Lawrence H. Cooke
CHIEF JUDGE OF THE STATE OF NEW YORK

Briefing Paper

for

Edwin Meese, III -- Counselor to the President

on

The State Justice Institute Act

For Meeting At

3:40 p.m.

Monday, October 25, 1982

For Further Information:

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Purpose of Meeting:	To request administration support for the State Justice Institute Act -- S. 537 and H.R. 2407.
Participants:	Lawrence H. Cooke, Chief Judge of the State of New York and chairman of the Conference of Chief Justices; Justice Paul C. Reardon, Supreme Judicial Court of Massachusetts, (Ret.); and Harry W. Swegle, Washington Liaison, Conference of Chief Justices.
Status of Legislation:	S. 537 passed the Senate without dissent on August 10. H.R. 2407 was unanimously reported September 23 by the House Judiciary Subcommittee on Courts. The full House Judiciary Committee is expected to report the bill during the post-election session and send it to the floor on the suspension calendar. It also is part of the Dole-Butler "Bankruptcy Package" of legislation supported by the Department of Justice.
Sponsors:	The SJI Act was drafted by a task force of the Conference of Chief Justices and the Conference of State Court Administrators. It has bi-partisan sponsorship in both the House and Senate and has been endorsed by the Chief Justice of the United States, the Judicial Conference of the United States, and the American Bar Association. The Department of Justice, while appearing to endorse the legislation on the merits, has opposed it on budgetary grounds.
Summary of Legislation:	The SJI Act would provide to state and local courts a resource comparable to that provided state and local correctional systems by the National Institute of Corrections. It would be funded at a comparable level and provide a comparable range of national clearinghouse, research, technical assistance, demonstration and training programs. It would round-out the existing set of federal programs for state and local justice systems and, more importantly, fill a gap in the President's program to strengthen federalism by strengthening the judicial power of the states. Funding authority is set at $20-million for fiscal 1983 and $25-million for fiscal 1984 and 1985.

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Rational for a State Justice Institute

The State Justice Institute Act was drafted by state judicial officials in 1979 to meet a unique national need, i.e., to create a national mechanism by which state judiciaries could most effectively improve their own systems while working with the federal government on a broad range of problems affecting our dual state-federal judicial system.

It grew out of some 10 years experience with the Law Enforcement Assistance Administration, the first and only federal funding agency whose programs impacted significantly on state courts. It was designed to make federal assistance more efficient, more effective, and equally important, more in keeping with the requirements of the separation of powers doctrine and the integrity of state courts within the federal system.

We were particularly aware of the complex jurisdictional issues inherent in our state-federal system of justice and of the need for a mechanism by which state courts collectively could address these issues in cooperation with the federal judiciary, the Department of Justice, and the Congress. 1/

1/ It should be noted in this regard that the Senate recently approved legislation (S. 675) proposed by Senators Thurmond and Heflin which would create a commission to review issues of state-federal jurisdiction and make recommendations for change. The Judicial Conference of the United States (see Chief Justice Burger's statement attached) also has created a committee to deal with state-federal issues. In addition, the House recently passed legislation (H.R. 7173) which would give state and federal courts representation on the Advisory Commission on Intergovernment Relations which also might be expected to address, for the first time, state-federal jurisdictional questions.

For instance, the Conference of Chief Justices supports pending proposals which would greatly curtail the growth of federal caseloads through elimination of federal jurisdiction in diversity of citizenship cases and through limitations on federal habeas corpus review of state convictions. 2/

Unfortunately, none of the proposals to deal with these issues has mustered the necessary Congressional support. Political opposition to them ultimately is based on the argument that state courts are inadequate forums and cannot be trusted to deal with the cases at issue. It is, therefore, the perception of state courts as inadequate forums that makes it so difficult politically to institute very desirable changes in the jurisidction of the federal courts.

The Conference of Chief Justices is confident the State Justice Institute could devise programs that would help negate the political opposition and pave the way for appropriate reforms. Thus, the Conference views the Institute as an indispensible resource if state courts are to successfully participate in the development and implementation of policies that will effectively reduce the rate of growth in federal caseloads and retain the basic role of state courts in our federal system.

2/ The Conference also has expressed the willingness of state courts to assist the federal courts in the adjudication of federal questions cases, and has expressed its concern over the increasing number of actions in federal courts against state and local officials under 42 USC 1983 and related fee awards under Sec. 1988.

Such issues give an important political dimension to the work of the Institute but even this political role will be dependent on success of the Institute's basic mission: improvement of state court systems.

The Institute would avoid the mistakes and inefficiencies of earlier assistance programs involving the courts because it would:

-- Place responsibility for improvement of state courts systems directly on the judicial officials charged with this responsibility under their own state constitutions and laws.

-- Be under control, at both the state and national levels, of state officials with first hand knowledge of the problems facing their courts.

-- Permit large economies of scale by concentrating on national programs that would serve the needs of all 50 states.

-- Eliminate the need for a large bureaucracy by operating with a small staff in conjunction with existing judicial agencies of the states and the state courts themselves. (The Institute could support but not duplicate services of existing agencies such as the National Center for State Courts and the National Judicial College.)

-- Permit improvement of courts on a system-wide basis, i.e., in a manner recognzing their interrelated civil and criminal functions.

-- Provide a vehicle by which state courts collectively could cooperate at the national level with other components of state and local criminal justice systems, and such agencies as the Federal Judicial Center, the National Institute of Justice, and the Bureau of Justice Statistics.

