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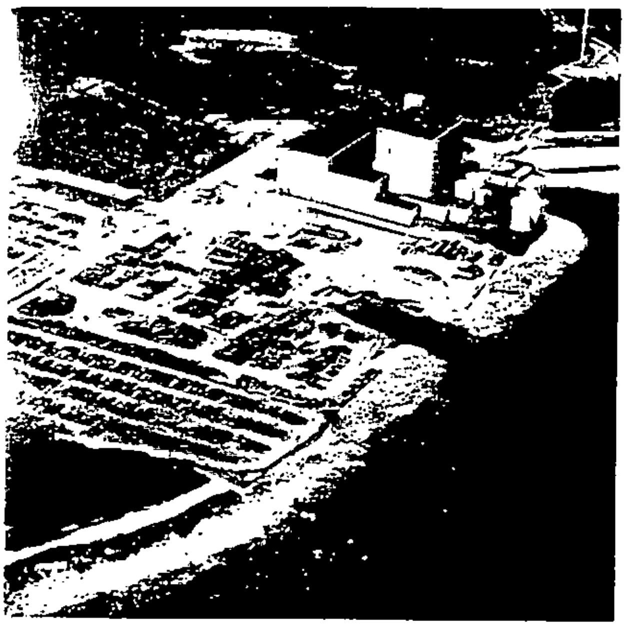

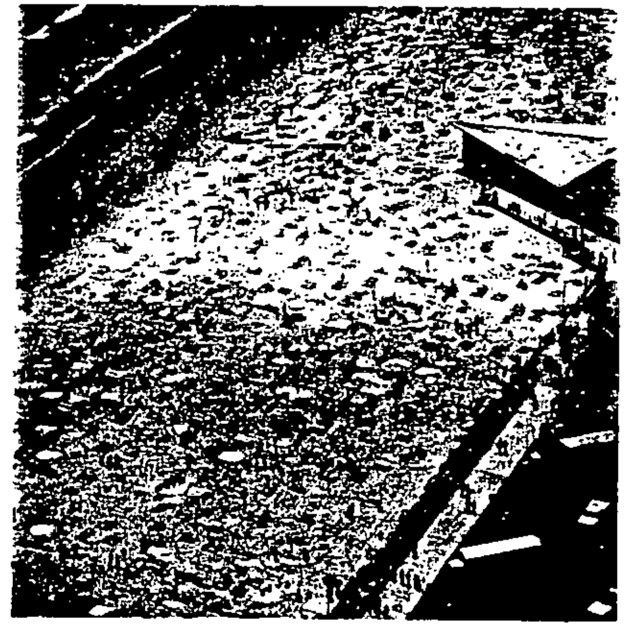

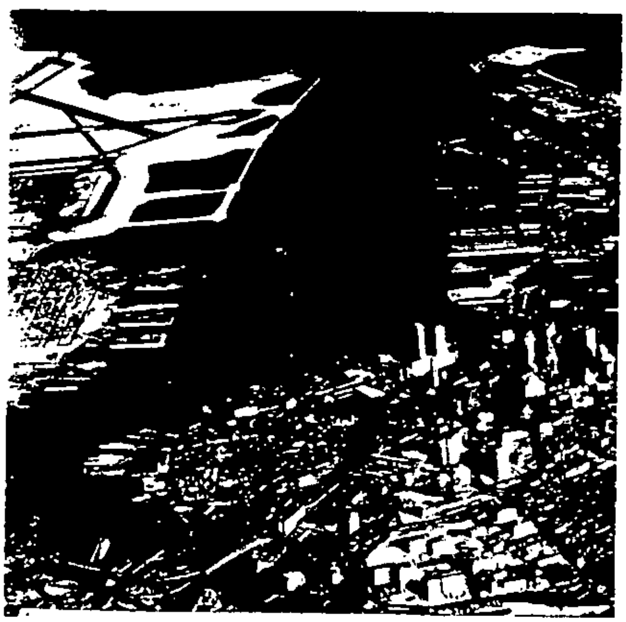

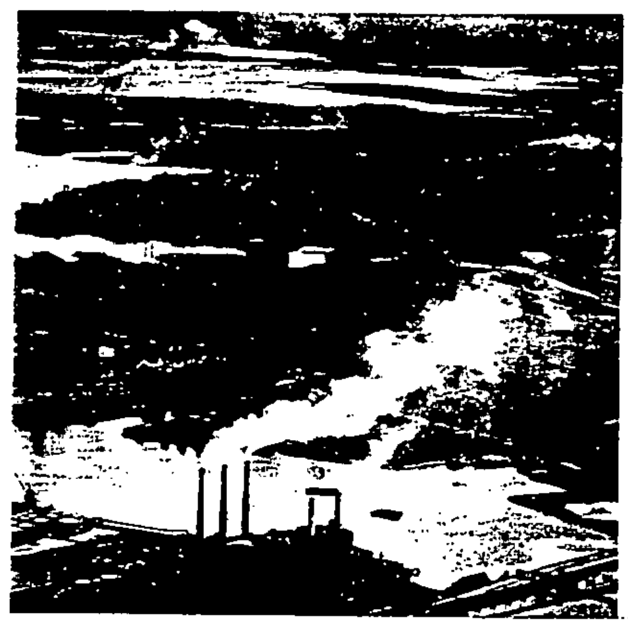

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CHAPTER 6

REGIONAL GOVERNMENT IN NEW ENGLAND: A PROTOTYPE

by

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ABSTRACT

All of the environmental problems discussed in the accompanying articles are aggravated by the frequent inability of the political system to mobilize effective efforts to combat them. This happens because regional decisions are generally formulated by non-regional processes, leading to inefficiency, poor planning, and limited solutions for problems too important to be approached on a piecemeal basis. In approaching this morass, we have used three principles as guidelines: (1) Government should be administered on a plane high enough to accommodate coordinated lower-level implementation of policies; (2) total family income should be recognized as the only criterion for effective and equitable taxation; and (3) efficient land allocation should be fostered by more conscious application of existing control mechanisms.

Consideration of these issues has led us to advocate the following: (1) Elimination of the multiplicity of governments; (2) creation of a regional government to administer interstate problem solving; and (3) overhauling the existing property tax to emphasize land-use management and other social goals, such as pollution abatement. We suggest that this can be accomplished in part through a three-phased program to establish a regional government and through implementation of a new property tax.

CHAPTER 6

REGIONAL GOVERNMENT IN NEW ENGLAND: A PROTOTYPE

I. INTRODUCTION

As attention focused on the problems of the cities during the last decade, one federal committee recommended that urban problems be given regional consideration:

> The most pressing problem of local government in metropolitan areas may be stated quite simply. The bewildering multiplicity of small, piecemeal, duplicative, overlapping local jurisdictions cannot cope with the staggering difficulties encountered in managing modern urban affairs. The fiscal effects of duplicative suburban separatism create great difficulty in provision of costly central city services benefiting the whole urbanized area. If local governments are to function effectively in metropolitan areas, they must have sufficient size and authority to plan, administer and provide significant financial support for solutions to areawide problems. (Committee for Economic Development, Modernizing Local Government 44, 1966.)

The existence of 146 government entities within the metropolitan Boston area illustrates that New England particularly suffers from a maze of fragmented jurisdictions. The second most urbanized region[1] in the United States is New England where, in 1960, 76.4% of the total population was urban.[2] Because of the compactness of the New England region, the resulting sprawl leapfrogs state boundaries, creating interstate problems of increasing complexity.

The resulting economic dislocation distorts the difficult problem of finding sufficient revenues to finance public projects. As the Advisory Commission on Intergovernmental Relations (ACIR) noted:

> The multiplicity of governments and its political corollary "home rule" can work against the most efficient allocation of resources--*a "surplus" situation in one community ordinarily will finance projects of increasingly lower priority rather than underwrite a high priority function in a neighboring community confronted with a*

> *"deficit" situation.* It should also be noted that the multiplicity of local governments creates a political milieu that makes state equalization efforts more costly than efficient. In order to help the poorer districts or communities, it is usually necessary to provide a measure of aid to all districts including the most wealthy.[3] (Emphasis added)

This fragmentation of tax bases generates dangerous fiscal disparities.[4] At the same time that central cities are faced with the continuing need to spend large amounts per capita for public services, their tax bases are being eroded. New England receives over one-half of its revenue from the property tax, which of all taxes is the most inequitable and least responsive to economic growth. The finances of the New England states reveal some consistent patterns:

(1) Receipts from the Federal Government to be applied against the four major functional areas--education, highways, public welfare, and health and hospitals--were substantially below the national average.

(2) State-level payments for education (26.5%) were significantly below the national average (40.7%) with the result that the local share of education costs among the states (67.6%) far exceeded the national average (52.0%).

(3) In all six states, per $1,000 of personal income, education was by far the largest expenditure item in 1967-68.

(4) The state's share of expenditures for public welfare and health and hospitals greatly exceeded the national average.

(5) The net result of the state-local relationships described in items (2)-(4) above was that state aid in New England, as a percentage of local general revenue in 1966, was only 21.2%, compared with a national average of nearly 31%.

(6) Thus the traditional New England emphasis on strong local government resulted in a reliance on local property taxes for 53.4% of all state-local revenue from taxes, compared with a national average of only 43.5%.[5]

(7) Conversely, non-property taxes comprised only 1% of total local taxes, compared with a national average nearly 13 times as large.[6]

Criticisms of the property tax are legion. Disadvantages of the tax include the fact that, in order to attract taxpaying users, localities are forced to develop land for residential and commercial use which might otherwise be retained for recreational purposes. In addition, the property tax is difficult to administer. As part of our study, we shall examine a revision of the tax structure with particular emphasis on revising the property tax.

The Massachusetts Constitution[7] as well as statutory[8] and case law make it clear that property is to be assessed and taxed at full "fair cash valuation."

> This means fair market value, which is the price an owner willing...to sell ought to receive from one willing...to buy.[9]

It has been held to be wholly illegal to assess land at less than full valuation.[10] Nevertheless, the statewide ratio of assessed value to sales price has been determined to be only 36.7%[11] Perhaps the greatest disadvantage of the property tax is that a large percentage of land may be tax-exempt. It has been estimated that 60% of Boston's real property is tax-exempt since many schools, hospitals, and religious organizations are located within the city.[12]

Boston will feel financial strains in the future if the property tax continues to be a major source of revenue. This prognosis is supported by two statistics. Of the 37 largest Standard Metropolitan Statistical Areas (SMSA's), Boston is the fifth smallest in land area.[13] At the same time, per capita total general expenditure by the central city is the fourth largest of the 37 areas.[14] Such statistics have led one group to conclude that:

> ...economic growth of the City of Boston will be severely constrained, even with the changing economic structure of

> its economy and the upgrading of jobs and income that may be expected to accompany the growth of business, personal and government service activities, as manufacturing and trade continue to move out....[P]ublic expenditure needs of the City of Boston, already overwhelmed by outlays for health, welfare and safety, allowing less than adequate margins for education, transportation and housing, are soaring as the City of Boston continues to provide for the bulk of the area's poor, needy, and disadvantaged, and as standards of public service for social welfare rise. To fulfill the potential for the liability of the City of Boston economy, in these circumstances, [will] require measures at the state and national level to redress, in part, the fiscal and economic disparities presently confronting the City of Boston.[15]

The importance of Boston's problems for New England is seen when one recognizes that Boston serves at least three states as a major financial and cultural center. The fiscal and governmental problems of the city should be viewed in an interstate context.

At best, the tax complex of the interstate metropolitan area "is difficult, if not impossible, to analyze. As long as there is a substantial interchange of people between the parts of an area belonging to the different states, it is unlikely that there will be any close correlation between the payment of taxes and the reception of benefits from public expenditures."[16] As a consequence of this inequitable distribution of the revenue dollar, wrong-way migrational patterns of business and people have been accentuated, thereby forging "a white, middle- and high-income noose around the increasingly black and poor inner city; and [subjecting] much of rural America to a continuing course of gradual erosion."[17]

The problems of financing government are intertwined with the settlement and land-use patterns of New England. *It is a major premise of this paper that planning mechanisms must be institutionalized in government to deal with the problems of inefficient land use and erosion of tax bases.* Consideration must be given to the social imbalance resulting from the black-core city/white-suburb phenomenon. In addition, action must be taken to restore the ecological balance of the land and waters of New

England, long ago disturbed in the process of industrialization. New England's open spaces, one of its prime attractions, must not be usurped from displacement by unplanned and poorly-controlled development.

Existing mechanisms to control land use are inefficient. The prime mechanism, zoning, instead of following and implementing planning, often precedes and provides the structure within which planning is done.[18] Although the New England states individually have authorized the establishment of planning agencies,[19] it is felt that the problems which the planners must face do not end at the boundaries between states. More centralized planning is needed. Land-use patterns will also be influenced by federal transportation, labor, power, and foreign trade regulations. The logic of desirable development demands that the governmental and planning functions for the New England region be centralized.

