State–Federal Judicial Observer

NEWS AND COMMENTARY OF INTEREST TO THE STATE AND FEDERAL JUDICIARY

A joint publication of the Federal Judicial Center and the National Center for State Courts • Number 7 • October 1994

State, Federal Judicial Bodies Agree on Health Care Dispute Resolution Principles

The chief organizations representing state and federal judges have spoken with one voice on principles to be followed for dispute resolution systems in the debate on health care reform legislation.

The National Conference of Chief Justices, at the conclusion its annual meeting in Wyoming on August 4, acted on the recommendations of its State–Federal Relations Committee and adopted a resolution stating four principles that Congress should follow in enacting health care legislation. The conference is composed of chief justices for supreme courts of states and U.S. territories. Former Tennessee Chief Justice Lyle Reid chaired the state–federal committee.

The four principles were adopted (with only slightly different language) by the Judicial Conference of the United States on August 9. The Judicial Conference acted on a recommendation of a special health care subcommittee of its Committee on Federal–State Jurisdiction, composed of both state and federal judges, which met in Wyoming at the same time as the state chief justices' meeting.

The principles adopted by both judicial bodies (in the language adopted by the Judicial Conference) are as follows:

1. The full exhaustion of administrative remedies for benefit-denial claims should be a requirement for any health care legislation. Such a requirement enhances the efficiency of the review and the effectiveness of such claims. Claimants should not be permitted to bypass administrative remedies and to proceed directly into a court of competent jurisdiction.

2. Following the exhaustion of administrative remedies, and consistent with the general principles of federalism, state courts should be the primary forum for the review of benefit-denial claims.

3. Traditional discrimination claims and actions should be handled differently than benefit-denial claims based on issues such as medical necessity.

4. To ensure the effectiveness of the enforcement provisions of any health care legislation, it is critical that sufficient resources be provided to the responsible administrative and judicial entities.

The resolutions of the respective state and federal judicial bodies containing the four principles were sent to every member of Congress.

Federal and state members of the health care subcommittee of the Judicial Conference Committee on Federal–State Jurisdiction are U.S. District Judge Barbara J. Rothstein (W.D. Wash.), chair; U.S. Court of Appeals Judge Stephen H. Anderson (10th Cir.); U.S. District Judge J. Frederick Motz (D. Md.); Chief Justice Harry L. Carrico (Va. Sup. Ct.); and Chief Justice Thomas J. Moyer (Ohio Sup. Ct.). ❑

NCCJ Adopts Two Strong Resolutions on Federalism

At its annual meeting in Wyoming in August, the National Conference of Chief Justices adopted two resolutions dealing with judicial federalism.

The first resolution states the chief justices' strong opposition to "federal preemption of existing state product liability law . . . as an unwise and unnecessary intrusion on principles of federalism." The justices also oppose any such preemption because such a measure would be "contrary to the need for speedy and economical resolution of disputes."

The resolution notes that the conference has continually opposed since 1983 "broad federal legislation" that would cause such preemption; that such opposition has been continuously reaffirmed by the conference; and that state product liability law has achieved "substantial uniformity over a 30-year period." The conference opposes specifically "such radical concepts as the proposition that the U.S. Court of Appeals should be the final arbiter of state tort law."

The second federalism resolution recognizes "the need to reduce jurisdictional conflict among tribal, state, and federal courts" and notes the accomplishments of the Tribal Courts and State Courts Project, a project funded by the State Justice Institute. The resolution endorses the following four principles developed by the project:

• Tribal, state, and federal courts should continue cooperative efforts to enhance relations and resolve jurisdictional disputes.

• Congress should provide resources to tribal courts consistent with their current and increasing responsibilities.

• Tribal, state, and federal authorities should take steps to increase the cross-recognition of judgments, final orders, laws, and public acts of the three jurisdictions.

• The Tribal Courts and State Courts Project should define the appropriate jurisdiction of tribal courts over conduct on tribal lands by tribal members, nonmember Indians, and non-Indians.

The resolution made permanent the council's Committee on Jurisdiction in Indian Country.

Copies of the two resolutions may be obtained from the National Center for State Courts, 300 Newport Ave., Williamsburg, VA 23185, phone: (804) 253-2000. ❑

Seminar Features Nationally Known Authors; Oates, McPherson Speak

Four nationally known authors were featured faculty members of the fifth annual Harold R. Medina Seminar for State and Federal Judges on Science and the Humanities at Princeton University in June.