-- Provide a vehicle for implementation of special criminal justice projects authorized by Congress or federal executive agencies as these might involve state courts. 3/

In brief outline, the State Justice Institute would be a federally funded, non-profit corporation directing a national program for improvement of state court systems and fostering cooperation with the federal judiciary and related agencies of the federal government. The Institute would be operated by an executive director under the supervision of an 11-member board of directors appointed by the President and confirmed by the Senate. Six board members would be state judges and one a court administer chosen from a panel or panels of candidates recommended by the Conference of Chief Justices following consultation with appropriate legal and judicial organizations. 4/ There would be four public members appointed directly by the President. The Institute would operate through grants and contracts with funding priority going to projects of state and local courts and their national non-profit support and training organziations.

3/ Sen. Arlen Specter is conducting hearings, in anticipation of legislation, on problems posed by the massive back logs of criminal cases in major metropolitan areas. The SJI would be an ideal mechanism for implementing any program Congress might propose in this regard.

4/ The Department of Justice raised questions about the constitutionality of the selection process which were addressed in an amendment to H.R. 2407 adopted by the House Judiciary Subcommittee on Courts.

State supreme courts would be the accountable administrative agencies for projects of state and local courts within their jurisdictions. Such projects would require a 25 percent match. The emphasis would be on programs of national scope including national clearinghouse, research, technical assistance, demonstration, education, and training programs.

The legislation specifically forbids use of federal funds to supplant state or local funds or to support basic court services.

As amended by the Senate the legislation authorizes funding at up to $20-million in fiscal 1983 and $25-million in fiscal 1984 and 1985. However, it is expected the bill will be further amended to defer initial funding to fiscal 1984.

Budgetary Impact

The Conference, as indicated, believes the State Justice Institute will be the catalyst for reforms that will result in long-term budgetary gains for the federal government. We expect that the Institute will be funded at no more than $10-million to $15-million in the first year of operation. Appropriations for the next two years would, hopefully, be in the range of $15-million to $20-million. Thus, we are seeking a total committment of from $40-million to $55-million through fiscal 1986.

On the other hand, a recent study by the Administrative Office of the United States Courts (Appendix A) indicates that the federal judiciary would save some $180.6-million over the next five years through elimination of diversity jurisdiction alone. Such savings would continue and even increase if state courts assume, as they should, a larger share of the total judicial burden.

The Conference of Chief Justices believes the new study, which was not available to the Office of Management and Budget or the Department of Justice when the administration adopted its position on the SJI Act, provides in itself a basis for a change of position. 5/

Why a Federal Program?

In summary, the Conference of Chief Justices believes that state judiciaries, because of the separation of powers and their place in our federal system, have a unique need for an independent, federally funded, national agency to represent and assist them. There is no existing agency, including the National Center for State Courts, that can fill this role.

5/ There is reason to believe the Department of Justice supports this legislation on the merits but has been constrained in its official comments by OMB's continuing opposition on budgetary grounds. (See Appendix G)

The need is spelled out in the Report of our Task Force on a State Court Improvement Act (Appendix B). It is summarized in our recent statement to the House Judiciary Subcommittee on Courts (Appendix C) and in the Report of the Senate Judiciary Committee on S. 537 (Appendix D.

The Task Force report reviews the experiences of state courts --both good and bad-- under the LEAA legislation and details (1) the extent to which state courts are affected by federal law as well as (2) the important role state courts play in the enforcement of federal policies. The federal interest in state courts also is attested to in the statements of Chief Justice Warren E. Burger (Appendix E) and the Judicial Conference of the United States (Appendix F).

We have then, turned to the federal government, and and not the states, because the State Justice Institute's program is national in scope. There is no procedure through which 50 independent state legislatures can act in concert on a program such as we propose. Nor is there precedent for it.

We believe the Institute will serve the national interest well by helping to reduce the rate of growth of the federal judiciary while improving the quality of state courts and assuring them their proper role in our federal system. These are goals, we also believe, that this administration supports.

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ATTACHMENTS

Appendix

A -- Study of Diversity Cost Savings by Administrative Office of United States Courts

B -- Report of the Task Force on a State Court Improvement Act - Conference of Chief Justices

C -- Statement of the Conference of Chief Justices on H.R. 2407. - the State Justice Institute Act

D -- Report of the Senate Judiciary Committee on the State Justice Institute Act

E -- Letter of Chief Justice Warren E. Burger endorsing the State Justice Institute Act

F -- Letter of the Judicial Conference of the United States endorsing the State Justice Institute Act

G -- Statement of the Department of Justice opposing the State Justice Institute Act

H -- H.R. 2407 -- the State Justice Institute Act.

U.S. Department of Justice

Office of Legal Policy

Washington, D.C. 20530

MEMORANDUM June 14, 1983

TO: Bill Barr

FROM: David J. Karp DJK

SUBJECT: State Justice Institute Proposal

Pursuant to our phone conversation yesterday, I am attaching the following items:

(i) Our initial response letter on the State Justice Institute proposal;

(ii) Later draft testimony supporting the proposal which was not delivered; and

(iii) Later testimony that was submitted to the responsible House Subcommittee reiterating opposition to the proposal for budgetary reasons.

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

JUL 29 1981

Honorable Peter W. Rodino
Chairman
Committee on the Judiciary
House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Justice on H.R. 2407, the State Justice Institute Act. For the reasons set out in this letter, the Administration opposes this legislation.

