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NATIONAL INSTITUTE OF JUSTICE: ANOTHER LAYER OF FEDERAL GOVERNMENT

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In this article, Governor Exon addresses himself to problems presented by the proposed National Institute of Justice. The National Institute of Justice, an idea developed by Bert H. Early, Executive Director of the American Bar Association, is designed to consolidate resources and energies toward modernization of the American legal system. The institute would be an independent, nonprofit, federally chartered corporation. Structurally, it would be governed by a board of undetermined size, the members appointed by the President with the advice and consent of the Senate. Functionally, the institute would gather and disseminate information, diagnose the principal bottlenecks in the flow of criminal and civil justice, establish priorities and develop long-range goals, stimulate research into areas of the law previously neglected, serve as an advisor to branches of government and the legal profession, provide "functional continuity" for the modernization of the legal system, and keep the modernization effort free from political control.

When first asked to contribute to the *Nebraska Law Review's* symposium on the National Institute of Justice, I was reluctant to accept. It appeared that this was a matter concerned with the professional administration of law designed by and for lawyers and judges—an area in which a lay person should not venture.

However, after reading the remarks of Chief Justice Warren E. Burger, delivered to the opening session of the American Law Institute,¹ and after reading Bert H. Early's article in the *West Virginia Law Review*,² I consented to participate in this symposium—not because I was convinced that a reading of either the Chief Justice's address or the Early article made me an expert in the administration of justice, but because I became convinced that the

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1. Burger, *Has the Time Come?*, 55 F.R.D. 119 (1972) [hereinafter cited as Burger].
2. Early, *National Institute of Justice—A Proposal*, 74 W. VA. L. REV. 226 (1972) [hereinafter cited as Early].

proposal for a National Institute of Justice is not confined to the mechanical day-to-day work of the court and lawyer. It would appear that the proposal to a great extent involves the lay people of this state and country. As Chief Executive of this state, remarks by me might be both appropriate and helpful in discussing the merits of the proposed institute.

Far too often in today's complex world problems are examined in a superficial fashion, in what may even be an unrepresentative situation. A solution is then proposed in hopes that by using terms such as "reform" or "streamlined" or "modern" the problems will be eliminated. It is as if we rush in to find a cure before we have properly determined the cause of the disease, only to discover that we have in fact found a cure for a disease not yet discovered and the disease which we sought to cure remains unaffected.³

Likewise, as the blind men examining the elephant, what we may see as the problem may be peculiar to an area or to our own experience. Obviously the problem of crowded dockets, court delays and the like common to metropolitan areas are not common to the vast majority of state or federal courts. Trial dockets in the United States District Court for the District of Nebraska are relatively current and delays, if any, result more often from request of counsel than from the nature of the litigation or the problems of the court.

Certainly, the problems of the state courts in Cook County, Ill., are totally unlike those in Lincoln, Neb., or Torrington, Wyo. Yet the operation of courts, both state and federal, in Nebraska and Wyoming may be closer to the norm than Philadelphia, Chicago or Los Angeles. Creating some form of National Institute of Justice to relieve the problems of the courts, when in fact the problems are limited to a few metropolitan areas, seems somewhat of an "overkill."

In today's governmental world solutions to problems are too often sought by suggesting that a new form of federal agency be created, be it directly governmental or quasi-governmental, as in the case of the National Institute of Justice. The creation usually promises the local autonomy will remain and self-government will be paramount. Yet the very creation of the problem-solver and the inherent restrictions which must be a part of that agency continue to erode away at the notion of self-government and local control.

3. For similar remarks by Chief Judge T. John Lesinski of the Michigan Court of Appeals, see *Lincoln Sunday Journal and Star*, Nov. 19, 1972, § A, at 7, cols. 2-5.

It is difficult to imagine how an agency with perhaps twelve members who, as suggested by Mr. Early, are appointed by the President and confirmed by the Senate⁴ could assure either local representation or local control. Just as members of a court or independent agency are selected by a President with an eye to finding appointees with a philosophy similar to his own, it seems to follow that appointees to the National Institute of Justice would likewise reflect differing presidential attitudes. How that might insure the elimination of the many ills sought to be cured by the National Institute of Justice is difficult to understand.

The Chief Justice in his address to the opening session of the American Law Institute sets out six characteristics which he suggests might serve as a basic concept for a National Institute of Justice. The sixth would seem to make the other five, if not unnecessary, at least difficult to fulfill. The sixth characteristic, as suggested by Mr. Justice Burger, is that "such a program should be one to assist the states to do what they lack resources to do for themselves—it should definitely not be a program to 'federalize' the state courts."⁵ Yet nowhere in either the Chief Justice's address or Mr. Early's article has any real examination been made to determine what assistance states need or where they lack resources to handle any problems themselves. Why create a new corporate-like agency before we really know what it does? Again, outside of the major metropolitan areas, where the principal problems seem to be sheer numbers, it is difficult to know just what it is that the National Institute of Justice would do to aid a state such as Nebraska in bringing about what we lack the resources to do for ourselves, or in bringing about that which cannot be accomplished by the arm of existing agencies, corporations and foundations.