John Simpson/LEIGH

National Book Award winner Joyce Carol Oates discussed her latest novel, Black Water, *with state and federal judges at the fifth annual Harold R. Medina Seminar on Science and Humanities at Princeton University in June.*

The literature portion of the seminar included three prominent writers, all on the Princeton faculty, discussing their works. Joyce Carol Oates, winner of the National Book Award, treated the judges with an after dinner commentary on her latest novel, *Black Water*. Russell Banks, another Princeton-based novelist, discussed his forthcoming novel about martyr John Brown. Arnold Rampersad, of Princeton's Department of English, reviewed his assistance to the late Arthur Ashe in the preparation of Ashe's autobiography.

Prof. James McPherson, a member of the Princeton history faculty and author of the Pulitzer Prize-winning *Battle Cry of Freedom*, led off the presentations for the last day of the seminar with a lecture titled "What Did They Believe They Were Fighting For: The War Between the States." The discussion focused on the motives for participating in the Civil War of soldiers from both the North and South.

The first day of the seminar was devoted to science, and it included presentations relating to physics, molecular biology, and engineering. Prof. David Wilkinson of the Princeton physics faculty reviewed recent developments and discoveries in studies of the universe. He also discussed some of the issues and areas of research in physics that will be developing in the next decade.

Another highlight of science day at the seminar was a slide presentation on "Engineering Developments and Political and Cultural Change" by Princeton engineering professor David Billington. That was preceded by another slide presentation by Prof. Billington on "Cultural Significance in Engineering Symbols—The Bridge," a favorite lecture at earlier seminars.

Other seminar presenters were Dr. Myron Magnet, author and former member of the Board of Editors of Fortune Magazine; theologian Chester Gillis of Georgetown University; pre-Columbian art curator at Princeton, Gillet Griffen; and Russian literature scholar Ellen Chances, also of Princeton.

The seminar is sponsored each year by

See MEDINA, page 3

State and Federal Judges, Court Personnel to Attend March Conference on Ending Racial, Ethnic Bias

More than 180 judges, court officers, administrators, legislators, and educators from states, U.S. territories, and the federal judicial system are expected to attend the first National Conference on Eliminating Racial and Ethnic Bias in the Courts, in Albuquerque, N.M., March 2–5, 1995.

The National Center for State Courts (NCSC) is sponsoring the conference with funding from the State Justice Institute. The NCSC has also consulted the Federal Judicial Center on the conference plan and agenda, and the FJC will design special segments for federal court participants.

The conference will focus on actions designed to assist judicial leaders and administrators in the development of innovative strategies to identify and eliminate the existence and causes of racial and ethnic bias in their judicial systems. Objectives include the following:

• encouraging courts to dismantle all vestiges of racial and ethnic bias in the judicial branch;

• presenting an analytical framework for understanding specific ways in which personal, institutional, and systemic bias may operate in the courts;

• providing a forum for judges, officers of the court, court administrators, representatives of public and private organizations, scholars, and the general public to exchange ideas on how the existence of bias in the courts and efforts to eliminate it affect court policy making and management;

• informing participants about successful efforts to investigate the existence and nature of bias in the courts and about barriers to that success; and

• inspiring participants to develop strategies to eliminate racial and ethnic bias from their court systems and to follow up on their strategic plans.

Activities for achieving these objectives include small-group discussion and exercises, workshops, and a "town forum" discussion. A panel presentation will explore approaches used to raise awareness about bias, such as task forces, diversity training, programs on sentencing disparities, and public forums and hearings. State teams, federal participants, and representatives from public, private, and community organizations will work on action strategies. The teams will have an opportunity to share their findings with other conference participants.

Conference follow-up will include establishing a database of experts on racial and ethnic bias in the courts, publication of the conference proceedings, and development of a survey of various strategies for addressing racial and ethnic bias in each state and territory. These plans may provide a framework for the leadership of the nation's various judicial systems as they devise appropriate reform strategies and carry them out.

A brochure describing the conference in more detail will be mailed out later this year. The Federal Judicial Center will contact chief circuit judges to explain its funding policies for the conference. For more information about the conference, state court personnel should contact H. Clifton Grandy, Project Director, or Karen M. Hughes, National Center for State Courts, 300 Newport Ave., Williamsburg, VA 23185, phone: (804) 253-2000, fax: (804) 220-0449. ❑

Inside . . .

Chief Justices' Conference Takes Strong Stand Against Justice Dept. Regulation

The National Conference of Chief Justices has taken a firm stand against a proposed Department of Justice regulation that would permit department lawyers to communicate with persons represented by counsel under circumstances not now permitted by many state legal ethics codes.