The concept of the State Justice Institute was initially advanced in the report on the Conference of Chief Justices and Conference of State Court Administrators Task Force for a State Justice System Improvement Act. 1/ The Institute was conceived of as a more satisfactory means of managing federal funding of state court improvement projects, and of providing a secure source of continued financial support for national organizations concerned with state court improvement, such as the National Center for State Courts. 2/ The existing system of funding, administered primarily by LEAA, was thought to be deficient on several grounds. The setting of policy by a federal executive agency with respect to state court improvement projects was seen to raise problems of federalism and of separation of powers. 3/ The inclusion of state

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1/ The report is reprinted in State Justice Institute Act of 1979: Hearings on S. 2387 Before the Subcomm. on Jurisprudence and Governmental Relations of the Senate Comm. on the Judiciary, 96th Cong., 1st & 2d Sess., at 135-201 (1980) [hereafter cited as "Senate Hearings"].

2/ See S. Rep. No. 843, 96th Cong., 2d Sess. 26-28 (1980) [hereafter cited as "Senate Committee Report"]; Senate Hearings, supra note 1, at 64-66, 77-82, 173-74.

3/ See Senate Committee Report, supra note 2, at 22-23; Senate Hearings, supra note 1, at 10-11, 170-172.

court funding as one aspect of a broader program concerned with all types of law enforcement activities placed the state courts in the position of competing with state executive agencies for limited federal funds, and failed to give recognition to the distinctive and independent character of the state judiciaries. 4/ The law enforcement mandate of LEAA imposed constraints on the use of funds for projects concerned with the civil aspects of state court systems, 5/ and the uncertainty that existed over the general fate of LEAA raised doubts that funding of state court projects would continue without special provision. 6/

The solution proposed was to create a private non-profit corporation, the State Justice Institute, which would be governed by a body composed primarily of state court personnel. The Institute would receive a separate appropriation from the federal government and, within the context of the broad guiding principles set out in the implementing legislation, would have discretion to allocate funds to the state courts and to organizations concerned with state court improvement. The proposal for creation of the State Justice Institute was introduced in the 96th Congress as S. 2387 and H.R. 6709. S. 2387 was the subject of hearings on Oct. 18 and Nov. 19, 1979, and on March 19, 1980, before the Subcommittee on Jurisprudence and Governmental Relations of the Senate Judiciary Committee, under the direction of Senator Heflin. 7/ The bill was brought to a vote on July 21, 1980, and passed unanimously by the Senate. 8/

4/ See Senate Committee Report, supra note 2, at 24; Senate Hearings, supra note 1, at 16-17.

5/ See Senate Committee Report, supra note 2, at 24-25; Senate Hearings, supra note 1, at 26-27, 74.

6/ See Senate Committee Report, supra note 2, at 25.

7/ See Senate Hearings, supra note 1.

8/ The Senate Committee Report accompanying the bill is cited in note 2 supra. The report contained a statement by Senator Thurmond indicating that he would have preferred that the states bear all the financial burden for maintaining and improving their judicial systems, but that he had decided not to oppose the legislation, subject to two amendments he had proposed which were incorporated into the version of the bill approved by the full Judiciary Committee. See Senate Committee Report, supra note 2, at 33-35.

The current version of the proposal, on which we have been asked to comment, is H.R. 2407. 9/ The bill would create a State Justice Institute that would direct a national program of assistance for state court improvement by providing funds to state courts and other appropriate organizations. The Institute would be headed by a Board of Directors whose voting members would be six judges, one state court administrator, and four public members. The President would appoint the Board members with the advice and consent of the Senate. The President's choices in nominating the six judges and the state court administrator for membership on the Board would be limited to a list of at least fourteen candidates submitted by the Conference of Chief Justices.

The provisions of the bill relating to grants and contracts indicate that Institute funds are to be used primarily for research, demonstrations, innovative projects, and other justice improvement measures, and are not to be employed to support basic court services. Matching funds equal to 25% of the total cost of a grant to, or contract with, a state or local judicial system must normally be provided by the recipient. The Institute is generally barred from involvement in litigation and political activities. The funding authorized for the Institute is $20,000,000 in 1982, $30,000,000 in 1983, and $40,000,000 in 1984.

The goals that the Institute proposal is designed to further are obviously important, and the specific arrangements set out in H.R. 2407 seem generally well designed to advance these objectives. However, we have concluded that we cannot support this legislation. The reasons for this conclusion are largely budgetary. The proposal does not bear any of the most obvious earmarks of a new funding project that should be advanced in a time of austerity. It does not relate specifically to an area that has been made the responsibility of the federal government by the Constitution or federal law; it does not relate specifically to a stated priority of the Administration or the Department of Justice; and it does not address a problem of national scope that the states are inherently incapable of dealing with on their own. Indeed, it is far from clear to us that the state courts are the element of state justice systems most urgently in need of additional funding. These three points will be discussed with greater particularity in the remainder of this letter.

(i) Federal Interest and Responsibility. The proponents of the State Justice Institute have argued that the propriety and desirability of federal funding for state court improvement projects follow from the fact that the state courts are, in a sense,

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9/ The current Senate counterpart is S. 537.

federal courts. The state courts, under the Supremacy Clause, are required to enforce federal law, and a substantial portion of their time and resources is taken up in doing so. The state courts are also required to comply with the constitutional requirements of due process. The costs of discharging both of these responsibilities have increased greatly in recent decades as a result of the decisions of Congress in expanding the scope of federal law and the decisions of the Supreme Court in interpreting the federal Constitution. It is argued that some level of federal funding for state court activities is required as a matter of fairness, or is at least appropriate, given the general federal interest in the adequate administration of federal law, and the burdens which the state courts bear in discharging their federal responsibilities. 10/

These considerations are not without force. However, certain countervailing considerations may also be noted. In forming the United States the individual states made the judgment that the general benefits of national government would outweigh the resulting costs to them. The same judgment was made subsequently by the remaining states in joining the union. The quid pro quo for the burdens resulting from the responsibilities of statehood--including enforcement and compliance with federal law--need not take the form of reimbursement to the states for the specific expenditures incurred in discharging these responsibilities, but may be found in the general functions which the federal government carries out to the benefit of the states, such as national defense and the regulation of interstate commerce.