Centralization of power refers to "the transfer of effective power of political decisions to higher governmental levels encompassing wider geographic area."[20] Yet, "at bottom 'centralization' is no more than an attempt rationally to relate governmental forms and institutions to the geographic breadth of the public need for uniform regulations and minimum service standards...A centralized government can be a responsible and responsive government, and a decentralized government...can yield irresponsibility as well as diffusion of poerwer."[21]

Regional decisions are now being formulated by nonregional processes. This has led to inefficiency, poor planning, and limited solutions for problems too important to be approached on a piecemeal basis. In approaching this morass, three principles will be used as guidelines:

(1) *Government should be administered on a plane high enough to accommodate coordinated lower-level implementation;*

(2) *Total family income should be recognized as the only criterion for effective and equitable taxation;*

(3) *Efficient land allocation should be fostered by more conscious application of existing control mechanisms.*

The basic areas of concern, as already identified, are *government structure*, *land use*, and *tax structure*.

Consideration of these areas of concern leads us to advocate the accomplishment of the following:

(1) Elimination of the multiplicity of governments;

(2) Creation of regional government to administer inter-state problem solving;

(3) Overhauling the existing property tax to emphasize land-use management and other social goals, such as population control.

This may be accomplished in part through a phased program to establish a regional government and through implementation of a new property tax which would operate more efficiently to allocate land for use. Governmental reform promoting fiscal responsibility would come in three stages.

The first stage, to be completed by 1980, will include intrastate governmental consolidation; establishment of a regional compact; imposition of a city payroll tax; and full-value property tax assessment. Looking to political feasibility, only low-order intergovernmental cooperation is proposed. In order to foster a climate favorable to increasingly non-local control in later stages, several more farreaching mechanisms will be initiated in the first stage.

Once these proposals have been implemented, stage two will commence and will include reform projects establishing Metro- and Sub-Regional governments; modification of intrastate institutions; and refining of revenue measures. Stage two should be completed by the year 2000.

The third stage of reform represents the culmination of previous efforts to consolidate government and should be completed in the years 2015-2020. This stage envisions the completion of the Sub-Regional and Metropolitan governments which cross state lines. State and federal constitutional amendments are advocated, authorizing states to consolidate their powers into regional governments.

II. STAGE ONE

1. Intrastate Governmental Cooperation

The minimum level of cooperation urged is the voluntary association of existing governments into localized Councils of Governments.[22] There should be little opposition to this proposal because it does not threaten existing governmental units and because it requires neither enabling legislation nor popular referendum. Such COG's would provide a forum for the exchange of views on common problems and should lead to jointly-sponsored legislation, coordinated planning, and cooperation in some governmental activities. Because such councils would be voluntary and their decisions not binding, they are recommended for use primarily in rural areas where there is now no inter-local cooperation.

Inter-local cooperation may also be accomplished without altering existing governments through contractual relationships.[23] An example is contracting between cities for reciprocal municipal services such as fire protection and water supply. Such cooperative contracting is most appropriate for any commodity service or proprietary function which (1) lacks need of major substantive discretion; (2) involves standardized and accepted performance methods; (3) requires specialized professional or technical qualifications; and (4) has a comparatively stable demand.[24] Statutes authorizing such contracting are in existence.[25]

City-county consolidation is not recommended. The county is an anachronistic governmental unit which should be abolished. A higher level of cooperation can be achieved through the formulation of *special districts*. Special districts cut across territorial lines but do not replace governmental units. They assume certain government functions as public corporations or as quasi-municipal corporations.[26] These special districts should be distinguished from authorities such as the Massachusetts Bay Transit Authority (MBTA). While the accomplishments of the MBTA and the Metropolitan District Commission are recognized, it is felt that such independent authorities are nonresponsive to public will, hampered by the lack of general taxing powers and, inevitably, jealous guardians of their own delegated powers. A proliferation of such authorities could lead to overlapping and working at cross-purposes.

For heavily-urbanized areas such as the Boston and the Providence Metropolitan Statistical Areas, *federations* of governments are urged. The governing councils of such federations could be elected from the constituent cities and towns. Council decisions would bind federation members. An executive, preferably from an outside area, would be elected by the council. The Home Rule Amendment to the Massachusetts Constitution authorizes the legislature to create such metropolitan or regional entities and to grant them powers to tax and borrow.[27] The metropolitan federation would fulfill regional functions such as property assessment, debt borrowing, libraries, sewage and garbage disposal, pollution control, housing for the elderly and poor, etc. Local functions would be retained by city and town governments. The functions of the independent authorities would be assumed by the metropolitan federation.[28]

2. Interstate Regional Cooperation

The use of two currently available tools--the Interstate Compact and the Urban Development Corporation--to tackle interstate problems is proposed. The problems of metropolitan man frequently straddle provincial or "state" lines, but still remain subnational in scope.

Interstate Compacts

Although use of the compact device has produced few outstanding examples of success, the compact could emerge into a powerful and expedient governmental tool during the next few decades. To be successful the compact should have strong financial powers and a well-developed political accountability and responsiveness.[29] The use of interstate compacts is sanctioned by the United States Constitution, which authorizes a State to "enter into any Agreement of Compact with any other State" with "the Consent of Congress."[30]

The interstate compacts currently employed with varying success may be classified as follows:

(1) Natural resource development (or public welfare) compacts:

(a) Subject matter of enduring concern to the whole state;
(b) User charges are insignificant;
(c) Reasonable and politically acceptable to resort to general state revenues for costs above and beyond those born by the Federal government; and
(d) Informal federal involvement.

Example: *Atlantic and Gulf States Marine Fisheries Compact*

(2) Regulatory compacts:

(a) Local focus and small costs;
(b) Governmental in nature;
(c) General budget of signatory states carries the cost burden.

Example: *Washington Metropolitan Area Transit Regulation Compact*

(3) Self-sustaining proprietary local service compacts:

(a) Financial burden carried by revenue bonds and user charges;
(b) Major objective is public service.

Example: *The Port of New York Authority*

(4) Non-self-sustaining proprietary local service compacts:

(a) Designed for large-scale projects;
(b) Revenue bonds and user charges not expected to carry all the burden.[31]

Example: *Delaware River Basin Compact*

The compacts which have been entered into by the New England states concern planning, radiological health, water pollution control, and interstate cooperation commissions.

The non-self-sustaining proprietary local service compact is proposed for use as an intermediate device for integrating the New England region. The efforts of the compact would be directed to nonprofit, socially-oriented objectives. Such a New England States Compact would be administered by a full-time *Board of Regional Directors*, two from each state, and a permanent administrative staff. During Stage One, the Board would be responsible for promulgating Regional Development Plans for New England and engaging in specific study projects. It would also coordinate plans proposed by the Regional Development Corporations, to be described later.

The problem of massing public support for the Board's plans and the necessity of insuring the Board's responsiveness dictate that the Board be cognizant of the following when formulating policy:

> (1) Tax Level Differences. Among those likely to oppose change are the people who now benefit from the differences in tax levels that characterize almost all metropolitan areas....To eliminate or narrow the tax differences by governmental restructuring would, of course, benefit some metropolitan residents; but it would increase the taxes of others--and the latter group is likely to include influential members of the area's power structure.
>
> (2) Social Disparities. Poor and disadvantaged people, including a considerable proportion of Negroes and other ethnic minorities, tend to be concentrated in "poverty areas." The central cities typically have far larger proportions of such "high-cost citizens"... (therefore the well-advantaged) groups may well fear that governmental restructuring--whatever its possible advantages in other ways--will considerably reduce their political muscle.
>
> (3) Established Interests. Ongoing governmental arrangements accumulate a host of persons who rely heavily on the continuation of the status quo....For those people the prospect of major structural change at

best involves uncertainty, and at worst the possible loss of familiar advantages of status or economic benefit.

(4) Public Uncertainty. Most metropolitan residents lack close acquaintance with the local governments that serve and tax them...their concern is not likely to promote structural change unless they can be convinced that:

(a) Existing organizational arrangements contribute seriously to the problems involved;

(b) Other kinds of action--such as more grants from the state or federal government--would be inadequate; and

(c) The proposed structural change offers promise of major improvement and is clearly better than any available alternative.[32]

It is suggested that the creation of a powerful interstate compact will have a twofold effect. First, it will enable our existing governmental structure to meet the environmental and social challenges with a degree of positivism and responsibility that will permit massive changes during the next two decades. All New England must contribute to the solution of the problem which is so easily identified and dismissed as being unique to Massachusetts or Rhode Island, i.e., "metropolitanism." Second, a strong regional compact which can be shown empirically to operate efficiently will serve as a catalyst to the future consolidation of traditional state services and functions into a regional type of government--subnational in nature, yet fiscally strong enough to fund regional projects, thereby protecting regional and local interests in a "new federalism."

The compact would be funded from direct contributions from federal grant-in-aid programs[33] and from state support in satisfaction of the contractual compact. The compact would not represent a new federal subdivision; its authority would be predicated solely upon that of the founding states.

Since compacts are the products of coordination of interstate interests and can be drafted with infinite variation, they provide a very practical first step in reflecting government response to social and environmental pressures. The compact appears to be an excellent vehicle for governmental officials to promote positive social change without engaging in political suicide.

Regional Development Corporations (RDC's)

While overall planning is to be done by the Board of Regional Directors, specific problems will be dealt with by a *Regional Development Corporation.* All of the New England states have adopted legislation creating Development Credit Agencies and Industrial Bond Plans. This legislation parallels a national trend:[34]

> Private development credit corporations operate under the following general scheme. After incorporation the organization issues its stock..., and when a stated amount of capital has been paid in, the corporation is permitted to start business. Because the corporation is designated to provide a source of credit not elsewhere available, and not to compete with existing credit sources, prospective borrowers may have to show proof that they have been refused loans from commercial sources. Lending funds are provided to the corporation at a low interest rate by its non-stockholding members, which are traditional commercial credit agencies that have agreed to make funds available on call in return for obligations of the corporation. The limit of each member's lending capacity is set at a small percentage of its total capital and surplus, and all calls upon the members are required to be prorated in relation to the loan limit of each. Loans by the corporation are at an interest rate slightly higher than that paid to the members, and are secured by mortgages on the property or by the stock of the borrower. Total obligations of the credit corporation are generally limited to a stated multiple of its paid-in capital surplus, and loans to any one borrower are similarly limited to a percentage thereof.[35]

In Massachusetts, specifically, the agency[36] authorized to issue bonds is obliged to "promote, stimulate, and advance the business prosperity of the Commonwealth...to encourage and assist through loans, investments, or other business transactions, in the location of new business and industry...."[37] The constitutions of the New England states require that such expenditures be for a public purpose.[38] This requirement has been relaxed in recent years.[39]

There is no apparent federal constitutional impediment to the creation, through compact, of interstate Regional Development Corporations vested with authority to act as credit agencies and to issue industrial bonds. They could be utilized to implement specific objectives of the compact--for instance, low-cost housing construction and mass transit operation, as well as real estate market control for housing and industry.

The fiscal operations of the RDC would be run in generally the same manner as in existing state credit agencies. Although such credit corporations have had varied success on the state level, we submit they could be effective on the regional level if properly administered.

Directed in such a way as to assure coordination with an overall Regional Plan, each RDC would itself adopt a master plan. Through vote of both legislative houses, individual states would have veto power. The RDC's would thus function within the compact as an operating body to implement the Regional Plan through financing, land acquisition, and technical assistance to private industry.

3. Local Financing: City Payroll Tax and Total Income Assessment

As was stated earlier, over one-half of all local and state revenue in New England is provided by the property tax. Yet such a tax is inelastic,[40] particularly when compared with the automatic growth characteristics of the progressive income tax. Heretofore, the property tax has been able to keep pace with revenue requirements through increased assessments and escalation of rates, assisted by an unprecedented expansion in construction.[41] However, it now appears that these tax rates have approached the limit where they constitute *confiscation*, while environmental considerations may limit the rapid growth of new construction.

That the property tax is inappropriate for financing cities such as Boston was demonstrated earlier. The property tax has been maintained in its historic form because it is a stable source of revenue. In a rural society, the value of a family residence served as a fairly good proxy of the ability to pay taxes. But in a modern urban society, total household income is a more precise measure of taxable capacity.[42]

In Stage One, it is proposed that a broader tax base be achieved through imposition of a payroll tax on all wage earners within the core cities of Boston and Providence. All wages above federal poverty level would be subject to taxation at a low progressive rate.[43] Although this is not consistent with the desirable objective of taxing total income, the payroll tax is advocated as a method of providing the core city with much-needed revenue.

The efficacy of municipal income taxes (a step beyond the payroll tax) has been demonstrated--at least 17 cities of over 150,000 in population have enacted such taxes.[44] In several cases the rates are different for residents and nonresidents, while some cities (New York) have progressive rates. For the larger central cities the tax offers an equitable, productive, and administratively feasible source of revenue.[45] It also allows the city to derive some revenue from nonresidents who earn income in the city and use city services. A constitutional amendment would be required in Massachusetts to implement such an income tax.[46]

To recapitulate, Stage One is to be completed by 1980 and proposes:

(1) Instrastate governmental cooperation;
(2) Establishment of a regional compact;
(3) City payroll tax;
(4) Total income assessment.