At their annual conference, held in August, the chief justices adopted a resolution that strongly opposes the proposed rule and urged U.S. Attorney General Janet Reno to delay making it final.

The proposed regulation is set forth in part 77 of Title 28 of the Code of Federal Regulations. Section 77.5 provides that an attorney for the government may communicate with a represented person concerning the subject matter of the representation if the communication "(1) is made in the course of an investigation, whether undercover or overt, of possible criminal activity; and (2) occurs prior to the attachment of the Sixth Amendment right to counsel with respect to charges against the represented person arising out of the criminal activity that is the subject of the investigation; or (3) the communication is otherwise permitted by law."

The basis for the chief justices' objection is that, under state professional conduct codes and under the ABA Code of Professional Conduct, a communication by a government prosecutor or government attorney with a represented person would constitute unethical conduct and subject the prosecutor or attorney to disciplinary proceedings in the states for unprofessional conduct.

The chief justices' resolution urges the Attorney General to "continue discussions with representatives of the conference in an effort to resolve the issue and avoid a regrettable constitutional confrontation which might arise if the Final Rule is implemented."

The chief justices also endorsed an extensive "comment" on the proposed rule—this comment had been prepared by a special committee created by the chief justices to deal with the issue and was sent to the Attorney General in March.

The chief justices, in their resolution, noted that "as a matter of policy and ethics, as well as principles of federalism and separation of powers, the state supreme courts have the sole and exclusive responsibility to supervise the practice of law in each jurisdiction." "The Proposed Rule," they continued, "is antithetical to such policies, principles, and ethical considerations."

The Department of Justice had advised the special conference committee in an August 1 letter that it would not delay making the rule final.

The conference also opposed the rule when it was first proposed in 1993, having adopted an earlier resolution that created the special committee and charged it with communicating to the Attorney General the "grave concerns of the conference" and the desire to avoid a "constitutional confrontation."

Chief Justice E. Norman Veasey (Del. Sup. Ct.), chair of the special committee, in transmitting the comment to U.S. Attorney General Janet Reno in March, proposed in an accompanying letter a compromise regulation that would permit such communications by prosecutors in some instances: when the other lawyer has consented; when the prosecutor is expressly authorized to do so by a specific act of Congress; or when the represented party initiates the contact and the prosecutor reasonably believes that notification of the party's lawyers creates a risk of death or substantial bodily harm. The compromise was rejected by the Department of Justice.

Members of the chief justices' special committee, in addition to Chief Justice Veasey, are Chief Justice Malcolm M. Lucas (Cal. Sup. Ct.), Chief Justice Luis D. Rovira (Colo. Sup. Ct.), and Chief Justice Richard W. Holmes (Kan. Sup. Ct.). ❑

State–Federal Judicial Observer

a joint publication of the
Federal Judicial Center and the National Center for State Courts

William W Schwarzer, Director, Federal Judicial Center
Russell R. Wheeler, Deputy Director, Federal Judicial Center
Larry R. Sipes, President, National Center for State Courts

EDITORIAL STAFF
James G. Apple, Chief, Interjudicial Affairs Office, Federal Judicial Center
Charles Campbell, National Center for State Courts

EDITORIAL ADVISORY BOARD
Justice Susan P. Graber, Oregon Supreme Court; Chief Justice Thomas J. Moyer, Supreme Court of Ohio; Judge Sandra Mazer Moss, Court of Common Pleas of Philadelphia; Judge Alexander H. Williams III, Superior Court of Los Angeles County; Senior Judge Peter T. Fay, U.S. Court of Appeals for the Eleventh Circuit; Senior Judge Monroe G. McKay, U.S. Court of Appeals for the Tenth Circuit; Judge Robin J. Cauthron, U.S. District Court, W. D. of Oklahoma; Chief Judge Michael A. Telesca, U.S. District Court, W. D. of New York; Mr. Robert M. White II, Washington, D.C.; Professor Daniel J. Meador, University of Virginia Law School, Charlottesville, Virginia

Published in the Interjudicial Affairs Office, Federal Judicial Center, One Columbus Circle, N.E., Washington, DC 20002-8003; phone: (202) 273-4161, fax: (202) 273-4019

A note to our readers

The *State–Federal Judicial Observer* welcomes comments on articles appearing in it and ideas for topics for future issues. The *Observer* will consider for publication short articles and manuscripts on subjects of interest to state and federal judges. Letters, comments, and articles should be submitted to Interjudicial Affairs Office, Federal Judicial Center, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, DC 20002-8003.