It may also be noted that the federal courts bear certain burdens which would otherwise be borne by the state courts, though no reimbursement is expected from the states in return for such activities. For example, when jurisdiction is based on diversity of citizenship, the federal courts hear state law cases which would otherwise have to be handled by the state courts. Essentially the same point can be made in relation to the full range of subjects which are currently regulated by federal laws whose enforcement is partially or wholly committed to the federal courts. In the absence of assumption of responsibility by the federal government for regulation and enforcement in these areas--for example, patents, bankruptcy and antitrust--the states would need to undertake their own regulation, and the resulting burden of enforcement would fall on the state courts.

10/ See Senate Committee Report, supra note 2, at 18-22; Senate Hearings, supra note 1, at 7-8, 111-13, 144-61.

Finally, while the federal interest in the adequate administration of federal law does provide some support for the propriety or desirability of federal assistance to state courts in enforcing and complying with federal law, the State Justice Institute Act is not especially designed to further this interest. The Act does not require that funds disbursed by the Institute be used exclusively or primarily to assist state courts in enforcing or complying with federal law, but authorizes support of projects relating to nearly all aspects of state court improvement.

(ii) Relationship to Administration Priorities. The Administration has identified violent crime as an area of priority concern. This priority has been reflected in the creation of the Attorney General's Task Force on Violent Crime. The State Justice Institute proposal does have some general relationship to this priority, since many of the projects funded by the Institute would presumably contribute, directly or indirectly, to improvement of the ability of the state courts to deal with violent crime, and crime in general. However, the legislation does not create any presumption in favor of the allocation of Institute funds to projects concerned with violent crime, or any other Administration priority. By design, decisions concerning grants and contracts are left to the Institute's Board of Directors which would operate free of federal control.

The Violent Crime Task Force is reportedly considering recommending the resumption of LEAA-type funding of certain projects on a more limited and controlled scale. If such a recommendation is forthcoming, the criticisms of the past system of assistance to state court projects through LEAA funding that have accompanied the State Justice Institute proposal should be taken into account in deciding on the mechanism for allocating funds to judicial projects, if such projects are to be funded. However, this question will have to be considered within the context of the general recommendations of the Task Force concerning federal funding of state and local justice improvement projects.

(iii) State Competence. The principal functions of the State Justice Institute would be to make decisions concerning the disbursement of federal funds to state court improvement efforts, and to handle the award and monitoring of such grants and contracts. At least in theory, the same type of Institute might be created by all the states, or a group of interested states, with funds contributed by the subscribing states substituting for the federal money authorized in the current legislative proposals. Supporters of the legislation have responded to this objection by pointing to the uneven commitment of the various states to provision of

sufficient support for the operation and improvement of their own court systems, 11/ and the difficulty of securing state funding for national organizations--such as the National Center for State Courts--which provide important services to the state judiciaries. Problems of this sort may make a state-based alternative less effective than a federally supported State Justice Institute, or perhaps simply unfeasible. 12/ However, the proponents of the Institute have only claimed that the states have been unwilling to provide adequate overall support for state court improvement efforts--not that they are incapable of doing so--and a state-based system would offer certain advantages over the federal funding approach. In particular, a state-based system would remove all elements of federal influence and control from decisions concerning the allocation of funds to state court systems, and would allow each state to decide whether the benefits to it from participation in the system justify the cost of subscription or membership.

In sum, the Administration opposes H.R. 2407 and equivalent proposals for the creation of a federally funded State Justice Institute. 13/

11/ See Senate Hearings, supra note 1, at 47.

12/ A state-based system would also face the practical problem of allocating costs among the subscribing states in a mutually acceptable manner. See Senate Hearings, supra note 1, at 112.

13/ There is a specific feature of H.R. 2407 which merits separate comment. As noted earlier, the President's choices for seven of the members of the Board of Directors of the State Justice Institute would be limited to a list of candidates submitted by the Conference of Chief Justices. This provision raises serious constitutional doubts. We recognize that Congress can impose qualifications for the persons whom the President seeks to appoint, and define the general class of persons from which the President may make an appointment, including the requirement that appointees to certain offices must be selected from lists submitted by the Conference of Chief Justices. See Myers v. United States, 252 U.S. 52, 265-74 (1926) (Brandeis, J., dissenting). On the other hand, the power of Congress to impose qualifications for appointments does not mean that the President can be compelled to appoint persons whom he considers unsuitable for the position. In other words, the qualification provision of the type here involved means that the appointee must be acceptable to the Conference of Chief Justices as well as to the President. A list submitted to the

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The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

(Signed) Robert A. McConnell

Robert A. McConnell
Assistant Attorney General

13/ (Continued) President therefore must contain a sufficient number of candidates to afford the President "ample room of choice." 13 Op. A.G. 516, 525 (1871); see also 29 Op. A.G. 254, 256 (1911); 41 Op. A.G. 291, 292 (1956). A provision for a list containing "at least" fourteen names for seven appointments, i.e., two for each vacancy, does not in our view comply with that requirement, unless it is assumed implicitly, in order to save the constitutionality of the provision, that the President has the right to reject a list which does not contain any acceptable nominees. See § 4 (b)(2) of the Pacific Northwest Electric Power Planning and Conservation Act, 94 Stat. 2702. This section provides explicitly that the appointing authority, the Secretary of Energy, "may decline to appoint for any reason any of a Governor's nominees for a position and shall so notify the Governor. The Governor may thereafter make successive nominations within forty-five days of receipt of such notice until nominees acceptable to the Secretary are appointed for each position."