III. STAGE TWO

1. Governmental Consolidation

If local governments are to function effectively in metropolitan areas, they must be of sufficient size and authority to plan, administer, and provide financial support for solutions to areawide problems. To overcome decentralization and provide sufficient power to deal with metropolitan problems, the Boston and Providence federations should now be formalized into *Metropolitan Governments*. This would effectively eliminate the cities and towns within the metropolitan area as decision-making and revenue-allocating entities. Governing council members would now be elected from districts of equal population.[47] The independent authorities, the Massachusetts District Commission, the Massachusetts Bay Transit Authority, and the Massachusetts Port Authority all would be subsumed as departments of the Metropolitan Government of Boston. Geographically, the Boston Metropolitan Government should encompass at least the 78 cities and towns which now compose the M.B.T.A. territory.

Most activities now undertaken by county governments should be assumed by the metropolitan governments and by the less urban councils of governments. Some county functions such as penal institutions, courts, and agricultural schools should be assumed by the New England Compact.

The councils of the metropolitan governments of Boston and of Providence should be assisted by advisory committees of experts in aspects of urban affairs. Each advisory committee would be composed of 15 members, one-third each selected by the governor, the council executive, and the constituent electoral districts.

Less urban areas would now be governed by institutionalized, mandatory councils of governments. The New England states would then in effect be divided into *Sub-Regional Areas* (*SRA's*), governed either by metropolitan governments or councils of governments. Each SRA government would possess regional planning, land use, and tax assessment powers. The boundaries of the SRA's would be determined by the state legislatures with the consultation of the Board of Regional Directors of the New England Compact.

The SRA's should be established in accordance with the following criteria:

(1) The natural geography;

(2) Existing land use
   (a) Industrial
   (b) Population concentrations
   (c) Recreational and natural resources
   (d) Urban/rural interface;

(3) Current trends in legislation concerning intrastate governmental consolidation efforts;

(4) Existing interstate cooperation and consolidation efforts;

(5) Existing federal land-use policies and restrictions;

(6) Socially- and ecologically- desirable conditions
   (a) Balanced urbanization
   (b) Tolerable pollution levels
   (c) Efficient regional transportation
   (d) Accessibility of recreational and natural resources.

In order for the SRA's to respond to regional concerns, it may be necessary to establish subregional governments which cross state lines--for instance, in the Springfield-Hartford area and the Providence-Fall River area. No two state legislatures involved could alone establish a local government encompassing the interstate areas. Through compact two states could, however, require the contiguous area governments of, e.g., Fall River and Providence, to coordinate and cooperate in their activities.

The dangers of nonresponsiveness of such governments may be minimized by instituting the office of ombudsman into the SRA's.

2. Strengthening the New England Compact

At Stage Two, the constitutions of the New England states must be amended to permit at-large popular election of two state representatives to the Board of Regional Directors. The board, at this point, will be institutionalized as the New England Cabinet. A chief administrator will be elected from among the cabinet members for a two-year term. His successor must come from another state. This institutionalization will be necessary because of the growing importance of the former compact. It will also serve to democratize the compact in preparation for Stage Three.

At Stage Two, the Federal Constitution should be amended to permit state delegation of legislative authority to the regional government without retention by the states of legislative veto power. The caliber of the regional government's activities will not necessarily change; rather, decisions made at the regional level will become final.

Many devices used currently to implement governmental decisions will be used by the regional government. For instance, in the area of land-use planning, the tools of zoning, land acquisition, and taxation will be used. Other traditional methods of land-use control such as subdivision, regulation, business licensing, highway access, historic district regulation, etc., should assist in implementing regionwide plans. While such tools may ultimately prove inadequate, their use while new methods of implementation are developed will ease the transition.

3. Financing

At the core of successful planning is sufficient data on which to make reasonable decisions. Because New England's natural beauty is one of its greatest resources, land-use planning is crucial. Subregional governments at an early part of Stage Two will compile inventories of all land within their respective jurisdictions. Each existing tract of land will be classified and catalogued according to existing use, desired use, present owner, and full-value assessment. In the latter portions of

Stage Two, subregional land-use plans will be coordinated with the prescribed regional land-use plan of the New England Cabinet. The land-use plan will in turn be used as the basis for the new tax to be described in Section V.

Upon establishment of the two metropolitan governments, the payroll tax will be eliminated and an income tax initiated within the broader subregion. Progressive state income taxes, enacted after state constitutional amendment, should become the major source of state revenue.[48] At this point, the local income tax could be a fixed percentage of the state tax.[49] By "piggybacking" the two taxes, the local tax should be easy to compute and administer. It would also avoid conflicts with the socially-desired exemptions and credits set by the state.

Additional funding to both intra-and interstate organizations would come from the states and the federal government. The federal government could impose a tax on the New England Compact Region and return the funds to the states comprising the region for allocation. This scheme avoids the legal pitfalls present in state and federal constitutions when proposals are made for state taxation at regional levels. The scheme would be improved if the federal government distributed the tax revenue directly to the regional and SRA levels. Ideally, it is hoped that the New England region will ultimately assume its own authority to tax and thus become self-sustaining.

Until the region does become self-sustaining, the traditional disposal of federal funds will continue greatly to influence the region's development. Among direct expenditures by the federal government, which will have influence on the region, are the location of federal installations, award of federal contracts, and subsidy of private industry. Indirect federal spending will continue to enable state and local governments to attempt fiscal projects otherwise impossible. One typical expenditure is that provided for under the Urban Mass Transportation Act[50] whereby cities may receive funds to develop an urban mass transport system. Substantially identical programs exist in the areas of urban renewal, pollution control, and regional planning.[51]

To repeat, State Two, to be completed by the year 2000, has as its specific proposals:

(1) Institutionalization of the Metropolitan Government;

(2) Establishment of SRA's;

(3) Strengthening the Regional Compact;

(4) City payroll tax becomes broader income tax;

(5) State income tax made progressive and increased.

IV. STAGE THREE

The third stage envisions the creation of a truly regional New England government. It should be completed in the years 2015-2020, the years of the project termination.

Modifications of the magnitude proposed will invariably meet strong resistance from currently-entrenched-interest groups. However, we submit that the current ecological and social disequilibrium warrants more than token patchwork responses from our elected leaders. Only a callous and unconcerned official could ignore the problems described in other chapters of this report; and only an unenlightened and unresponsive official can dismiss as academic rhetoric concerned efforts for meeting problems on the level--if not in the exact form--of our proposals. We do not intend to overemphasize currently-popular cliches. However, major institutional response must take place in a planned progressive manner. Otherwise the current trend toward federalization of problem-solving, with all of its attendant inadequacies, and the emasculation of lower levels of government will be accentuated. Thus even some of our most extreme proposals, such as constitutional amendments, must be viewed as viable given the framework of a 50-year time span and the complexity of the problems.

The major step to be taken at this stage is the structural completion of the subregional and metropolitan governments which cross state lines. Further, state and federal constitutional amendments authorizing states to consolidate their powers into regional governments would enable them to set up subregional governments encompassing territory in two states. Therefore, a Springfield-Hartford government, a Providence-Fall River government, and a new government encompassing parts of western Massachusetts and southern Vermont could be established under the New England Cabinet.

The proposed federal constitutional amendment should state in substance that:

> Nothing in this constitution shall prevent any given state or group of states from abdicating their sovereignty to a binding regional form of government. Nothing in this amendment shall permit secession from the federal union.

Additional language would specify the manner whereby the region would be congressionally represented at the federal level.

V. PROPERTY TAX REFORM MEASURES

1. Introduction

We shall now shift this discussion to a more concrete example of the elements of the aforementioned institutional reform. This example is the general property tax and, although intrinsically microcosmic, it is an essential element to any reform package.

Governmental reform must include sound revenue-gathering mechanisms. We support total family income as the appropriate source of revenue for supporting regional government. However, proposals substantially reforming existing governmental structures in New England must also take into account the currently important revenue-gathering device--the general property tax. Since its inception the general property tax has been maintained despite its inability to conform to the generally-accepted theories of equitable taxation, primarily because it has been a very stable source of revenue. Nevertheless, today's general economic climate prohibits effective implementation of the tax, and we join with those tax theorists who are disenchanted with the property tax as currently administered. However, we depart from their camp insofar as complete abolition is advocated. Its revenue function must be preserved insofar as the financing of property-oriented services is concerned. Equally important, we propose giving new emphasis to the policing and control mechanisms of the tax, thus utilizing it as an essential force within a planned progression towards regional government. In the property tax we find a powerful tool for retarding unrestrained migration patterns; for policing effluent discharges; and for establishing sound land-use incentives.

2. Discussion of the Concept

Assume that Stage One of the governmental reform previously proposed has been implemented, and that the New England state legislatures have sanctioned a functioning interstate compact. One of the initial tasks of the Board of Governors would be to determine the most desirable and functional land-use allocation within the region. Hopefully, this task will be accomplished in an atmosphere (insofar as possible) free from local political pressures. This area land-use determination of subregional areas will be made irrespective of existing interstate political borders. The factors to be considered include:

(1) The natural geography;

(2) Existing land use
- (a) Industrial
- (b) Population concentrations
- (c) Recreational and natural resources
- (d) Urban/rural interface.

(3) Current trends and legislation concerning intrastate governmental consolidation efforts;

(4) Existing interstate cooperation and consolidation efforts;

(5) Existing federal land-use policies and restrictions;

(6) Socially- and ecologically-desirable conditions
  (a) Balanced urbanization
  (b) Tolerable pollution levels
  (c) Efficient regional transportation
  (d) Accessibility of recreational and natural resources.

The general classifications of the subregional areas are three in number, and might reflect percentage designations similar to those shown in Table 6.1 (it must be emphasized that

DESIGNATION		PERCENTAGE
Class One:	URBAN	
	a. Public	30%
	(1) Roads	
	(2) Hospitals	
	(3) Municipal and governmental buildings	
	b. Industrial	30%
	(1) Heavy (stressed)	
	(2) Light	
	(3) Service	
	c. Housing	30%
	d. Recreational and open	10%
Class Two:	URBAN/RURAL	
	a. Public	20%
	b. Industrial	25%
	(1) Heavy	
	(2) Light (stressed)	
	(3) Service	
	c. Housing	40%
	d. Recreational and open	15%
Class Three:	RURAL/NATURAL	
	a. Public	5%
	b. Industrial	10%
	c. Housing	30%
	d. Recreational and open	55%

Table 6.1 Desired Land Use in the Year 2020--Subregional Area Designations and Percentages

the figures represented in this table have been arbitrarily selected for purposes of descriptive analysis).

For a state such as Massachusetts there would be approximately sixteen of these SRA's as shown in Figure 6.1. Of the sixteen, six would potentially transcend interstate borders as currently drawn. Three of these six are currently designated as

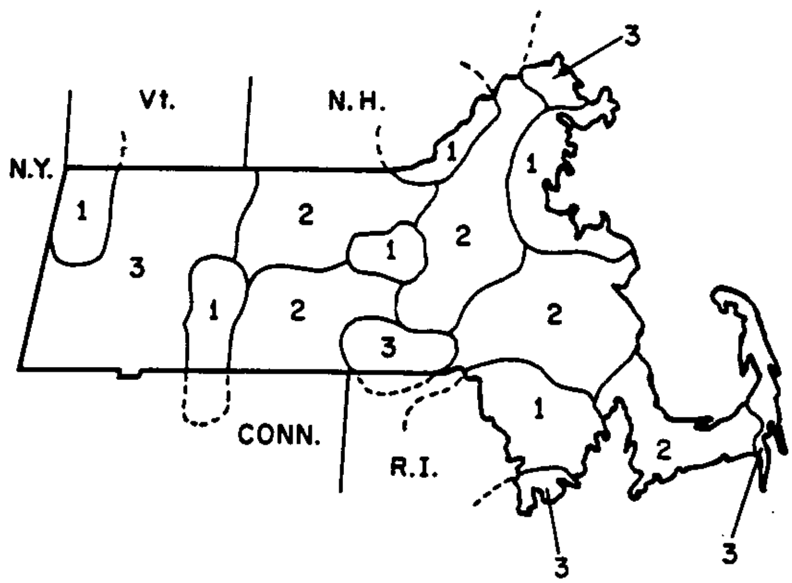

Figure 6.1 Massachusetts Sub-Regional Areas

interstate Standard Metropolitan Statistical Areas. The other three would reflect a policy decision of the board relating to desired land use in the region. Within any given SRA a state would have autonomy to develop land as it chooses and where it chooses, under the auspices of a local planning board and subject to the absolute percentage requirements defined initially by the board.

As an illustration of the application of this land-use/taxing concept, we might look at the hypothetical future development of the city of Bangor, Maine, situated as shown in

Figures 6.2 and 6.3. Assume that the SRA within which Bangor is situated has been designated to be an Urban/Rural-Class Two area, and that the current and desired land-use patterns in that SRA are characterized as shown in Table 6.2 and Figure 6.4.