As mentioned earlier, far too often programs are designed for one state or area and adopted by another in the name of "reform" without real understanding or meaning. The recent adoption of the district county court system for Nebraska may very well prove to be a living example of just such a mistake. The act was heralded as "reform" and sold under representations and assurances that more efficient, less costly justice would be guaranteed. It now appears as if at least a share of the citizens, both lay and lawyer alike, were correct. The new proposal will cost substantially more than what was anticipated or can be justified, and will "over-provide" judicial service in many areas of the state to the end that

4. Early, *supra* note 2, at 234.

5. Burger, *supra* note 1, at 125.

the cost of such a program cannot be justified. While good in abstract theory, the practical application falls short of its desired end. It is in this type of reform that we must be certain that in the interest of making improvement we do not move in the wrong direction.

While Mr. Early suggests that the institute would not conflict with or duplicate the federal judicial center, the National Center for State Courts, the American Judicature Society, or the American Bar Association,⁶ it is difficult to see how the institute would avoid the conflict or duplication.

The purpose of the institute is indeed laudable:

[T]he establishment of a national public agency, governed by the most eminently qualified individuals available, and dedicated to the mission of giving national cohesion and increased public and private support to the now inadequate and piecemeal efforts directed toward improving the justice system at all levels.⁷

Fleshing up the bones of such a structure, however, by implementing the day-to-day procedures that will bring about that broad concept without either conflicting with or duplicating existing institutions, or creating new, unnecessary institutions is difficult to imagine.

It cannot be disputed that as more and more people live longer and longer, and as the needs of citizens become greater, the complexity of government grows; nevertheless, efforts should be made to resist the natural inclination to expand government at every level on the belief that every problem that exists, whether fully understood or not, can adequately be solved by simply creating another agency and spending additional dollars. While one should not be reluctant to venture into new frontiers, aimlessly wandering in barren deserts looking for an unknown oasis is wasteful.

After examining in some detail the suggested purposes of the institute,⁸ I find it difficult to fully understand how or why these goals should be obtained. Without being critical of Mr. Early's motives, which admittedly in these broad terms are commendable, I find myself reading concepts that are nothing more than an amalgamation of words without sufficient detail to make it clear what the words describe. In the absence of more detail, one is hard pressed to analyze effectively the proposal let alone encourage yet another layer of quasi-government and its necessary control.

One of the purposes of the institute is "to provide direction and

6. Early, *supra* note 2, at 227, 234-35.

7. *Id.* at 227.

8. *Id.* at 230-31.

leadership that would be both responsible and responsive."⁹ Again, it is difficult to understand how this direction and leadership will be responsible and responsive. How, for instance, will the institute, without usurping certain rights of the states, provide either responsible or responsive direction and leadership? Can this really be done without directly involving the state legislatures which apparently are to have no representation on the institute except for the indirect representation which the congressional delegates from four or five states might provide? Placing the purse strings in a body must of necessity place control in that same body.

A second purpose of the institute is establishment of a permanent body charged both with the development of an overview of the law and with the establishment of priorities.¹⁰ Priorities as to what, and for whom? Who is to establish the goals within which priorities can be formed? If the institute establishes goals and priorities on a national basis, it will be unable to provide the necessary leadership and assistance to the states. Obviously the priorities and goals for Chicago, New York and Philadelphia are totally different from those for any city in Nebraska, including Omaha. Likewise, the needs, goals and priorities of the various states are widely divergent. How can the institute be all things to all governments? The very size of the boundaries sought to be encompassed makes the success of the project doubtful.

Thirdly, the institute is to "serve as a fiscal agent to receive and disburse public and private funds for research, evaluation and action."¹¹ Again, unless some safeguards are developed, states like Nebraska will be left out simply because imposing systems on Nebraska similar to those imposed on New York would be wasteful. Moreover, Nebraska would probably have to wait on a list of priorities until the more pressing problems of Michigan, New York, Illinois and California were resolved. In either event, the institute would be something less than a national institute. Or, what might happen is that Nebraska would receive funds for programs which Nebraska in fact does not need but must take or lose the funds. Too often in programs federally created or funded, benefits must be allocated equally so as to give everyone "their fair share." This distribution of fair shares often results in the wasteful use of funds in areas not in need. For instance, expending funds to improve court dockets in Nebraska because a certain amount of funds is being used elsewhere for such programs would obviously be wasteful.

It is suggested that the institute would serve as a clearinghouse

9. *Id.* at 230.

10. *Id.*

11. *Id.*

for a multitude of programs: giving directions for law schools; developing modernization in offices; specializing; creating plans for paraprofessionals; developing new systems for delivering legal services to individuals; developing group legal services, prepaid legal cost insurance, lawyer referral systems, and judicare; continuing legal education; regulating professional qualifications; researching in and about the law; administering justice.¹² Yet, it is also suggested that this will be done with a minimum of staff.¹³ How any institute could conceivably be effective in all of these areas and provide the fifty states with some fair share of help, yet maintain a nominal or minimum staff is impossible to understand.