OBITER DICTUM

Substantive Legal Issues Create Tensions Between State and Federal Courts

by Justice Susan P. Graber
Oregon Supreme Court

(This column has been adapted from materials distributed by Justice Graber at the Western Regional Conference on State–Federal Judicial Relationships in June 1993, in Stevenson, Wash.)

Most of the conferences and writings on state–federal judicial relationships concern court procedures and communications. There are, however, certain substantive legal issues that both cause and reflect some of the tensions between the two systems. The following is a discussion of some of the kinds of cases and legal issues that arise on the federal side yet implicate the operations of the state courts.

A. Abstention Doctrines

A fundamental issue in state–federal judicial relationships is the problem of overlapping and conflicting state and federal jurisdiction. There are a number of complex, often interrelated judge-made abstention doctrines relevant to that problem. The doctrines constitute a rejection of the absolute right to a federal forum where federal jurisdiction exists, and they have the common purpose of dealing with uncertain, or at least ambiguous, issues of state law.

These judge-made abstention doctrines include the following:

• When a state's action is being challenged in federal court as contrary to the federal constitution and there are questions of state law that may be dispositive of the case, the federal court should abstain (although it may retain jurisdiction while the parties' rights are determined in the state forum). *Railroad Comm'n of Texas v. Pullman Co*., 312 U.S. 496 (1941).

• Federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out domestic policy. *Burford v. Sun Oil Co*., 319 U.S. 315 (1943) (a case involving an order of the Texas railroad commission relating to the drilling of oil wells).

• A federal court may stay a federal diversity action in eminent domain cases. *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25 (1959).

• A federal court should not enjoin a state criminal prosecution begun prior to the institution of the federal suit except in very unusual situations, where necessary to prevent immediate irreparable injury. *Younger v. Harris,* 401 U.S. 37 (1971). The doctrine has now been extended to civil proceedings. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982).

• Pendency of an action in a state court is not a bar to proceedings concerning the same matter in federal court, other than in exceptional circumstances. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). Six factors are relevant to the decision whether to stay or dismiss a federal proceeding in deference to state adjudication: (1) the order in which jurisdiction was obtained over the action (the "priority" factor); (2) the law that provides the rule of decision on the merits (the "choice of law" factor); (3) the convenience or inconvenience of the forum; (4) the desirability of avoiding piecemeal litigation; (5) the adequacy or inadequacy of state law proceedings in protecting the defendant's rights: and (6) in an action involving property, which court first assumed jurisdiction over the property in dispute (the "jurisdiction over the res" factor).

Some of the abstention doctrines described above may involve postponement of federal jurisdiction, rather than its abdication. When the federal court retains jurisdiction—that is, does not dismiss the case—litigants may return to federal court for adjudication of federal issues.

B. Certification

Certification is a procedural method of resolving some state–federal jurisdictional issues. A federal court in which a case is pending certifies an unresolved question of state law (generally one that disposes of all or part of the case) to the court of last resort of that state, which answers the question. The federal court then adjudicates the pending case.

Now provided in at least 29 states, certification was first recognized by the Supreme Court in *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207 (1960). The Court has strongly endorsed the use of certification in cases where state law is difficult for the federal court to ascertain.

State statutory and discretionary criteria for accepting certification vary. For example, in *Western Helicopter-Servs. v. Rogerson Aircraft*, 311 Or 361, 811 P.2d 627 (1991), the Oregon Supreme Court determined that it will accept a certified question if the certifying court is one of those designated in the state's certification statute, if the question is one of law, if the law at issue is Oregon law, if there is no controlling Oregon precedent, and if the question has the potential to determine at least one claim in the case. All states having statutory certification procedures accept certified questions from the Supreme Court and from federal courts of appeal, and most also accept questions from federal district courts. Some accept questions directly from bankruptcy judges and magistrate judges.

C. Selected Areas of Substantive Law

There are a number of substantive areas of law that present questions of overlapping and conflicting state and federal jurisdiction, some of which are addressed by federal statutes. A few examples will suggest the extensive opportunities both for common ground and for conflicts.

• Under the Anti-Injunction Act, 28 U.S.C. § 2283, federal courts are prohibited from enjoining most state proceedings, with certain exceptions: where such injunctions are expressly authorized by Congress, where they are necessary in the aid of the federal court's jurisdiction, and where they are necessary to protect or effectuate the federal court's prior judgments (the "relitigation exception"). The "in aid of jurisdiction" exception implies that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's authority in that regard.