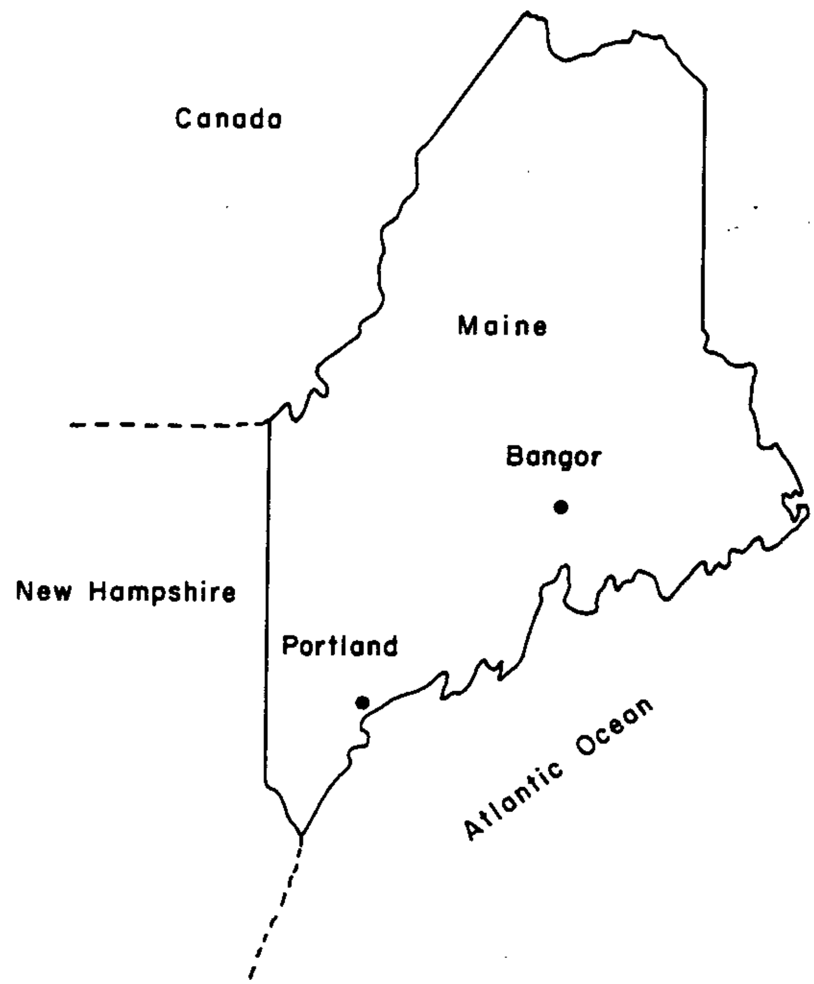

Figure 6.2 The State of Maine

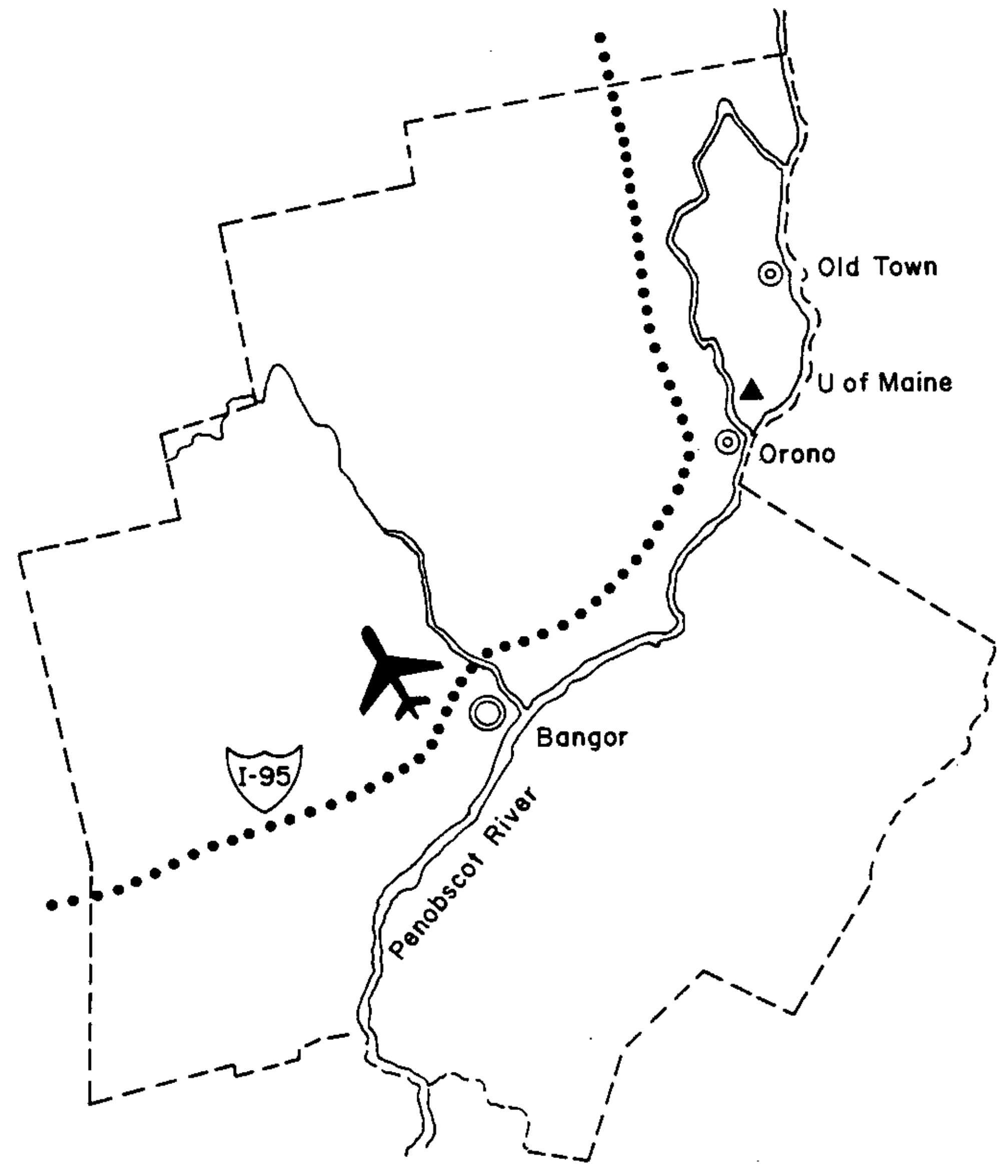

Figure 6.3 The Bangor Area

Land Designation	Existing Percentages	Desired Percentages	Percent Change
URBAN/RURAL: Class Two			
a. Public	10	20	plus 10
b. Industrial	10	25	plus 15
c. Housing	30	40	plus 10
d. Recreational	50	15	minus 35

Table 6.2 Subregional Area Example of Shifting Land-Use
Bangor, Maine

These exhibits indicate that, in order to actually effect the change to the Urban/Rural classification, major incentives and pressures will have to be applied. This can be accomplished most efficiently and with a minimum of social and governmental disruptions by the implementation of land-use controls such as zoning and property taxes.

This technique would first require the regional board to determine a primary tax rate structure for each SRA classification within a range of 0% to 25% to full-value assessment, as shown in Table 6.3. No individual SRA would have the authority to tax above these absolute amounts. (Again, the figures have been arbitrarily determined for purposes of discussion.) Hopefully, the range within each category of land reflects feasible limits on the regional level for influencing a) land-use decisions, b) population concentrations, and c) industrial growth. In addition, such designations might directly affect the standards of quality of life by encouraging, for example, the heaviest polluters to relocate to areas of less pollution where (presumably) lower primary property tax rates would prevail.

Further, it should be noted that SRA's could be encouraged to proceed more rapidly in the direction of the prescribed land-use percentages by having the region tax publicly-held lands as sort of a penalty for nonresponsiveness. For example, in the

LAND USE	URBAN (CLASS ONE)	URBAN/RURAL (CLASS TWO)	RURAL/NATURAL (CLASS THREE)	RANGE[4]
Industrial	20-25%	15-25%	10-25%	25%
Housing[2]	15-20%	10-20%	5-20%	↑
Recreational and open (private)	10-15%	5-15%	0-15%	↓
Recreational and open[3] (public)	0-5%	0-5%	0-5%	0%

1. To be determined by the Regional Board of Governors.
2. One-half acre per family to be permitted as a maximum at these basic rates.
3. Tax upon some publicly-held land might be deemed advisable in some instances where quasi-penalties are deemed necessary.
4. The tax rate will never be permitted to exceed 25% of full assessed value, as control above this level will be accomplished through zoning procedures.

Table 6.3 Absolute Tax Rate Variables[1] in Percentages of Fair Market Value and at Full Assessment

Bangor area the hypothetical figures show that an eventual decrease of 35% in recreational and open lands has been deemed acceptable and desirable within the subregion. By taxing public surplus holdings of land, pressure could be applied to the local implementing governments to reallocate public land, for example, towards housing. This reallocation could be accomplished by sale to private developers and financed through the regional development corporations, as previously discussed. The region's absolute rates place the highest premium on industrial land in an Urban Class One Subregion. Disregarding public holdings of land (which may or may not be subject to a tax), the lowest rate is applied to private undeveloped land in a Rural/Natural area. Consequently, this device makes it necessary for taxpayers to value carefully the advantages of a specific location in relation to personal finances or corporate profits. These rates reflect the highest level at which government tax policy can determine land-use within a given area. Any further land-use control efforts should stem from the standard zoning procedures.

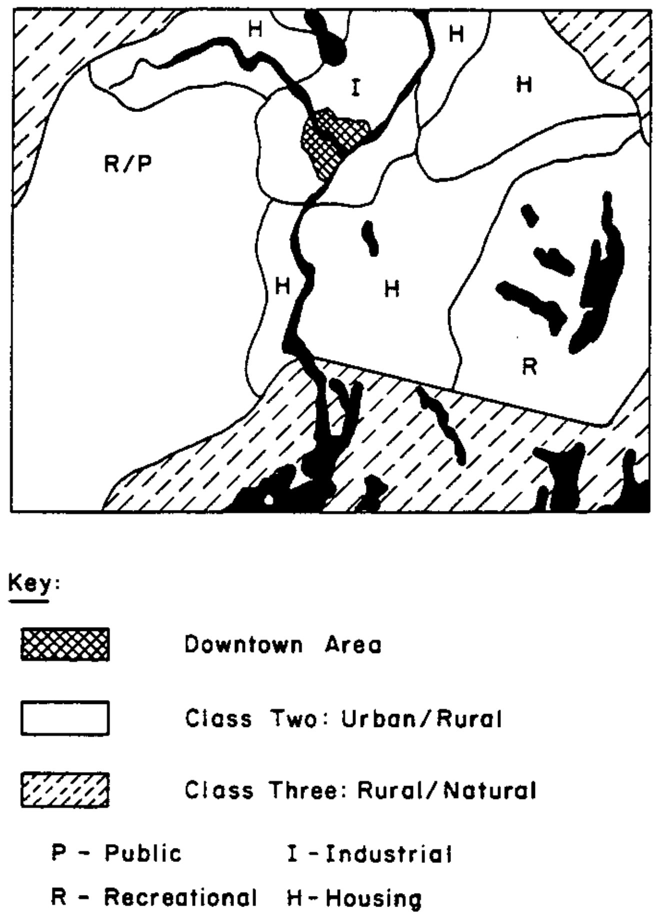

Figure 6.4 Land Use Designations in the Bangor Area

Equal revenue needs are neither anticipated nor desired for each class of SRA, for an individual subregion should be able to provide the services that its citizens may desire. Therefore, it should be obvious that some mechanism must be employed whereby an SRA can determine, within the absolute limits just discussed, what its specific rate will be. We submit that such a control can best be exercised by creating a mixture of tax credits and deductions that would tend to encourage the growth desired within each SRA, and finance the services.

This secondary level of tax control, as shown in Table 6.4, for the Bangor region, is to be imposed at the subregional level and involves a sophisticated manipulation of a system of credits and deductions. This system should be designed not only to control subregional land use, but also partially to discourage

Land-Use Classifications	Deductions	Credits	Class Two Absolute Limits
Heavy Polluter Moderate Polluter Light Polluter Light Industry Banking and Invest. Service Small Service Commercial Farm	Flexible Variables		Industry/Business 15-25%
Multi-Family (>10) Multi-Family (3-10) Single (>3 C's) Single (w/o C's) Single (3 C's) Single (2 C's)			Housing 10-20%
Urban Area (+ 1/2 acre) Rural Area (1/2 acre) Wild (+ 15 acres)			Private Undeveloped 5-15%
Public Undeveloped Public Developed	Taxed at Regional Level		Public 0-15%

Table 6.4 Secondary Tax Control at Subregional Level--Bangor

overpopulation and pollution, currently two of our most acute social evils. Indirectly, this system should also encourage the redistribution of single-family housing units to those couples currently having children living within the family social unit, who presumably need more house and yard space than do older or single persons. Of course, an absolute desire to maintain these privileges or luxuries can be indulged by paying a tax premium. Such incentives can also help to relieve some of the current pressures on public education by allowing certain communities within a subregion to concentrate upon providing school and teaching facilities. In all instances, the credit/deduction scheme as well as absolute rates should be subject to periodic review in order to insure flexibility and response to changing conditions as reflected by increased demands for government services.

3. Conclusion

In concluding this discussion of our novel tax system, it should be emphasized that, although our plans and proposals are untested, the mechanisms for implementation are available to governments under our presently-constituted institutional system. As governments eventually consolidate, this tax scheme is potentially of great utility in instituting a land-use policy which will conform with, and be fiscally responsive to, the future needs of our society.