The author sets forth various functions of the institute, suggesting it serve a survey, appraisal and information collection and dissemination function,¹⁴ whatever that may mean. The author recognizes that

the task of determining what has been and is being done by the federal, state and local governments, private foundations, law schools, interest groups, professional organizations and other educational institutions is a task of great magnitude, but is essential to any coordinated effort directed towards modernization and reform.¹⁵

He must also recognize that this cannot be done with little or no staff. To suggest that a staff would remain modest in size because it would contract with others to perform services is simply disguising the reality of the matter. Whether those employed and paid by the institute occupy a single building in a single location in Washington, D.C., or occupy space in various offices, buildings and law schools throughout the United States, they are nevertheless a part of the staff. How this hiring results in a greater sharing of knowledge at no extra cost is difficult to understand.

Coordinating medical research as is done by the various national health institutes for the National Science Foundation is one thing; coordinating legal research is an entirely different matter. The need to share knowledge in medicine and avoid costly duplication in research is to society's benefit. Cancer is cancer, whether it is in midtown Manhattan or on the plains of Nebraska.¹⁶ The law, its philosophy and attitudes, as well as its administration, is entirely different, depending upon whether it is midtown Manhattan or Nebraska. To limit random thinking inherent to the law and law

12. *Id.* at 231.

13. *Id.* at 234.

14. *Id.* at 231.

15. *Id.*

16. See Remarks by Judge Lesinski, *supra* note 3.

schools is both improper and harmful. It is nothing less than an infringement of academic freedom. Even within the framework of the National Science Foundation, one is unable to find as broad a concept, or as all-encompassing authority as is now being suggested for the proposed National Institute of Justice.

Throughout the proposal there are suggestions which of necessity contradict each other. On the one hand, it is suggested that the institute would develop coordinating functions and act as a research catalyst;¹⁷ on the other hand, it is suggested the institute would not supplant existing agencies.¹⁸ Perhaps I am attempting to over simplify, but it seems to me that if one of the reasons for creating the institute is to avoid duplication, then the author cannot suggest that it is not intended to put existing agencies out of business. Obviously, one or the other must fall by the wayside or be absorbed.

It is further suggested that the institute will retain a position of neutrality.¹⁹ Yet, in the next breath, it is suggested that the body be appointed by the President with the advice and consent of the Senate and provide a common rallying point for concerned individuals and organizational efforts to obtain congressional and executive response to projected needs.²⁰ Clearly, except in unusual situations, persons appointed by the President with the advice and consent of the Senate and used to obtain congressional and executive response would have difficulty remaining neutral.

Perhaps the greatest defect in the proposal is that it brings under one umbrella too many notions and functions which have but one common theme—they in some manner involve the law. A stronger thread is needed to give design to such a comprehensive undertaking.

The institute is also of questionable merit in light of the effectiveness of some of our present institutions. Judicial reform is coming about and improvements are being made. The American Judicature Society has made giant strides in improving the administration of justice and should not at this point be deterred or requested to respond to a higher order. The Commissioners on Uniform Laws throughout the United States have through the years effectively brought about uniform laws that have beneficial similarity among the states. The multitude of committees of the American Bar Association have performed yeoman work in every

17. Early, *supra* note 2, at 232.

18. *Id.* at 234.

19. *Id.* at 233.

20. *Id.* at 233-34.

conceivable area and have effectively, *on a voluntary basis*, recognized and fulfilled needs. They have effectively performed these functions outside of governmental control and at a time and place which is most beneficial for the rank and file citizenry. These efforts ought not to be distracted.

Once again, the desire to bring about order fails to recognize that what appears to be disorder may simply be classification. If Mr. Early's proposal is the creation of an institute which would suggest new projects and programs and bring together various agencies and schools, such an institute might be useful. These functions would not require substantial funding. Moreover, the American Bar Association could bring about the suggested coordination by creating a coordinating committee.

It would appear that voluntary coordination could be accomplished through existing state agencies without vesting in one federal quasi-governmental agency so much control not subject to state veto. As already noted, the American Judicature Society can effectively coordinate much of the needed court reform. The Uniform Law Commissioners can also play an important role in that regard, as well as in other areas. Coordination can be accomplished through the National Governors' Conference and the National Association of Attorneys General. But most important, the final decision within each state will still be left to the state, without pressure, financial or otherwise, from outside. And all of these can be effectively coordinated within the existing framework of the American Bar Association and the National Conference of State Courts.

There may be both a time and a place for a National Institute of Justice. To this layman, it does not appear that now is either the time or the place. The use of an inspiring title such as "National Institute of Justice" without a more detailed and declared purpose is of small worth. Spending hours debating so vague a concept is seeking a cure before we have isolated the disease. Such effort is not only a waste of man hours, but may also set such an institute off in so wrong a direction that it cannot be corrected onto a proper course. Unlike Cervantes' Don Quixote, neither state government nor its respective courts and law schools should be chasing windmills on the mistaken notion that the defeat of the windmill heralds success for the state. A more careful and reasoned determination should be made before such a plan is given further consideration.