• Under 28 U.S.C. § 1443, providing for civil rights removal jurisdiction, a case may be removed from state to federal court in three circumstances: (1) where a person has been denied or cannot enforce in state court a civil right of equality (the "denial" clause); (2) where a defendant is being sued or prosecuted for performing any act under color of authority derived from any law providing for equal rights (the "authority" clause); and (3) where a defendant is being sued for refusing to perform an act that would be inconsistent with such a law (the "refusal" clause).

• The Declaratory Judgment Act, 28 U.S.C. § 2201, provides that, with certain exceptions, a federal court may declare the rights or legal relations of interested parties

See OBITER DICTUM, page 4

British Lord Chancellor Greets State, Federal Judges at Seminar

Lord James McKay of Clashfern, Lord Chancellor of Great Britain, discussed British legal reforms with American judges at a conference in the Lord Chancellor's chambers during the second annual John Marshall Harlan Seminar for State and Federal Judges. The seminar, held in July, took place in London and Edinburgh.

The seminar is sponsored by the Judiciary Leadership Development Council (chaired by Judge John W. Kern III of the District of Columbia Court of Appeals), the Law Society of London, the General Council of the Bar of the United Kingdom, and the University of Edinburgh. The program is named for Justice John Marshall Harlan of Kentucky, who served on the U.S. Supreme Court from 1877 to 1911.

Lord McKay told the seminar participants that some of the legal reforms he proposed in a series of papers issued in 1989 had been adopted, including opening up access to the courts, granting appearance rights in courts to solicitors, and adopting a modified contingent fee system.

Judge Kern presented Lord McKay with a biography of Justice Harlan at the conclusion of the session.

Seminar participants included four state judges, seven federal judges, and two federal administrative law judges. The seminar featured lectures and discussions about the English legal system, English legal history, and current issues in English criminal law. There were also special sessions on European Community law and the European Court of Human Rights.

The London portion of the program included visits to "Old Bailey," the Central Criminal Court in London, and the Royal Courts of Justice, where the American judges sat with their English counterparts and observed trials. They also met with the English judges for afternoon tea and conversation.

In Edinburgh, the judges participated in discussions at the Faculty of Law at the University of Edinburgh, where they heard presentations on comparisons of the English and Scottish systems of civil and criminal law, issues of medical jurisprudence, and recent developments in public international law.

A reception for the judges at the Faculty of Advocates in Edinburgh preceded visits to the homes of Scottish judges and advocates (barristers).

At the conclusion of the seminar, Judge Kern said that "the evaluations by the participants were unusually complimentary of all aspects of the program. Every evaluation gave it the highest overall rating."

He indicated that "a third, similar seminar is being planned for the summer of 1995, during the first two weeks of July." Interested judges should contact Judge Kern at 2510 Virginia Ave., Watergate East 314-N, Washington, DC 20037, phone: (202) 338-5513. ❑

Special Issue of *Justice System Journal* Details Courts' Attempts to Deal with Rising Drug Caseloads

A special issue of the *Justice System Journal* reports how state courts have coped with the rising tide of drug cases and how successful they have been. The special issue is titled "Swift and Effective Justice: New Approaches to Drug Cases in the States." The *Justice System Journal* is published by the Institute for Court Management of the National Center for State Courts.

Fifteen authors from academia, state courts, and the private sector examine and evaluate the three major approaches used by the courts to respond to increasing drug caseloads: (1) case-processing management (including differentiated case management and expedited drug-case management programs funded by the Bureau of Justice Assistance, U.S. Department of Justice); (2) special drug-treatment courts; and (3) sentencing alternatives (treating drug offenders in addition to incarcerating them).

In developing approaches to manage their rising drug caseloads, the state courts had to deal with three fundamental questions:

• How will special, speedier processing of drug cases affect the remaining court caseloads?

• Will special drug-case processing result in "assembly line justice," leading in turn to different sentences than drug offenders would otherwise receive?

• Will special drug-case processing reduce recidivism among drug offenders?

The special issue's articles indicate that, overall, special drug-case management approaches seem to be working, leading to faster processing of these cases.

Some of the articles show that special drug-treatment courts tend to blur the distinction between prosecution, defense, and judicial personnel. Cases can take longer because large numbers of defendants are placed under court supervision for longer periods of time. The articles suggest that special drug-treatment courts and sanctions have little effect on recidivism among drug offenders.