Undelivered Draft

Undelivered Draft

TESTIMONY

OF

JONATHAN C. ROSE
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY

BEFORE

THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES
AND THE ADMINISTRATION OF JUSTICE
U.S. HOUSE OF REPRESENTATIVES

CONCERNING

H.R. 2407, A BILL TO CREATE
A STATE JUSTICE INSTITUTE
ON

SEPTEMBER 15, 1982

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to appear before this Subcommittee to testify on H.R. 2407, a bill that would create a State Justice Institute.

The concept of the State Justice Institute was initially advanced in the Report of the Conference of Chief Justices and Conference of State Court Administrators Task Force for a State Justice System Improvement Act. 1/ The principal function of the Institute would be to administer a funding program for state court improvement projects and the national support institutions of the state courts. The Institute would receive federal funding for purposes of carrying out this program. The Institute would also carry out other important functions, including serving as a liaison between the federal and state judiciaries, making recommendations concerning the proper allocation of responsibilities between the state and federal courts, promoting recognition of the importance of the doctrine of separation of powers, and promoting judicial education. 2/

1/ The report is reprinted in State Justice Institute Act of 1979: Hearings on S. 2387 Before the Subcomm. on Jurisprudence and Governmental Relations of the Senate Comm. on the Judiciary, 96th Cong., 1st & 2d Sess., at 135-201 (1980).

2/ See H.R. 2407 § 3(b).

In response to a request of Chairman Rodino, the Administration transmitted a letter to Congress in July of 1981 stating our views at that time regarding the State Justice Institute proposal. 3/ Our response noted that the objectives of the proposal are obviously important, and that large difficulties could arise in connection with efforts to achieve them by other means. We concluded, however, essentially for budgetary reasons, that the proposal should not be adopted.

On re-consideration, the Administration supports creation of the State Justice Institute as provided in H.R. 2407, subject to certain suggested amendments that I will discuss hereafter. In the remainder of my testimony I will address the questions of federalism and budgetary constraints that are raised by the Institute proposal, and the relationship of the State Justice Institute proposal to other court improvement measures supported by the Administration.

I. Considerations of Federalism

A. Positive Considerations

The proposal of H.R. 2407, like any proposal for federal involvement in areas of primary state responsibility,

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3/ See Letter of Assistant Attorney General Robert A. McConnell to Honorable Peter W. Rodino, Chairman, House Committee on the Judiciary (July 29, 1981).

requires assessment in light of the principles of federalism. Presumptively, the ordinary functions of government should be carried on at the state and local levels, with the federal role confined to areas in which a special need or federal interest can be shown. There are a number of ways in which the State Justice Institute proposal would advance specifically federal interests or otherwise further the interests of federalism.

First, as the Institute's proponents have often noted, there is a direct federal interest in the efficiency and fairness of state proceedings, since the state courts play a large role in the administration of federal law. The state courts, under the Supremacy Clause, are required to enforce federal law, and a substantial portion of their time and resources is taken up in doing so. The specificially federal activities of the state courts include adjudicating federal causes of action in a variety of areas in which Congress has given the state courts concurrent jurisdiction, entertaining federal defenses that are raised in any type of civil action, and protecting the federal rights of defendants in state criminal proceedings. While H.R. 2407's proposal does not require that the Institute's activities be directed toward improving the state courts' administration of federal law, as a practical matter such improvements are largely inseparable from the general improvement of state court operations. Reforms promoting the general efficiency and

fairness of state proceedings will have their effect on the federal aspects of the state courts' activities. Conversely, the potential for improving the state courts' functioning in their federal role is limited unless it is approached as part of a broader program of court improvement. For example, a more expeditious handling of federal causes of action by the state courts, and fuller protection at the state level of the federal right to a speedy trial in criminal cases, can only realistically be achieved through reforms addressed to the general problems of overcrowded dockets and inefficiency.

Second, one of the basic strengths of our federal system is the potential it creates for experimentation and innovation. Any state with the nerve and imagination is free to strike out on new paths. If innovations undertaken in particular states prove to be successful, they can become the model for comparable reforms in other parts of the country. While this potential is built into the basic organization of the country as a federation of largely autonomous states, the extent to which it is realized in practice depends on favorable empirical conditions. Specifically, the means must exist for undertaking "experiments" in particular states and localities, and mechanisms must exist by which other parts of the country are informed of their character and results. The State Justice Institute will help assure that the practical conditions exist for the realization of this

basic value of federalism. It will do so through its support of innovative and demonstration projects in particular court systems, and through its support of the information clearinghouse, research, technical assistance, and educational activities of the national support institutions of the state courts.

Third, creation of the Institute is supported by the federal interest in the improved operation of the federal courts. In the past, the federal courts were the leaders in the field of judicial administration, and the state systems relied heavily on experience acquired at the federal level. In more recent times, however, the picture has changed. Now state courts are often the pioneers, exploring new approaches in a variety of areas including, for example, the use of arbitration and mediation. The knowledge gained from experiments at the state level supported by the State Justice Institute promises to improve the quality of justice available in the federal courts as well as the state courts.