REFERENCES

1. Perloff, Dunn, Lampard, and Muth, "Regions, Resources and Economic Growth," 19 (1960). The regional concept of states within the United States seems never to have been formally agreed upon or officially designated. These authors have divided the country into eight regions for purposes of statistical consideration. These are: New England, Middle Atlantic, Great Lakes, Southeast, Plains, Southwest, Mountain, and Far West. The classification is somewhat arbitrarily geographic, and should not be taken as a firm diecast for the proposed regional governmental structure suggested *infra*.

2. Advisory Commission on Intergovernmental Relations, *Urban and Rural America: Policies for Future Growth*, Appendix I-B at 175 (1968).

3. Advisory Commission on Intergovernmental Relations, *Fiscal Balance in the American Federal System*, Vol. I, Report No. A-31, at 60.

4. Advisory Commission on Intergovernmental Relations, *Urban America and the Federal System*, Report M-47, at 1, October 1969.

5. Advisory Commission on Intergovernmental Relations, *State and Local Finances: Significant Features 1967-70*, Report No. M-50, Tables 14-17. [Hereinafter referred to as ACIR M-50.]

6. ACIR A-31(I), *supra* note 3, pages 90 *et seq*. and Table 12.

7. Part II, ch. 1, s/s 1, art. 4.

8. Massachusetts General Laws, ch. 59, s/s 38.

9. *Boston Gas Co. v. Assessors of Boston*, 334 Mass. 546, 566.

10. *Bennett v. Board of Assessors of Whitman*, 354 Mass. 239 (1968).

11. J. Shannon, "Conflict Between State Assessment Laws and Local Assessment Practice," in *Property Taxation U.S.A.* (1967) 41. [Hereinafter cited as "Shannon."]

12. Advisory Commission on Intergovernmental Relations, *Fiscal Balance in the American Federal System*, Vol. II, Report No. A-31 at 123. [Hereinafter referred to as ACIR A-31(II).]

13. *Ibid*. at 102.

14. Ibid. at 103.

15. Ibid. at 123-24.

16. Winters, "Interstate Metropolitan Areas 5," Michigan Legal Publications (1962).

17. ACIR, supra note 5, at 2.

18. Christensen, Land Use Control for the New Community, 6 Harv. J. Legis. 496, 506 (1969).

19. See, e.g., New Hampshire Rev. Stat. Ann., chs. 12 and 36 (1966); Rhode Island Gen. Laws 45-22.1 (1968); Vermont Stat. Ann., ch. 10, sec. 301 (1958).

20. Dixon, "Constitutional Basis for Regionalism: Centralization; Interstate Compacts; Federal Regional Taxation," 33 Geo. Wash. Law Review, 47 (1964).

21. Ibid. at 54, 55.

22. See S. Scott and J. Bollens, Government: Regional Organization for Bay Conservation and Development (1967).

23. See Koerner, Interlocal Cooperation: The Missouri Approach, 33 Missouri Law Review 442 (1968).

24. Advisory Committee on Intergovernmental Relations, A Handbook for Interlocal Agreements and Contracts (1967).

25. See, e.g., statutory authorization for interlocal cooperation commissions, Rhode Island Gen. Laws, sec. 45-40-1 (1968).

26. For a general discussion of the legal classification of special districts, see Novak, Legal Classification of Special District Corporate Form in Colorado, 45 Denver L.J. 347.

27. Massachusetts Constitution Amended, Art. II, sec. 8.

28. For an earlier plan for consolidation of Boston Metropolitan Area Governments, see Planning for the Greater Boston Metropolitan Area, 5 Pub. Ad. Rev. 113 (1945).

29. Dixon, supra note 20, at 57.

30. U.S. Const., Art. I, sec. 10. See also, Frankfurter and Landis, The Compact Clause of the Constitution - A Study in Interstate Adjustments, 34 Yale L.J. 691 n. 25 (1925). "The Constitution puts this power negatively in order to express the limitation upon its exercise by putting this authority for State action in a section dealing with restrictions upon the States. The significance of what was granted has probably been considerably minimized."

31. Dixon, supra note 20, at 57 et seq.

32. ACIR, supra note 4, at 82.

33. The utility of such federal spending as a means for promoting regional development has been recognized by both former Secretary of Agriculture Orville L. Freeman, "Towards a National Policy on Balanced Communities," 53 Minn. L. Rev. 1163, 1174 (1969) and John H. Southern, in a speech on Regional Growth and Development, before the 42d Annual Agricultural Outlook Conference, Nov. 19, 1964.

34. See Staff of Senate Comm. on Banking and Currency, 85th Cong., 2d Sess., "Development Corporations and Authorities," vii. (Comm. Print 1958); U.S. Small Business Administration, "Development Credit Corporations" (1954).

35. Note, "Legal Limitations on Public Inducements to Industrial Location," 59 Columbia L. Rev. 618, at 639-40. See generally H.R. Rep. No. 1889, 85th Cong., 2d Sess. 69 (1958); U.S. Small Business Administration, supra note 34, at 4-6.

36. Massachusetts Business Development Corporation.

37. Mass. Acts and Resolves 1953, ch. 671, sec. 4.

38. See Opinion of the Justices, 211 Mass. 624, 98 N.E. 611 (1912); Opinion of the Justices, 204 Mass. 607, 91 N.E. 405 (1910). See also Mass. Const. Declaration of Rights, art. X, Mass. Const., pt. II, art. IV, ch. 1, '1; Mass. Const., art. LXII (Commonwealth credit not to be pledged for the benefit of private enterprise).

39. Note supra note 35, at 640. The constitutional objections relate to the expenditure of public monies for private benefit. See generally Tilden, supra note 33, at 8-9. Cf. Ayer v. Commissioner of Administration, 340 Mass. 586, 165 N.E. 2d 885 (1960) which ruled that a "membership corporation" was solely functioning to serve the Commonwealth and therefore subject to constitutional limitations on Commonwealth action.

40. ACIR A-31(I), supra note 5, at 108.

41. Ibid.

42. Elisin, "The Fineness of Metropolitan Areas," Michigan L. School Legis. Res. Ctr., 32 (1964).

43. See Blum and Kalsen, "The Uneasy Case for Progressive Taxation," 19 U. Chicago L. Rev. 417, 520 (1952).

44. CCH State Tax Guide at 1533.

45. Walker, Fiscal Aspects of Metropolitan Regional Development, 105 U. Pennsylvania L. Rev. 489, 497 (1957); see als Hartman, Municipal Income Taxation, 31 Rocky Mountain L. Rev. 123 (1958).

46. Massachusetts Constitution Amended, Art. 44, Opinion of the Justices, 266 Mass. 583, 586.

47. This may be required by Avery v. Midland County, 390 U.S. 474 (1968).

48. See W. Newhouse, Constitutional Uniformity and Equality in State Taxation, 178-80 (1959).

49. This is the system currently used by Vermont which takes a flat percentage of the federal tax rate paid. Vermont Statutes Annotated Secs. 32:5822.

50. 49 U.S.C., sec. 1601-30 (1964), as amended by 49 U.S.C.A., secs. 1602-07, 1610, 1611 (1969). See generally Fitch, Urban Transportation and Public Policy, 227 (1964).

51. See, e.g., Federal-Aid Highway Act, 23 U.S.C., sec. 134 (1964), requiring the existence of a regional highway plan as a prerequisite to financial assistance.

LITTLE ADO ABOUT MUCH: JURISDICTION OF THE SUPREME COURT TO ISSUE MANDAMUS*

A long unfolding drama between a federal judge and his brethren judges reached its culmination in an unsuccessful petition for mandamus before the Supreme Court. The petition, brought by Judge Stephen S. Chandler, attacked an order that stripped him of his caseload. The order,[1] issued by the Judicial Council of the Tenth Circuit to Judge Chandler, declared that the judge was unwilling or unable to discharge the duties of his office and deprived him of case assignments. Seeking mandamus from the Supreme Court, Judge Chandler argued that this attempt to discipline a federal judge went beyond the powers of the Council and threatened the independence of the federal judiciary, an independence guaranteed by article III[2] and the impeachment clause[3] of the Constitution. The Supreme Court did not answer the question whether it had jurisdiction over the case.[4] In *Chandler v. Judicial Council of the Tenth Circuit*,[5] the Court denied the petition on the ground that even if jurisdiction existed, a case had not been made for granting the extraordinary relief of mandamus.[6]

Composed of the active circuit judges for each circuit,[7] judicial councils meet to receive the quarterly reports of the Administrative Office of the United States Courts and to "make all necessary orders for the effective and expeditious administration of the business of the courts within [their] circuit."[8] The district judges of each circuit are ordered to promptly carry into effect all orders of their council,[9] but no provision is made otherwise for enforcing such orders.[10] Councils are empowered to certify to the

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* Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1970).

1 Although the majority and concurring opinions treated the Dec. 13, 1965 order, which removed the Judge from both current and future assignments, as terminated by the Feb. 4, 1966 order, which allowed the Judge to continue with the cases then before him but prohibited future case assignments to him, Judge Chandler challenged the original Dec. 13 order and all subsequent orders. The opinion of the Court focused on the Feb. 4 order. Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 88 (1970). Judge Chandler argued that all the orders were beyond the powers of the Council and were defamatory in nature. Brief of Petitioner at 2, Motion for Leave to File Reply Brief and Reply Brief at 14, Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1970).

2 U.S. Const. art. III.

3 Id. art. II, § 4.

4 Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 86 (1970).

5 398 U.S. 74 (1970).

6 Id. at 89.

7 Although the judicial councils are composed of members of the court of appeals for a particular circuit (28 U.S.C. § 332 (1964)), proposals have been made to include district judges on the councils. Hearings on the Judicial Reform Act Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 90th Cong., 2d Sess. 33, 60-79 (1969).

8 28 U.S.C. § 332 (1964). See also J. Moore & H. Fink, Judicial Code Pamphlet ch. 15-1 (1967).

9 28 U.S.C. § 332 (1964).

10 This may partly explain the reasons for the criticism that the councils have failed to keep their judicial houses in order. See Brennan, The Continuing Education of the

appeals to remove himself from cases pending before him.[20] Meeting in special session on December 13, 1965, the Council issued an order describing Judge Chandler as "unable, or unwilling, to discharge efficiently the duties of his office . . . ."[21] The order[22] reassigned to other district judges the cases then assigned to or pending before the Judge and prohibited assignment of new cases to him. Judge Chandler challenged this order, seeking a stay and mandamus or prohibition from the Supreme Court. The Court denied relief on the ground that the Council's order was interlocutory.[23]

Trying another tactic, in January 1966, Judge Chandler wrote his brother district judges in the Western District of Oklahoma that he objected to the removal and reassignment of cases then pending before him, but did not object to not being assigned any new cases. By so doing, he sought to prevent the expression of a "disagreement" among the district judges, which would give the Council authority under section 137 to assign the cases themselves.[24] Judge Chandler contended that section 137 applied only to new cases, and therefore the Council had no authority to reassign cases then before him.[25]

The Judicial Council ordered the matter set for hearing for February, 1966, and invited the Judge to appear with counsel. Judge Chandler declined the invitation. The Council then modified its earlier order to allow Judge Chandler to continue to sit on cases filed and assigned to him prior to December 28, 1965. This modified order, dated February 4, 1966, assigned to the other judges of the district all cases filed after December 28, 1965, but allowed such a division of business to be modified by written order signed by all the active judges of the district.[26]

Representing the Council, the Solicitor General argued that the case was now moot since Judge Chandler had previously agreed that new business should be assigned to the other judges. Judge Chandler objected, explaining that his agreement was a strategic move to prevent the Council from invoking section 137.[27] In a supplemental memorandum, the Solicitor General dropped the mootness claim, suggesting that Judge Chandler dispose of his pending cases before seeking new ones. The Judge replied that

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20 Texaco Inc. v. Chandler, 354 F.2d 655 (10th Cir. 1965), cert. denied, 383 U.S. 936 (1966); Occidental Petroleum Corp. v. Chandler, 303 F.2d 55 (10th Cir. 1962) (en banc), cert. denied, 372 U.S. 915 (1963).

21 Excerpts from the order are quoted in the Court's opinion, 398 U.S. at 77-78.

22 The order was promulgated under the claimed authority of 28 U.S.C. § 332 (1964) and 28 U.S.C. § 137 (1964).

23 Chandler v. Judicial Council of the Tenth Circuit, 382 U.S. 1003 (1966), noted in The Chandler Incident and Problems of Judicial Removal, 19 Stan. L. Rev. 448 (1967). See also Note, Removal of Federal Judges—New Alternatives to an Old Problem, 13 U.C.L.A.L. Rev. 1385 (1966); Legislation, supra note 15; 41 St. John's L. Rev. 97 (1966).

24 398 U.S. at 81; see note 12 supra. For a discussion of the powers of the councils in cases of disagreement see p. 107 supra.