Copies of this special issue (vol. 17, no.1) can be obtained by contacting Carrie Clay, Publications Coordinator, National Center for State Courts, 300 Newport Ave., Williamsburg, VA 23187-8798, phone: (804) 259-1812, fax: (804) 220-0449. ❑

MEDINA, from page 1

the Judiciary Leadership Development Council, the Federal Judicial Center, and the Council on the Humanities and the Council on Science and Technology of Princeton University. It is held annually and is open to both state and federal judges. The 1994 seminar was the fifth in the series.

The sixth annual Medina seminar, now in the planning stages, will be held June 8–13, 1995.

Interested state judges should contact the chair of the Judiciary Leadership Development Council, Judge John W. Kern III, 2510 Virginia Ave., N.W., Watergate East 314-N, Washington, DC 20037, phone: (202) 338-5513. Scholarships for state judges to attend the seminar are available from the State Justice Institute.

For information about application procedures, interested federal judges should write to the Judicial Education Division, Federal Judicial Center, Thurgood Marshall Federal Judiciary Building, One Columbus Circle N.E., Washington, DC 20002-8003. ❑

At this year's Medina Seminar, Pulitzer Prize-winning historian James McPherson previewed his forthcoming book on motives of Civil War soldiers.

Realistic Long-Range Planning for Courts: A State–Federal Judicial Council Project

by Judge William W Schwarzer
Director, Federal Judicial Center

Long-range planning for state and federal courts must be tempered by a healthy dose of realism. This is doubly true in the case of state–federal judicial councils because they are ad hoc bodies—they have no statutory status and are invested with no regulatory or administrative authority. These characteristics do not take away from their utility. But these councils lack the type of staff needed to engage in operative planning for the future.

Councils therefore should not pretend to be anything other than what they are. However, that does not mean that they have to shy away from activities that can contribute to long-range planning for the courts.

Institutionalizing Councils

Perhaps the initial long-range planning concern for councils should be their own future. The pamphlet published by the Federal Judicial Center (and available from the Center's Interjudicial Affairs Office; see address in masthead, opposite page) on organizing and using state–federal judicial councils notes that they have had a checkered history. The existence of many of them has been episodic. Between 1970 and 1980, the number of councils fell from 37 to 9. Recently, councils have been reviving and their numbers are increasing.

This suggests that councils ought to give thought to institutionalizing themselves. Unlike government agencies that are hardy and seem to survive even beyond the time when they are needed, state–federal judicial councils enjoy none of the security that comes from bureaucratic and political support. Lacking a constituency, councils must survive on their merits.

Perhaps opportunities will arise for their legislative recognition. One way this might occur is by statutory references to state–federal judicial councils, assigning them functions and recognizing them as sources for advice or counsel or as recognized coordinating bodies. Their capacity to survive can perhaps also be enhanced by strengthening their attachment to established *de jure* bodies, such as state judicial councils in the relatively few states where they exist and the judicial councils in the federal system.

Discovery of Ways to Be Useful

Another approach to the institutionalization of councils is to find additional ways in which they can become useful and valuable. Agencies, committees, and other bodies should not survive for their own sake. Their survival should be a reflection—a function—of their usefulness. Councils therefore should on an ongoing basis determine what needs exist that they can fill. They should be like the pink Kaiser cement trucks we used to see on the streets that had written on their sides: "Find a Need and Fill It."

The original feeling for a need for councils stemmed from the perceived existence of frictions between state and federal courts. As those frictions seemed to decline, councils began to fade away. There is good reason to believe that today there is, on the whole, relatively little need for councils to deal with friction between the systems. What are the needs that exist now or that can be foreseen? The answer to that question will vary from state to state. If councils are to plan for an effective future role, they should begin by undertaking an imaginative and thorough search for needs that they can meet. It should not be enough simply to invent roles for the councils. There is no need for make-work organizations. Whatever roles the councils undertake, they should meet genuine needs if they are to survive.

Much of the common activity of councils addresses issues of immediate concern, such as coordinating habeas corpus review, dealing with problems created by bankruptcy stays, and improving communications between state and federal judges. These are important matters where councils play a useful role. But councils might do well to try to look beyond the horizon.

The Long-Term Problem of Resource Allocation

Perhaps the most serious long-term issue confronting both state and federal courts concerns resources. Courts face a future of increasing demand for services coupled with declining resources with which to provide them. Each court system is working on resource problems in its way, more or less effectively. It is likely that court systems will have to change in fundamental ways to cope with what seem quite clearly to be declining prospects for the future.

