal judiciary.

Such state initiatives would once again demonstrate the two-way flow of influence between the federal and state governments. For every success achieved by states in bringing about a more open, natural, and mutually supportive relationship between judges and legislators cannot but, in the long run, bring about a change in climate on the national scene. So, in sum, to bring down that "chronic, debilitating fever," I wrote about in Federalist No. 86, I now suspect that a large part of the antibiotics may come from the states. This is a prospectus for a promising joint venture.