25 See Brief for United States as Amicus Curiae at 9-10, Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1970).

26 The relevant parts of the order are quoted in the Court's opinion, 398 U.S. at 80.

27 See discussion at note 12 supra.

the condition that he apply for assignment of new cases after disposing of his pending docket was a further imposition on his judicial freedom.[28]

In light of a report filed by the district judges in July, 1967, that only twelve cases remained pending before Judge Chandler, the Council concluded that a modification of the February 4, 1966, order might be appropriate and so requested the district judges to agree upon a division of business within the district. On September 1, 1967, the district judges, including Judge Chandler, advised the Council that the current order of business was agreeable. The Council noted the agreement and did not enter a new order.[29]

Judge Chandler moved the Supreme Court for leave to file a petition for mandamus or prohibition. He challenged all the orders as unconstitutionally conditioning the exercise of his judicial office. The Council sought dismissal for lack of jurisdiction, arguing that review by mandamus would be an exercise of original jurisdiction and would thus be unconstitutional.[30]

The Court denied the writ with the following statement:

> Whether the Council's action was administrative action not reviewable in this Court, or whether it is reviewable here, plainly petitioner has not made a case for the extraordinary relief of mandamus or prohibition.[31]

By holding that, in any event, the *Chandler* case was inappropriate for the exercise of the Court's discretion to issue mandamus, the majority avoided the difficult question of whether there was jurisdiction to entertain the case.[32] The majority suggested that mandamus was inappropriate because other adequate relief was available,[33] but did not indicate precisely where such relief might be found. In a footnote,[34] the opinion raised but did not answer the question whether Judge Chandler could bring mandamus against the Council in a district court.[35] The crux of the Court's argument was that Judge Chandler should go back to the Council, express his disagreement with their orders, and hope for relief.[36] This seems, as Justice Harlan noted in his concurring opinion,[37] an odd argument to make to a

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28 Chandler v. Judicial Council for the Tenth Circuit, 398 U.S. 74, 91 (1970) (Harlan, J., concurring).

29 Id. at 81-82.

30 Id. at 82-83.

31 Id. at 89.

32 The Court relied on Rescue Army v. Municipal Court, 331 U.S. 549 (1947). Justice Harlan, concurring, suggested that this reliance was misplaced since in that case the Court denied relief pending additional proceedings "only *after* carefully determining that it had jurisdiction of the case." 398 U.S. at 93 (emphasis in original) (citation omitted).

33 This is in keeping with traditional mandamus doctrine that the writ will be denied where other adequate remedies are available. See L. Jaffe, Judicial Control of Administrative Action 177 (1965); R. Robertson & F. Kirkham, Jurisdiction of the Supreme Court of the United States § 309 (2d ed. R. Wolfson & P. Kurland 1951).

34 398 U.S. at 87 n.8.

35 See 28 U.S.C. § 1361 (1964).

36 See 398 U.S. at 86-88.

37 Id. at 91-92 (Harlan, J., concurring).

petitioner challenging the very authority of the Council to put him into such a position.

It seems that the Court was not prepared to use the facts of this case to define the scope of its mandamus jurisdiction[38] or to define the scope of the powers of the judicial councils.[39] It therefore disposed of the case in terms of remedial discretion, thus avoiding both these issues.

The *Chandler* opinion is one of waning sensibility, and its lack of clarity may be thought to be an abuse of the Court's discretion. The opinion may be faulted most seriously on the Court's failure to offer any reasoned theory of mandamus in its denial of relief. The exercise of judicial discretion must involve a reasoned choice between coherent theories. "It would seem that adjudication is meaningless unless the decision is reached by some rational process. If a decision is to be rational, it must be based upon some rule, principle or standard."[40] No coherent theory of mandamus is evident from the Court's opinion.

Although it was neither improper nor unusual for the Court to avoid answering a difficult jurisdictional question by answering an easier question of remedial discretion,[41] this method of disposition is open to criticism. It is not a serious criticism that this method of disposition does violence to the paradigm of judicial decision-making that a court must always establish its own jurisdiction before reaching the merits.[42] This method of disposition allows a court to resolve the conflict without engaging in avoidable and difficult law-making. But, in fact, there is a need for discussion of the limits

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38 Id. at 86.

39 Id. Even Justice Harlan, in reaching the merits, was unwilling to investigate the limits of the Council's powers under § 332. Although there are some broad statements of congressional purpose, Harlan stated that "[i]t is not necessary to define all of the limits on the powers of the Councils under § 332 in order to determine that the February 4 Order was a proper exercise of those powers." Id. at 125.

40 H.M. Hart & A. Sachs, The Legal Process 421 (1958), quoting Fuller, The Forms and Limits of Adjudication (an unpublished paper presented by Professor L. Fuller to a group of Harvard University faculty members on Nov. 19, 1957).

41 See Ex parte Bakelite Corp., 279 U.S. 438 (1929) (overruled by Glidden Co. v. Zdanok, 370 U.S. 530 (1962)), in which the jurisdiction of the Supreme Court to issue prohibition to the Court of Customs Appeals to prevent its hearing an appeal from the findings of the Tariff Commission was questioned. Justice Van Devanter wrote for the Bakelite majority:

> The power of this Court to issue writs of prohibition has never been clearly defined by statute or by decisions. And the existence of the power in a situation like the present is not free from doubt. But the doubt need not be resolved now, for, assuming that the power exists, there is here, as will appear later on, no tenable basis for exercising it. In such a case it is admissible, and is common practice, to pass the question of power and to deny the writ because without warrant in other respects.

Id. at 448 (footnotes omitted).

42 See H.M. Hart & H. Wechsler, The Federal Courts and the Federal System 719 (1953):

> The first duty of counsel is to make clear to the court the basis for its jurisdiction as a federal court. The first duty of the court is to make sure that jurisdiction exists. If the record fails to disclose a basis for federal jurisdiction, the court not only will but must refuse to proceed further with the determination of the merits of the controversy unless the failure can be cured.

of the Court's mandamus jurisdiction.[43] *Chandler* provided an opportunity for the Court to clarify both the constitutional limitations on its mandamus jurisdiction and the principles that govern the discretion inherent in mandamus. The need for such a clarification is witnessed by the fact that most applications for writs are disposed of without opinion.[44] One could easily regret the lost potential in *Chandler* for giving more guidance to future petitioners.

The majority opinion suggested that the question of jurisdiction turned on whether the Council's actions were judicial or administrative.[45] If judicial, the case could perhaps be reviewed as an exercise of the Court's appellate jurisdiction.[46] If administrative, review in the Supreme Court would be constitutionally forbidden.[47] Justice Harlan, concurring,[48] attempted to answer the nagging questions of jurisdiction and appropriateness of relief. Utilizing the jurisdictional analysis suggested by the majority, Justice Harlan found that the Council's actions were judicial in nature, thus satisfying the article III jurisdictional requirements.[49] Finding statutory jurisdiction under the All Writs Act satisfied as well,[50] Justice Harlan declined relief on the ground that the Council acted within its authority.[51] Justices Black and Douglas, dissenting, also found jurisdiction, but thought the Council's actions unconstitutional.[52]

This Comment is not concerned with the merits of the controversy, but rather with the approach taken by the Court in analyzing the jurisdictional question. In determining whether review of the Council's actions is an exercise of appellate or original jurisdiction, it is not sufficient to ask whether the actions are administrative or judicial. If the actions were judicial, issuance of mandamus would most likely be an exercise of appellate jurisdiction.[53] It does not follow, however, that if the actions of the Council were

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43 Sloss, Mandamus in the Supreme Court Since the Judiciary Act of 1925, 46 Harv. L. Rev. 91, 101-02 (1932); see Wolfson, Extraordinary Writs in the Supreme Court Since Ex Parte Peru, 51 Colum. L. Rev. 977 (1951). For an attempt to define some standards, see Note, Federal Court Review by Extraordinary Writ: A Clogged Safety Valve in the Final Judgment Rule, 63 Yale L.J. 105 (1953).

44 See Sloss, supra note 43, at 94. Petitions for writs are given similar treatment in the courts of appeals. A five-year study of such applications in the second circuit revealed that 32 of 47 were dismissed without opinion. Note, supra note 43, at 106 n.11.

45 398 U.S. at 86, 89. In its analysis the Court adopted an approach reminiscent of the doctrine that common-law writs of certiorari will not lie to review "administrative" as opposed to "judicial" acts. The distinction between administrative and judicial actions below was meant to insure that review by certiorari would only involve questions of law taken from a record made at a hearing, itself required by law. Thus, where there had been no hearing or no record, the action was tagged "administrative" and review by certiorari was unavailable. See L. Jaffe, supra note 33, at 177.

46 398 U.S. at 86.

47 Id. at 89.

48 Id.

49 Id. at 96.

50 Id. at 117.

51 Id. at 129.

52 Id. at 141-42.

53 Id. at 96 (Harlan, J., concurring).

administrative, issuance of mandamus would be an exercise of original jurisdiction.

I. Article III Appellate Jurisdiction

Assuming *arguendo* that the Council's actions were administrative, is an article III court constitutionally permitted to exercise jurisdiction over the Chandler controversy? As long as the Court, in reviewing the administrative action, exercises a judicial function, there are no constitutional objections to vesting review of administrative actions in article III courts. *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.*[54] upheld the jurisdiction of the court of appeals to review orders of the Federal Radio Commission (FRC) where review was expressly limited to "questions of law" with the provision "that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary or capricious."[55] An earlier case held that a statute conferring jurisdiction on the court of appeals to review FRC orders was unconstitutional where review was not so expressly limited and where the court was empowered to alter or revise the decision below and enter such judgment as it thought just.[56]

Nelson Brothers found that the question whether the Commission had acted within the limits of its statutory authorization was particularly suited for judicial decision:

> When, on the appeal, as here provided, the parties come before the Court of Appeals to obtain its decision upon the legal question whether the Commission has acted within the limits of its authority, and to have their rights, as established by law, determined accordingly, there is a case or controversy which is the appropriate subject of the exercise of judicial power.[57]

Judge Chandler argued that the Judicial Council had acted outside of its statutory and constitutional authority in restricting his caseload. In reviewing this claim, a court would be exercising a judicial function.

Review of administrative action in a court would seem to be an exercise of appellate jurisdiction where the scope of review was appropriately limited. If the court were exercising its appellate jurisdiction, it could not make an original determination of the facts of the case. Review must be on the record developed below, not by trial de novo. The Court must not have the power to revise administrative orders and substitute its own judgment.

Marbury v. Madison[58] established that article III limits issuance of mandamus by the Supreme Court to cases in which the writ is sought in aid of or in exercise of the Court's appellate jurisdiction:

54 289 U.S. 266 (1933).
55 Id. at 275-76.
56 FRC v. General Elec. Co., 281 U.S. 464 (1930).
57 289 U.S. at 278.
58 5 U.S. (1 Cranch) 137 (1803).

> To enable this court, then, to issue a *mandamus*, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.[59]

Justice Marshall attempted to define the meaning of "appellate":

> It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause.[60]

The commonplace vesting of review of administrative action in the circuit courts of appeal,[61] courts of exclusively appellate jurisdiction, refutes the notion that the "cause" must have been heard first by a court if review is an exercise of appellate jurisdiction.[62] In order for review to be an exercise of appellate jurisdiction, a case or controversy must have been the subject of the proceedings below—the petition for review must not create the controversy.

Because Judge Chandler failed to attend the hearing and to express to the Council his disagreement with its orders,[63] it might be argued that there were no proceedings below to be corrected. It would seem more reasonable to view Judge Chandler's actions as continuous challenges to the jurisdiction of the Council.[64] The challenge did not prevent the Council from issuing orders or from removing the Judge from future case assignments. The February 4, 1966 order was, in essence, a decision on Judge Chandler's claim that the Council was powerless to remove him.

In a sense, every petition for mandamus creates an original action in that it institutes a new case.[65] But this is tangential to the real problem of whether mandamus is being invoked to correct a proceeding that resolved a pre-existing case or controversy. The question then is whether a case or controversy existed between Judge Chandler and the Council at the time the Council issued its order. A judicious answer is that a case or controversy did exist. The conflict may be perceived as a protest by a party whose conduct is being regulated that the regulating body is acting beyond its authority. The positions assumed by the parties in *Chandler* were clearly adverse, and the facts of the dispute were sufficiently concrete for adjudication.[66]

Although there may be no constitutional objection to an article III court reviewing administrative action as an exercise of appellate jurisdic-

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59 Id. at 175 (emphasis added).

60 Id.

61 For instance, review of National Labor Relations Board determinations is vested exclusively in the circuit courts of appeal. 29 U.S.C. § 160(f) (1964).

62 See Old Colony Trust Co. v. Commissioner, 279 U.S. 716, 722-25 (1929).

63 See 398 U.S. at 88.

64 Justice Harlan viewed the case in this light. Id. at 90-91.

65 Applications for writs were listed on the Original Docket until 1965; now they are listed on the Miscellaneous Docket. See R. Stern & E. Gressman, Supreme Court Practice § 11.1 (4th ed. 1969).