Councils are just beginning to think about whether and how state–federal cooperation and coordination might alleviate some of the resource problems we face. Active measures, of course, have to be carried out through other agencies and channels. But it is conceivable that the councils can become a vehicle or forum for the exchange of information—and for the identification of opportunities—that could be quite helpful to the more effective utilization of resources. This would involve broadening the traditional role of councils to take in administrative matters, and this in turn should be reflected by expanding membership beyond judges.

The exchange of information about respective resources and needs could be the first step leading to developing sharing arrangements by the responsible authorities. One can easily imagine pooling of law libraries and other courthouse facilities, including courtrooms. Efficiencies and economies might be realized by coordination of some aspects of calling of jurors, probation administration, etc. Implementing such measures is not something councils should attempt to do. But councils can serve as catalysts by initiating thought, discussion, study, and analysis—by bringing together the actors in each system—leading ultimately to appropriate action.

Other Areas of Cooperation

This catalytic function can be a useful adjunct to conventional long-range planning activity by established authorities. One can imagine other areas: for example, exchanging information about experience with alternative approaches to discovery and disclosure could be useful to the development by the courts of rule changes (for both systems). Similarly, exchange of information about ethical rules and standards might encourage improvements in each system.

A major issue for long-range planners is the allocation of business between state and federal court systems. This is a source of political controversy and much debate. Councils can be a place where the issues are considered on a practical level, experiences are exchanged, and pragmatic answers to problems developed. The work of councils in this area could inform the positions taken by the leadership of the judicial system and assist in bringing about enlightened executive and legislative decisions. One can well imagine that a communication from a state–federal judicial council would carry considerable weight with legislators.

Councils may be a place for constructive thought and exchanges of experience and views, leading to more informed action in the state and federal court systems. But to play that role, councils must ensure their own long-term future—their continuity as serious and effective bodies that can make a valuable contribution. ❑

State–Federal Council Discussion Survey Reveals Variety of Subjects

The National Conference on State–Federal Judicial Relationships in Orlando, Fla., in April 1992, sparked enthusiasm in the states for organizing, reorganizing, or renewing state–federal judicial councils. The Interjudicial Affairs Office of the Federal Judicial Center regularly monitors the meetings and activities of these councils, and it publishes short summaries of the meetings of the various councils regularly in the *State–Federal Judicial Observer*.

The following is a compilation of discussion topics that have been included on the agendas of various councils from the summer of 1992 to the summer of 1994. The list reveals the rich diversity of subjects that have occupied the attentions of state and federal judges, and it suggests the usefulness of councils in discussing matters of mutual concern. In some instances, the discussion topics have led to concrete actions, such as the creation of gender-bias task forces, the implementing of plans for sharing facilities, the sharing of sources for jury lists, and similar activities. (A Federal Judicial Center pamphlet, *Organizing and Using a Council of State and Federal Judges*, has additional suggestions and information about councils.)

Alabama
bankruptcy stays
court management information systems
adequate funding for courts

California
new juror orientation programs
death penalty/habeas corpus rules
recruitment of death penalty counsel
law library and facilities sharing
budget cuts for judiciary
joint certification of court reporters
capital case symposium
new disclosure rules for related cases
court coordination guidelines
court interpreter issues
federalization of state law
certification of state law questions
prison inmate grievance procedures

Connecticut
joint use of jury pool selection processes
prison inmate grievance procedures

Florida
long-range planning for courts
size of federal judiciary
death penalty appeals

Georgia
ADR
public defender system

Hawaii
joint lists of pro bono counsel
calendar and scheduling conflicts
dual prosecution of criminal cases
certification of court reporters

Iowa
sharing of judicial education programs
sharing of courtroom space and facilities
joint settlement of related cases
calendar/scheduling conflicts
gender and racial bias in the courts
certification of state law questions

Kansas
court mediation programs
state–federal court budget problems
sentencing guidelines
federalization of state crimes
pro se law clerks

Louisiana
National Conference on State–Federal Judicial Relationships (Orlando Conference)
calendar/scheduling conflicts
reducing friction resulting from federal reversals of state criminal proceedings

Maine
overlapping jurisdiction in drug prosecutions

Minnesota
gender and racial bias
certification of state law questions
lawyer discipline
CJRA implementation
Fed. R. Civ. P. changes
building projects in the state system

Mississippi
loan of federal courtrooms for state proceedings
calendar/scheduling conflicts
effects of bankruptcy stays