Finally, the performance of the state judiciaries has a bearing on the future division of state and federal functions. Public dissatisfaction with the state courts can contribute to demands for the federalization of traditionally non-federal areas of law and re-assignment of their administration to the federal courts. By strengthening the state judiciaries the State Justice Institute will promote the long-range integrity of the federal system.

B. Response to Negative Considerations

There are also considerations of federalism which generally weigh against the institution of federal funding programs for activities that are not exclusively federal in character. In assessing the proposal of H.R. 2407 in light of these concerns, some general preliminary observations will be helpful.

The State Justice Institute, as noted earlier, would administer a program for state court improvement that would largely be supported by federal funds. Provision of such funds would be an exercise of Congress's authority under article I, section 8, clause 1 of the Constitution to engage in spending to "provide for the ... general Welfare of the United States." The scope of the authority under this clause is not limited to spending for specifically federal purposes but extends to provision of funds for any purpose that promotes the general welfare. This interpretation has been adopted in practice by Congress since the beginning of the nation, and has been confirmed judicially. 4/

4/ See The Constitution of the United States -- Analysis and Interpretation, S. Doc. No. 82, 92d Cong., 2d. Sess. 136-39 (1973).

The larger concerns for federalism do not arise from the provision of funds by the federal government for non-federal purposes per se, but from the tendency in this century to tie strings to such grants. When qualification for federal money is made to depend on conformity with federal rules, federal subsidies become the means for the extension of federal authority.

A related problem is the tendency of on-going federal funding to undermine local responsibility and control. Whether or not strings are directly attached to such grants, the status of the federal government as the source of funding tends to shift the center of gravity in public affairs from the state and local levels to the federal level. Persons involved with a state or local program have reason to go to the federal government with their concerns about it if it is federally supported. The provision of funding also creates a continuing temptation for the federal government to exercise oversight and control, whether or not that is originally intended. When state and local programs depend on federal money, their level of support from year to year comes to depend on federal priorities and federal budgetary considerations.

H.R. 2407 was obviously drafted with these concerns in mind, and is generally well-designed to meet them. The Institute would be set up as a private corporation rather

than a federal agency. 5/ A board of directors, a majority of whose members would be state judges, would handle disbursement of funds and generally supervise the Institute's activities. 6/ Hence, there would be no direct federal control or influence over day-to-day decisions. Institute funds would primarily be used for the support of national institutions servicing the needs of the state judiciaries, and for innovative projects and experimentation in particular state and local court systems. To insure that funds provided "are used to supplement and improve the operation of State courts, rather than to support basic court services," the Act prohibits the use of such funds "to supplant State or local funds currently supporting a program or activity." 7/ The bill's restriction of the use of Institute funds to court improvement activities and prohibition of their use to support basic court services limits the extent to which the Institute's activities might undermine local responsibility and control.

We believe, however, that there is a critical respect in which the proposal's response to concerns of federalism should be carried further. As presently drafted,

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5/ See H.R. 2407 § 3(a).

6/ See id. § 4.

7/ See id. § 7(d).

H.R. 2407 contemplates federal funding of the Institute that may continue indefinitely. This implicates many of the concerns noted earlier -- the level of support for the Institute's programs would vary, depending on federal priorities and budgetary constraints; periodic pilgrimages to the federal government by the representatives of the state judiciaries and on-going lobbying efforts would be necessary to keep up the level of support; and some degree of federal oversight and influence on the Institute's activities would be unavoidable.

For the long run these concerns could be eliminated by changing the use specified for part of the funds provided to the Institute. Currently, the proposal seems to contemplate the use of all allocated funds for the direct support of the Institute's activities. We would propose that the Act provide instead that each year a certain portion of the allocated funds -- for example, one quarter -- be set aside and placed in an endowment fund. When the endowment had increased to the point at which the revenues from it were sufficient to support the Institute's activities, federal funding could cease. The requirement that a portion of the allocated funds be used to create an endowment would admittedly reduce the amount available for the Institute's operations. It would, however, offer the state judiciaries eventual independence from federal support in the operation of their national institutions and in programs for state court improvement.

II. Budgetary Considerations

The provisions of the bill affecting the Institute's budgetary requirements and financial arrangements are generally sound. The bill contemplates review and comment on the Institute's annual budget requests by the Office of Management and Budget. 8/ To ensure the Institute's financial integrity, provision is made for auditing by independent accountants and the General Accounting Office. 9/ A constraint on expenditures in the form of grants to state and local court systems is imposed by the bill's requirement that 25% matching funds must normally be provided by the recipient of such a grant. 10/

We do object, however, to the level of funding proposed in H.R. 2407. For the first three years of the Institute's operation, the bill would authorize appropriations of $20,000,000, $30,000,000, and $40,000,000. 11/ The acute financial situation of the federal government, and the need

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8/ See id. § 5(c)(2).

9/ See id. § 12.

10/ See id. § 6(d).

11/ See id. § 13.

to exercise restraint even in relation to proportionately small budgetary items, requires no comment. We are also concerned over the ascending scale of the proposed appropriations in the bill, suggesting an ever-increasing federal contribution from year to year. These concerns were raised during Senate consideration of the proposal, and were met by substituting funding authorization at a more steady and generally lower level. Specifically, the Senate-passed bill authorizes for the first three years of the Institute's operations appropriations of $20,000,000, $25,000,0000, and $25,000,000. 12/ We believe that the funding of the Institute should be at most at the level specified in the Senate-passed bill. Even at this reduced level, the funds provided will be more than adequate to restore the operations of the support institutions of the state courts to the level obtaining under LEAA funding.