66 See Justice Harlan's discussion of Rescue Army v. Municipal Court, 331 U.S. 549 (1947), in 398 U.S. at 90-93 (concurring opinion).

tion, there may yet be constitutional barriers to direct review of administrative action by the Supreme Court. As the Court once noted in a cryptic bit of dicta, it does not "normally review orders of administrative agencies in the first instance."[67] And *Ex parte Vallandigham*[68] may be understood to suggest that direct review of administrative action by the Supreme Court would be an exercise of original jurisdiction. This reading of *Vallandigham*, it will be argued later,[69] is incorrect. *Vallandigham* should be understood as a case involving congressional intent to preclude judicial review of a specific administrative body. It is not a substantial barrier to direct Supreme Court review of administrative action where there is no congressional policy against review.

II. Statutory Jurisdiction

Statutory jurisdiction[70] in *Chandler* was based on the All Writs Act, which grants jurisdiction to the article III courts to issue writs where "necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[71] Once thought to limit the jurisdiction of an appellate court to issue writs in cases in which appeal had been perfected,[72] the Act is now understood to allow the Supreme Court to issue writs where the lower tribunal's action or inaction might defeat the Court's eventual jurisdiction, which could be invoked only after proceedings in an intermediate court.[73]

The doctrinal shift occurred in *Ex parte Peru*.[74] In *Peru* the Supreme Court issued mandamus to a district court, which had erroneously asserted in rem jurisdiction over a Peruvian naval vessel. Direct appellate jurisdiction was vested in the circuit court; ultimate discretionary jurisdiction lay in the Supreme Court. The parties were not relegated to their remedies in the circuit court since the "public importance and exceptional character" of the case warranted direct review by the Supreme Court.[75] The Court emphasized the discretionary character of mandamus. "The common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the Court . . . ."[76] According to *Peru*, the jurisdiction of the

[67] CAB v. American Air Transp., Inc., 344 U.S. 4, 5 (1952).

[68] 68 U.S. (1 Wall.) 243 (1863).

[69] See discussion pp. 116-18 infra.

[70] Although the original jurisdiction of the Court is conferred directly by the Constitution, the Court's appellate jurisdiction depends upon statutory grant. Durousseau v. United States, 10 U.S. (6 Cranch) 307, 313-14 (1810).

[71] 28 U.S.C. § 1651(a) (1964).

[72] Early cases, such as In re Glaser, 198 U.S. 171 (1905) and In re Massachusetts, 197 U.S. 482 (1905), held that mandamus could not be granted where the Supreme Court had neither original jurisdiction nor appellate jurisdiction either by direct appeal or by writ of error.

[73] See, e.g., Brief for the United States as Amicus Curiae at 31 & n.17 (cases cited therein), Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1970).

[74] 318 U.S. 578 (1943).

[75] Id. at 585. Justice Frankfurter dissented in Peru on the ground that the Supreme Court lacked jurisdiction where it would have only eventual review by certiorari and direct review of the district court was in the circuit court. Id. at 590.

[76] Id. at 584.

Supreme Court to issue mandamus is established where the Court had potential review of the case by certiorari and where the writ was sought in aid of that jurisdiction.[77]

Nothing inherent in the logic of the potential-jurisdiction doctrine of *Peru* prevents its extension one step further—to administrative action that is subject to judicial review.[78] Were the action of the Judicial Council characterized as administrative and the scope of review appropriately limited, judicial review of such action might be possible by mandamus action in district court,[79] the Administrative Procedure Act,[80] or the federal-question[81] grant of jurisdiction. Should jurisdiction in the district court to review the administrative determination be established, the Supreme Court would have eventual certiorari jurisdiction over the case.

The Court has held that potential review of administrative action is sufficient to support jurisdiction in an appellate court under the All Writs Act where issuance of the writ is necessary to protect judicial review. In *Federal Trade Commission v. Dean Foods Co.*,[82] the Federal Trade Commission attempted to stop the merger of two packaged milk companies by seeking a temporary restraining order and preliminary injunction from the court of appeals. The Commission argued that the merger would violate section 7 of the Clayton Act[83] and that unless the merger was halted, one of the companies would cease to exist, making it virtually impossible to restore the company as an independent entity should an antitrust violation be found. The court of appeals refused to give relief,[84] holding that the sole grant of enforcement power to the Commission was in section 11 of the Clayton Act, which authorizes cease and desist orders after an administrative hearing.[85] Review was vested in the court of appeals and the Supreme Court.

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77 See generally Wolfson, supra note 43.

78 H.M. Hart & H. Wechsler, supra note 42, at 282.

79 See generally Byse & Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action, 81 Harv. L. Rev. 308, 318-23 (1967). There is a substantial question of whether the judicial council is an "agency" for purposes of § 1361.

80 It may be argued that § 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-05 (Supp. V, 1970) is a jurisdictional grant. See Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967). See also Cranston, Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant, 68 Mich. L. Rev. 389, 437-46 (1970).

81 28 U.S.C. § 1331 (1964). It would be difficult to meet the jurisdictional-amount requirement of $10,000 in controversy.

82 384 U.S. 597 (1966), commented on in 55 Geo. L.J. 364 (1966) and 66 U. Ill. L.F. 1105 (1966). See also The Supreme Court, 1965 Term, 80 Harv. L. Rev. 252 (1966). Although the case involved a restraining order and injunction under the All Writs Act, the jurisdictional requirement under the Act should not vary with the form of relief sought. Because the courts of appeals are courts of appellate jurisdiction only, this case is taken to involve the same principles as those determining the Supreme Court's mandamus jurisdiction.

83 15 U.S.C. § 18 (1964).

84 356 F.2d 481 (7th Cir. 1966), rev'd, 384 U.S. 597 (1966).

85 15 U.S.C. § 21(c) (1964).

The Supreme Court reversed, holding that the court of appeals had jurisdiction to issue an order to protect its ability to render an effective remedy on review of the Commission's determination under section 11. The Court rejected the dissent's position that the court of appeals lacked jurisdiction under the All Writs Act until the Commission had entered an order after statutory proceedings.[86] Relief was allowed under the All Writs Act although the case was still before the agency and the potential jurisdiction of the reviewing court was not being threatened in any usual manner. It was the jurisdiction of the agency and the remedial power of the court that was threatened. *Dean* suggests that the requirement that the writ issue in aid of the Court's jurisdiction be read with an eye to the practical problems that may defeat jurisdiction.

Chandler may fulfill the first requirement of the *Peru* test—that the Supreme Court have eventual appellate jurisdiction. The second requirement—that the writ issue to aid that jurisdiction—is more difficult. It is not clear whether this test requires that issuance of the writ be necessary to preserve the jurisdiction, or merely that the writ issue in aid of that jurisdiction. In the interest of preserving the flexibility of the writs, the looser standard would seem more desirable and all that is required by *Marbury*.[87]

Judge Chandler forwarded a theory to support jurisdiction,[88] asserting that the Supreme Court had eventual appellate jurisdiction over the cases on which he would have sat but for the February 4 order. Final review of these cases could not adequately explore the damage suffered by the parties to these cases and by Judge Chandler. Thus review of these issues would be defeated unless the Court issued mandamus. Judge Chandler's assertion of the interests of the litigants,[89] as well as of his own interests, is in keeping with the "public" character of mandamus.[90]

Although, under the logic of *Peru*, the Supreme Court can be thought to possess jurisdiction to issue mandamus in review of administrative action, language in *Ex parte Vallandigham*[91] suggests that direct Supreme Court review of administrative action would be unconstitutional.[92] Vallandigham

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86 384 U.S. at 622 (Fortas, J., dissenting).

87 See p. 113 supra.

88 398 U.S. at 115 (Harlan, J., concurring). Justice Harlan's acceptance of this theory is extraneous to his basic reason for finding jurisdiction. Justice Harlan concluded that the actions of the Council were judicial in nature.

89 Whether Judge Chandler has standing to assert the interests of litigants who would have had him sit on their cases but for the Feb. 4 order is problematic. It is likely, however, that he is the only plaintiff who would assert their interest. See Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

90 See, e.g., L. Jaffe, supra note 33, at 180:

> [M]andamus and certiorari are often "public" proceedings brought by a citizen rather than an injured person. The "public" character of mandamus is manifested by the notion that mandamus is discretionary, that it can be refused where injury to the public from its grant would outweigh its value as a remedy for the plaintiff. (footnote omitted.)

91 68 U.S. (1 Wall.) 243 (1863).

92 Id. at 252.

sought a writ of certiorari from the Supreme Court to review his conviction by a Civil War military commission for the treasonous habit of expressing sympathy for the enemy. The Court first distinguished military commissions from courts-martial, finding the source of jurisdiction for the latter in statute. The jurisdiction of military commissions, it was thought, derived from a common law of war. The Court held that the petition was not within its appellate jurisdiction because the commission was not a court.[93] The decision asserted that the authority of the military commission was not judicial in the sense that the judicial power of the United States was exercised by the federal courts.[94] Presumably, because the Commission did not exercise judicial power, any review of the decision would be an original exercise of the judicial power.

If thought to stand for the proposition that review of an order of a federal administrative body by the Supreme Court must be an exercise of original jurisdiction because the body, not being a federal court, cannot exercise the judicial power of the United States, *Vallandigham* is inconsistent with *Martin v. Hunter's Lessee*.[95] In affirming the constitutionality of Supreme Court review of state-court judgments, *Martin v. Hunter's Lessee* rejects the argument that it is the nature of the body to be reviewed that determines whether the judicial power of the United States has been exercised, and thus whether the appellate jurisdiction of the Court extends to it. The Court stated:

> The appellate power is not limited by the terms of the third article to any particular courts. The words are, "the judicial power (which includes appellate power) shall extend to all cases" &c., and "in all other cases before mentioned the supreme court shall have appellate jurisdiction." It is the case, then, and not the court, that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the letter of the constitution for any qualification as to the tribunal where it depends.[96]

It is the case, not the nature of the tribunal below, that gives the reviewing court its power.

The *Vallandigham* decision may be understood, alternatively, as holding that the military commissions were created under congressional war powers and their judgments were not subject to review in article III courts.[97] There seems to have been no authorization for review of such commission judgments,[98] and there may have been a policy against review, save for review by habeas corpus. Because there was no authorization for review, the writ

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93 Id. at 251.

94 Id. at 250.

95 14 U.S. (1 Wheat.) 304 (1816).

96 Id. at 338.

97 Cf. In re Yamashita, 327 U.S. 1, 8 (1946). The question whether a military commission has acted outside of its jurisdiction is open to review by an article III court. Ex parte Quirin, 317 U.S. 1 (1942).

98 The statutory authorization of military commissions is silent on the question of judicial review. Act of March 3, 1863, ch. 75, § 30, 12 Stat. 731, 736.

could not issue in aid of any appellate jurisdiction. Direct review of commission judgments could not be an exercise of appellate jurisdiction unless the commission itself exercised judicial power. Since there was no statutory provision for review and because the commission did not exercise judicial power, Supreme Court review was prohibited.

Vallandigham necessarily suggests a two-part analysis for determining whether jurisdiction to issue a writ exists. First, is there a separate grant of jurisdiction to review the action? If so, the writ may issue in aid of that jurisdiction.[99] If not, does the body below exercise the judicial power of the United States? If so, review will be an exercise of appellate power. The "judicial power" test is difficult to comprehend. State courts do not exercise article III, section 1, judicial power either, yet review of state-court judgments in the Supreme Court is an exercise of appellate jurisdiction.[100] Perhaps the "judicial power" reasoning in *Vallandigham* is best to be understood as reinforcing the conclusion that Congress intended to deny jurisdiction to the civil courts to review the proceedings of military commissions, other than by habeas corpus.[101]

III. Collateral Problems of Statutory Jurisdiction

The temptation to conclude at this point that the Supreme Court may directly review administrative action as an exercise of its appellate jurisdiction must give way to yet another question: could exercise of jurisdiction under the All Writs Act be an unconstitutional usurpation of the article III appeals limitation? *Roche v. Evaporated Milk Association*[102] illustrates the tension between appellate review by mandamus and appellate review through the normal statutory processes.[103]

In *Roche* the Supreme Court reversed the appeals-court issuance of mandamus to a district court. Mandamus had issued to correct the district judge's alleged error in striking pleas in abatement to a criminal indictment. Reversing, the Supreme Court stated that mandamus could issue to compel an inferior court to relinquish jurisdiction it could not lawfully exercise or exercise jurisdiction it unlawfully repudiated.[104] The district court in *Roche* acted within its jurisdiction. Thus the proper way to correct its error was through the statutory appeals process.[105]

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99 See United States ex rel. Roman v. Rauch, 253 F. 814, 815 (S.D.N.Y. 1918).

100 The power of the Supreme Court to issue mandamus to a state court to force compliance with its mandate on review of a state-court judgment has not been decided. The existence of the power to issue mandamus to a state court was doubted by Justice Johnson, concurring in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 380-81 (1816). One commentator believes the power exists. See 1 J. Moore, Federal Practice ¶ 0.6[6], at 254 n.9 (2d ed. 1964). See generally Comment, Jurisdiction in the Supreme Court to Issue Mandamus to a State Court, 20 Texas L. Rev. 358 (1942).

101 See Kauffman v. Secretary of the Air Force, 269 F. Supp. 639 (D.D.C. 1967).

102 319 U.S. 21 (1943).

103 See Bankers Life & Cas. Co. v. Holland, 346 U.S. 379 (1953).

104 319 U.S. at 26.

105 See also Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964): "It is, of course, well settled, that the writ is not to be used as a substitute for appeal . . . ."