Missouri
National Conference on State–Federal Judicial Relationships (Orlando Conference)
automatic stays in death penalty cases
forfeiture of property proceedings in drug cases
prison inmate grievance procedures
unification of CLE requirements
concurrent jurisdiction in RICO cases
calendar/scheduling conflicts
effects of bankruptcy stays
sharing of courtroom facilities
appointments in pro se matters

Montana
long-range planning for courts
gender bias
case workloads of judges
handling of capital cases
certification of state law questions
court interpreter programs
National Conference on State–Federal Judicial Relationships (Orlando Conference)
bankruptcy education programs
new rules for fax filings
new building projects
cooperation in prison riot litigation

Nevada
status of law librarians
locus of incarceration of state/federal prisoners
bankruptcy conflicts
long-range planning for courts
cameras in the courtroom
prison inmate grievance procedures
use of prison facilities for hearings
death penalty resource center
press relations for courts
death penalty procedural rules
Federal Habeas Corpus Act of 1993
proliferation of pro se cases
liens on prisoner accounts for pro se cases
video teleconferencing for prisoner appearances
Western Regional Conference on State–Federal Judicial Relationships (Skamania Conference)

New York
certification of state law questions
certification and compensation of court interpreters

Ohio
certification of state law questions
death penalty habeas corpus cases
death penalty resource center
bankruptcy education programs
scheduling conflicts

Oklahoma
prison inmate grievance procedures
public relations for the courts

Tennessee
judicial evaluation survey
certification of state law questions
calendar/scheduling conflicts
joint education programs

Virginia
standardization of court interpreter program
use of legislative history in interpreting statutes
public relations and the courts
Fourth Circuit regional state–federal conference
federalization of state crimes
trial advocacy program for judges
court security
growing criminal caseloads
Uniform Transfer of Litigation Act
federal funds for state criminal justice system

Washington
sharing of court facilities
sharing of court interpreters
joint education programs

West Virginia
calendar/scheduling conflicts
ADR
automation in the courts
complex litigation
tracking of habeas corpus cases
standards for appointment of counsel
jury management
joint education programs
interpreter services
local court rules
court facilities
pro se litigation ❑

OBITER DICTUM, from page 2

seeking such declaration, even when questions of state law are implicated.

• Under the Tax Injunction Act, 28 U.S.C. § 1341, federal courts may not enjoin the collection of state taxes "where a plain, speedy, and efficient remedy may be had in the courts of such State."

• Suits for violations of contracts between an employer and a labor organization representing employees may be brought in federal court under the Labor Management Relations Act, 29 U.S.C. § 185.

• At least two federal statutes pertain to jurisdiction over bankruptcy actions. 28 U.S.C. § 1334 provides for nonexclusive federal jurisdiction of matters arising under or related to bankruptcy. 11 U.S.C. § 362 provides for automatic stay of all judicial proceedings (not including criminal proceedings) brought against a debtor who has filed for Chapter 13 bankruptcy, including actions to collect a claim against the debtor.

• 28 U.S.C. § 1362 provides that federal district courts have original jurisdiction over all civil actions, brought by recognized Indian tribes, in which the matter in controversy arises under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1360 provides for jurisdiction of civil actions arising under state law brought by enumerated Indian tribes in certain specified states.

• The dual sovereignty doctrine holds that successive criminal prosecutions by separate sovereigns for crimes arising out of the same acts are not barred by the double jeopardy clause of the Fifth Amendment to the U.S. Constitution. *United States v. Traylor,* 978 F.2d 1131 (9th Cir. 1992).

• Under 28 U.S.C. § 2251, a federal court before which a habeas corpus proceeding is pending may stay a state court proceeding against the detained person. Pursuant to 28 U.S.C. § 2254, an application for a writ of habeas corpus should not be granted unless it appears that the applicant has exhausted state remedies.

D. Conclusion

Increasingly, legislatures are attending to issues of potential state–federal judicial friction. For example, the Oregon legislature recently has amended its antitrust law in order to reduce the opportunity for duplication and conflict in that area. Substantively, Oregon's statute, ORS 646.705, mirrors federal law in most respects. The state statute also provides, however, that once a trial on an antitrust claim begins in federal court, the parallel state claim is abrogated unless there is a later determination that the federal court lacked jurisdiction.

At the congressional level, grants of exclusive jurisdiction definitively eliminate jurisdictional conflicts. Notwithstanding legislative awareness and action, however, there will continue to be room for the operation of judge-made abstention doctrines. ❑

State–Federal Judicial Observer (#7)
a joint publication of the Federal Judicial Center and the National Center for State Courts
Interjudicial Affairs Office
Federal Judicial Center
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, DC 20002-8003