Budgetary considerations also provide support for my earlier suggestion that the funding arrangement under the bill be changed from direct funding in perpetuity to a "gradual endowment" approach. Federal funding programs,

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12/ See 128 Cong. Rec. S10113 (daily ed. Aug. 10, 1982) (remarks of Senator Grassley).

once underway, have all too often grown far beyond initial expectations. Hence, we regard it as particularly important that the bill provide assurance that federal support will cease at some point. While some level of federal contribution will be required in any event for many years, adoption of the endowment approach would mean that the Institute will not be a permanent drain on the federal treasury, but at some time will become self-supporting.

III. Relationship to Diversity Jurisdiction and Habeas Corpus Proposals

The invitation to testify at these hearings included a specific request for discussion of the relationship of the State Justice Institute proposal to other judicial improvement measures supported by the Administration, including the abolition of diversity jurisdiction and habeas corpus reform. The diversity proposal is H.R. 6816, which was recently voted out by the full Judiciary Committee. The Administration's habeas corpus reform proposals have been introduced by Representative Lungren as H.R. 6050, which is presently before this Subcommittee.

While our support for the State Justice Institute proposal is not conditioned on the success of the diversity abolition proposal, there is an obvious relationship between

the two. The abolition of diversity jurisdiction would bring about a very large reduction in the workload of the federal courts, and a substantial reduction in the expenditures required for their operation, at the expense of a slight increase in the overall workload of the state judiciaries. Hence, with the abolition of diversity jurisdiction, federal support of the State Justice Institute could be regarded as a re-allocation of funds for the improvement of the state court systems whose responsibilities have been enlarged as a result, rather than as a new expenditure of federal funds. 13/

There is otherwise no direct relationship between H.R. 2407 and these other proposals. The habeas corpus reform proposals of H.R. 6050 would not increase the workload of the state judiciaries, but would reduce litigational burdens

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13/ The Administrative Office of the United States Courts has estimated that federal savings and cost avoidance over a five-year period resulting from the abolition of diversity jurisdiction would come to $160,800,000. At the funding level presently proposed in H.R. 2407 -- $20,000,000, $30,000,000, and $40,000,000 in the first three years of operation -- expenditures for the Institute over five years would come to $170,000,000 even if the level in the fourth and fifth years did not rise above the third year figure of $40,000,000. This would exceed the estimated savings and cost avoidance from diversity abolition. However, the general level of funding contemplated by the Senate-passed version of the proposal, see text accompanying note 12 supra, would be well within the estimated savings and cost avoidance.

resulting from collateral proceedings at both the state and federal levels. We are aware, however, that much of the opposition to the diversity jurisdiction and habeas corpus proposals has reflected apprehensions by some members of Congress concerning possible bias or other deficiencies in the state courts. While we believe that such concerns are not well-founded, we hope that the further improvement of state court operations promised by the State Justice Institute will help dispel them and facilitate adoption of these much needed reforms. Our support for the State Justice Institute proposal does not, of course, imply a view that the state courts are presently incapable of meeting their responsibilities, just as our support for federal court improvement efforts does not imply a view that the federal courts presently fail to provide fair adjudications.

IV. Conclusion

In sum, the State Justice Institute proposal of H.R. 2407 advances the interests of federalism and promises to be of basic importance to the future administration of the nation's courts. The Administration supports this proposal subject to amendment of the funding mechanism to assure that federal funding will not continue indefinitely and a reduction in the funding level to at most that authorized in the Senate-passed bill.

Department of Justice

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LEGISLATIVE AFFAIRS

STATEMENT

OF

JONATHAN C. ROSE
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY

BEFORE

THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES
AND THE ADMINISTRATION OF JUSTICE
U.S. HOUSE OF REPRESENTATIVES

CONCERNING

H.R. 2407, A BILL TO CREATE
A STATE JUSTICE INSTITUTE

ON

SEPTEMBER 15, 1982

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to advise this Subcommittee of the Administration's views concerning H.R. 2407, a bill that would create a State Justice Institute.

The concept of the State Justice Institute was initially advanced in the Report of the Conference of Chief Justices and Conference of State Court Administrators Task Force for a State Justice System Improvement Act. 1/ The principal function of the Institute would be to administer a funding program for state court improvement. The program would involve grants to particular state and local court systems for innovative and demonstration projects, and provision of financial support to the national support institutions of the state judiciaries, including the National Center for State Courts. 2/ The Institute would receive federal funds for purposes of carrying out this program. The Institute would also carry out other functions, including serving as a liaison between the federal and state judiciaries, making

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1/ The report is reprinted in State Justice Institute Act of 1979: Hearings on S. 2387 Before the Subcomm. on Jurisprudence and Governmental Relations of the Senate Comm. on the Judiciary, 96th Cong., 1st & 2d Sess., at 135-201 (1980).

2/ The importance of the activities of the National Center for State Courts was recently re-emphasized by the Chief Justice in his 1981 Year-End Report on the Judiciary. See id. at 23-24. We concur in his assessment of the importance of the work of the National Center for the nation's judicial systems.

recommendations concerning the proper allocation of responsibilities between the state and federal courts, promoting recognition of the importance of the doctrine of separation of powers, and promoting judicial education. 3/

In response to a request of Chairman Rodino, the Administration transmitted a letter to Congress in July of 1981 stating our views regarding the State Justice Institute proposal. 4/ Our response noted that the objectives of the proposal are obviously important, and that difficulties could arise in connection with efforts to achieve them by other means. However, we concluded that the proposal should not be adopted for budgetary reasons and certain other reasons. For example, while the President would appoint the Board of Directors of the Institute, it would not be subject to the control of the federal executive. It would accordingly be free to transmit its funding requests directly to Congress, with the role of the Office of Management and Budget limited to review and comment at the time of transmittal.

At this point we must reiterate our opposition to enactment of the State Justice Institute proposal. As before, our objections are largely budgetary in nature. In the remainder of my

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3/ See H.R. 2407 § 3(b).

4/ See Letter of Assistant Attorney General Robert A. McConnell to Honorable Peter W. Rodino, Chairman, House Committee on the Judiciary (July 29, 1981).

statement I will explain the grounds for our opposition and address the relationship of the State Justice Institute proposal to certain court improvement measures supported by the Administration.

I. Grounds of Opposition

The proponents of the State Justice Institute have advanced a number of arguments in support of the desirability and propriety of providing federal funds for its operation. They have noted that there is a degree of direct federal interest in the fairness and efficiency of state proceedings, since the state courts play a role in the administration of federal law. The specifically federal activities of the state courts include adjudicating federal causes of action in a variety of areas in which Congress has given the state courts concurrent jurisdiction, entertaining federal defenses that are raised in any type of civil action, and protecting the federal rights of defendants in state criminal proceedings. The burden of these responsibilities on the state courts has grown in recent years as a result of the decisions of Congress in expanding the scope of federal law and the decisions of the Supreme Court in interpreting the federal Constitution. The Institute's proponents have also suggested that the Institute's activities would facilitate future adjustments in the division of jurisdiction between the state and federal courts, thereby relieving the overburdened dockets of the federal courts and achieving an allocation of state and federal responsibilities that better serves the interests of federalism.

We are not insensitive to the force of these considerations, but do not believe that they can be accorded conclusive weight. The acute financial condition of the federal government, and the need to exercise restraint even in relation to proportionately limited budgetary items, require no comment. The appropriations authorized by H.R. 2407 for the first three years of the Institute's operation are $20,000,000, $30,000,000, and $40,000,000. An expenditure approaching $100,000,000 over a three year period is certainly substantial. Moreover, we are concerned over the ascending scale of the proposed appropriations, suggesting an ever-increasing federal contribution from year to year. Federal funding programs, once underway, have all too often grown far beyond initial expectations.

It should also be noted that we have limited federal assistance to state justice systems in other areas. Police, prosecutors and correctional institutions at the state and local level, as well as the state courts, are presently soliciting renewed federal financial support. The arguments that might be advanced by these other interests are similar to those of the courts -- police and prosecutors have also incurred additional burdens and expenditures as a result of the expansion of the federal rights of suspects and defendants, and prison systems in many states have been required to undertake major reforms as the result of direct federal intervention in suits challenging prison conditions. In terms of need, it is not apparent that the other elements of state and local justice systems are less deserving than the courts, or that

denial of their requests could be justified if those of the courts were granted.

II. Relationship to Diversity Jurisdiction and Habeas Corpus Proposals

The solicitation of the Administration's views for these hearings included a specific request for discussion of the relationship of the State Justice Institute proposal to other judicial improvement measures that the Administration supports, including the abolition of diversity jurisdiction and habeas corpus reform. The diversity proposal is H.R. 6816, which was recently voted out by the full Judiciary Committee. The Administration's habeas corpus reform proposals have been introduced by Representative Lungren as H.R. 6050, which is presently before this Subcommittee.

There is an obvious relationship between the State Justice Institute proposal and the proposal to abolish diversity jurisdiction. The elimination of diversity jurisdiction would bring about a very large reduction in the workload of the federal courts and a substantial reduction in the expenditures required for their operation, but would do so at the expense of a slight increase in the overall workload of the state judiciaries. We would accordingly give further thought to our position on the State Justice Institute proposal if the diversity proposal were adopted.

There is otherwise no direct relationship between H.R. 2407 and these other proposals. The habeas corpus reform proposals of H.R. 6050 would not increase the workload of the state judiciaries, but would reduce litigational burdens resulting from collateral proceedings at both the state and federal levels. We are aware that much of the opposition to the diversity jurisdiction and habeas corpus proposals has reflected apprehension by some members of Congress concerning possible bias or other deficiencies in the state courts. We do not, however, believe that such concerns are well-founded. The state courts are competent to decide civil disputes between inhabitants of different states, and to protect the rights of state criminal defendants under a more limited system of federal review, without the contribution of federal funds contemplated by the State Justice Institute proposal.

III. Conclusion

In sum, the Administration continues to oppose enactment of the State Justice Institute proposal of H.R. 2407. We do not believe that a new funding program of this type can be justified. 5/

5/ In a concluding footnote in our initial response letter, we stated a particular objection to the requirement that the President appoint seven members of the Board of Directors from a list of at least fourteen candidates submitted by the Conference of Chief Justices. We questioned the constitutionality of such a mode of selection on the basis of Constitution, Art. II, Section 2, Cl. 2, which regulates the manner of appointment of "officers of the United States." It is dubious, however, that the members of the Board of Directors would be "officers of the United States" in the pertinent sense in light of various provisions of the proposed Act, including an express statement in section 4(e) that the members of the Board shall not, by reason of their membership, be considered officers or employees of the United States. Independently of any question of constitutional constraint, we find objectionable as a basic matter of policy a selection procedure which narrowly constrains the President's discretion and is open to the possibility that he will be required to appoint a person he regards as inappropriate or unfit for the position. Provisions calling for the President to appoint individuals from a list of submitted names should provide that the President can require the submission of additional names.