Although *Roche* cites the statement in *Peru* that common-law writs are granted or withheld at the sound discretion of the court, its holding implies limits on this discretion where the writ would substitute for normal appeal.[106] The problem is aggravated when the writ is sought to circumvent the final-judgment rule[107] or a congressional policy against review.[108]

Chandler escapes the *Roche* problem. Judge Chandler alleged that the Council's actions far exceeded its authority, not that the Council merely erred on a matter within its jurisdiction.[109] Presumably, the orders of the Council were sufficiently final for review.

IV. Conclusion

It is slightly ingenuous to approach the problem of jurisdiction in *Chandler* by asking whether the actions of the Judicial Council were judicial or administrative. Even if the actions were administrative, an article III court may review the question whether the actions were within the limits of the Council's authority. So long as the scope of such review was properly limited, direct review of the administrative action by the Supreme Court might reasonably be thought to be an exercise of the Court's appellate jurisdiction.

Appellate jurisdiction to support issuance of the writ might exist on either of two theories: that the writ issues to aid an autonomous, eventual appellate jurisdiction in the Supreme Court, or that judicial review of administrative action can reasonably be thought to be an exercise of appellate jurisdiction so long as a case or controversy existed below. In any event, it is likely that the Supreme Court is the only body realistically able to resolve this problem in judicial administration. Its failure to adequately deal with the jurisdictional question is disturbing. It is particularly disturbing to those who think that there may be constitutional limits on the

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106 H.M. Hart & H. Wechsler, supra note 42, at 1352. But cf. 9 J. Moore, Federal Practice ¶ 110.26, at 283 (2d ed. 1970):

> Some of the older Supreme Court cases tended to talk largely in terms of jurisdiction: that the power of the Court to issue a prerogative writ depended on whether the lower court had exceeded, or wrongfully refused to exercise, its jurisdiction. But the Supreme Court has clearly and conclusively ruled that the power to issue a prerogative writ is not limited to jurisdictional matters. (footnotes omitted.)

107 See Note, supra note 43. It should be observed that 28 U.S.C. § 1254(1) (1964) authorizes the Supreme Court to exercise its certiorari jurisdiction either before or after rendition of judgment by the court of appeals. The Court has been reluctant to exercise this power to interject itself into cases involving review of administrative action. This reluctance stems from the fear that Supreme Court review prior to a decision by a lower court would be an unconstitutional exercise of original jurisdiction. Although direct Supreme Court review of administrative action might reasonably be thought to be an exercise of original jurisdiction, a strong argument can be made that the character of the administrative proceeding below is sufficiently judicial as not to make initial court review an exercise of original jurisdiction. See R. Stern & E. Gressman, supra note 65, at 29.

108 See generally Saferstein, Nonreviewability: A Functional Analysis of "Committed to Agency Discretion," 82 Harv. L. Rev. 367 (1968).

109 398 U.S. at 114.

Court's "discretion" to decline jurisdiction as well as to assume it. Judge Chandler may in fact have no other remedy. It is true that necessity cannot create jurisdiction. But given jurisdiction, necessity should guide discretion.

SANDRA LYNCH

THE APPLICABILITY OF THE CORN PRODUCTS DOCTRINE TO DISPOSITIONS OF SECTION 1231 PROPERTY PURSUANT TO A SECTION 337 LIQUIDATION*

Hollywood Baseball Association (Hollywood) was a minor-league baseball club. Because of the necessities of professional baseball, Hollywood had working agreements with major-league clubs that required it to sell player contracts on demand. From 1948 through 1957 Hollywood's average net income was $38,640, of which an average of $10,370 per year was derived from the sales of player contracts.[1] On December 17, 1957 Hollywood's stockholders adopted a plan of complete liquidation pursuant to section 337 of the Internal Revenue Code of 1954.[2] Under section 337 gains realized from the sale of certain property pursuant to liquidation are not recognized by the corporation. Instead, a single tax is paid by the shareholders upon the distribution of the proceeds.[3]

During the liquidation period Hollywood derived $117,000 from the sale of player contracts, which it listed as non-taxable under section 337.[4] Upon the subsequent receipt of a deficiency notice from the Internal Revenue Service, Hollywood promptly filed a petition with the Tax Court for a redetermination of the deficiency.

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* Hollywood Baseball Ass'n v. Commissioner, 423 F.2d 494 (9th Cir.), cert. denied, 400 U.S. 848 (1970).

1 Hollywood Baseball Ass'n v. Commissioner, 42 T.C. 234, 242 (1964), aff'd, 352 F.2d 350 (9th Cir. 1965), vacated, 383 U.S. 824 (1966).

2 Int. Rev. Code of 1954, § 337.

3 Id:

(a) GENERAL RULE.—If—

(1) a corporation adopts a plan of complete liquidation on or after June 22, 1954, and

(2) within the 12-month period beginning on the date of the adoption of such plan, all of the assets of the corporation are distributed in complete liquidation, less assets retained to meet claims,

then no gain or loss shall be recognized to such corporation from the sale or exchange by it of property within such 12-month period.

(b) PROPERTY DEFINED.—

(1) IN GENERAL.—For purposes of subsection (a), the term "property" does not include—

(A) stock in trade of the corporation, or other property of a kind which would properly be included in the inventory of the corporation if on hand at the close of the taxable year, and property held by the corporation *primarily for sale to customers in the ordinary course of its trade or business*. . . . (emphasis added).

4 42 T.C. at 235. Ninety-thousand dollars of the $117,000 was a deferred payment on the contracts of two players that had been sold prior to the liquidation period. Id. at 236.

CAN THE SECTION 1331 AMOUNT REQUIREMENT CONSTITUTIONALLY BAR A PLAINTIFF ALLEGING VIOLATION OF HIS FIRST AMENDMENT RIGHTS FROM USING THE FEDERAL COURTS TO GET AN INJUNCTION AGAINST A FEDERAL OFFICER?

> What happens if the Government is hurting people and not simply refusing to help them? Suppose Congress authorizes a program of direct action by Government officials against private persons . . . . Suppose, further, that it not only dispenses with judicial enforcement but either limits the jurisdiction of the federal courts to inquire into what the officials do or denies it altogether.[1]

Federal district courts are denied jurisdiction of federal question cases unless the matter in controversy can be valued at $10,000.[2] Although many claims valued at less than $10,000 can avoid this limitation by utilizing other jurisdictional grants that have no matter-in-controversy requirement,[3] suits for injunctive relief against federal officers on claims of infringement of constitutional rights can be grounded, in most instances, only in section 1331. Although other forms of relief, such as mandamus,[4] are available and often provide a practical solution to the problem, a limited class of cases remains for which injunction is the only appropriate remedy and section 1331 the only applicable jurisdictional grant. It is in this limited class of cases, in the particular context of a hypothetical case in which a plaintiff, in the face of governmental coercion, seeks injunctive relief against federal officers to protect his first amendment rights but is unable to assert a $10,000 matter in controversy, that questions arise as to the constitutionality of the amount limitation of 28 U.S.C. § 1331. The justification for this inquiry stems from the ultimate concern for the protection of the right to dissent, as dissent from federal policies and actions is increasingly practiced.

Because a plaintiff seeking an injunction against federal officials on a claim that his freedom of speech is imperilled must show that his first amendment right, a right inherently incapable of monetary valuation,[5] has a value of $10,000, the jurisdictional amount limitation may act to close the doors of the federal courts to this claim. Unless some other federal jurisdictional statute can be found on which to base the suit, or some other court can be

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1 Hart, The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1363, 1386-87 (1953).

2 28 U.S.C. § 1331(a) (1964). An exception is the exercise of the general equity jurisdiction of the District Court for the District of Columbia Circuit without regard to the amount in controversy. D.C. Code Ann. §§ 11-521, -961, -963 (Supp. II, 1969).

3 See, e.g., 28 U.S.C. § 1343 (1964).

4 28 U.S.C. § 1361 (1964).

5 Although such civil rights may have incidents that are capable of valuation, it is difficult to say that freedom of speech has a value of x dollars. For discussion of valuation of claims under section 1331 see Note, Federal Jurisdictional Amount: Determination of the Matter in Controversy, 73 Harv. L. Rev. 1369 (1960).

found to entertain the claim, the jurisdictional-amount limitation would leave an individual asserting an important constitutional claim without a forum and thus without a remedy. This situation may violate the fifth amendment due process clause and the first amendment.

Some vitality may be given to the hypothetical by reference to two cases that approximate the projected fact pattern, but in which allegations of the jurisdictional amount were found to be sufficient to give the courts section 1331 jurisdiction. In *Murray v. Vaughn*,[6] plaintiff alleged that he had been dismissed from the Peace Corps for writing a letter critical of United States involvement in Vietnam to a Chilean newspaper and sought a declaration that his expulsion was unconstitutional, an injunction to the Peace Corps to cleanse his record and reinstate him, and other relief. In *National Student Association v. Hershey*,[7] an organization representative of students sought a declaratory judgment voiding a directive from the Selective Service Director to local boards and an injunction against enforcement of the directive and delinquency regulations. The directive asserted that registrants who violated the Selective Service Act and regulations, particularly by participating in demonstrations that interfered with recruiting or caused refusal of military service, should be declared delinquent and reclassified 1-A. Similar situations in which the Government might act to chill first amendment rights and in which the aggrieved individual could not allege $10,000 damage can be posited without straining credulity.[8]

Several commentators have urged that the matter-in-controversy requirement be dropped from the federal question grant[9] and legislation has recently been introduced proposing elimination of the requirement from section 1331.[10] While recognizing the merits of such proposals, this analysis is limited to the constitutionality of the amount requirement in the infrequent situation where plaintiff seeks an injunction against federal officers on a first amendment claim; is unable to assert a $10,000 matter in controversy; cannot start suit under another federal jurisdictional grant; and finds that the appropriate state court asserts that it does not have jurisdiction to

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6 300 F. Supp. 688 (D.R.I. 1969). Dicta in Murray suggests that the amount limitation of section 1331 is unconstitutional as a violation of fifth amendment due process and article III where its application results in denial of judicial process of law to a plaintiff asserting a claim of constitutional right. Because the case and the reasoning it offers to support this suggestion is extensively analyzed in Comment, Murray v. Vaughn: Federal Jurisdiction in Suits Against Federal Officers and Pre-Prosecution Judicial Review Under the Selective Service Act, 50 B.U.L. Rev. (Intro., Pts. I, II) (Summer 1970), to be published shortly, this Note attempts to make a somewhat independent analysis of the constitutionality of section 1331. For this reason, analysis of the cases concerned with the constitutionality of 50 U.S.C. App. § 460(b)(3) (1964) will not be undertaken.

7 412 F.2d 1103 (D.C. Cir. 1969).

8 See also Wolff v. Selective Serv. Bd. No. 16, 372 F.2d 817 (2d Cir. 1967), in which plaintiffs claimed that their draft board had reclassified them after and because they engaged in demonstrations.

9 ALI Study of Jurisdiction Between State and Federal Courts 5 (Tent. Draft No. 5, 1966). See also Administrative Conference Urges "People's Counsel," 37 U.S.L.W. 2460 (Feb. 11, 1969).

10 S. 3568, 91st Cong., 2d Sess. (1970).

enjoin federal officers. It is suggested that the legislative policy embodied in the amount requirement of section 1331 does not comprehend the case hypothesized, and that rules of construction require that the constitutionality of the statute be saved by reading the amount limitation as separable and inapplicable to this case.

I. Purpose of the Jurisdictional Amount Provision

The increase in the jurisdictional amount in federal question cases passed in 1958 was designed to perform the following three judicial housekeeping functions: provide symmetry with the jurisdictional amount of the diversity grant,[11] eliminate petty controversies,[12] and reduce the number of cases instituted in the overburdened federal courts.[13] The symmetry of the $10,000 requirement in federal question cases with the $10,000 requirement in diversity cases seems to provide equal access to the federal courts, discriminating against neither of the two classes of cases. Yet this principle of equal access may not be justified when the different purposes in admitting the two classes of cases to federal court are considered. The decision of Congress to limit the diversity jurisdiction assumed that out-of-state litigants would face bias in state courts.[14] Although a $10,000 amount requirement in diversity cases could be predicted on a theory that the greater the amount in controversy, the greater the likelihood of bias, this theory cannot support imposition of the same amount requirement in federal question cases where the consideration involved in opening the federal courts is that the federal courts are more expert in constitutional issues.[15] The aesthetic desirability of symmetry does not alone warrant the imposition of a jurisdictional amount in federal question cases. The importance of a particular federal question case is not always accurately reflected by the dollar amount involved.[16]

It is doubtful that the jurisdictional amount provision in federal question cases has significantly reduced the number of cases started in federal courts:[17]

> [I]t is clear that the amount requirement of § 1331 is largely illusory, and that it has no significant impact on the workload of the federal courts.[18]

Professor Wechsler has suggested that, as a matter of policy, it is not wise to make access to the federal trial courts in federal question cases dependent on

11 28 U.S.C. § 1332 (1964). See Friedenthal, New Limitations on Federal Jurisdiction, 11 Stan. L. Rev. 213, 215-16 (1959).

12 S. Rep. No. 1830, 85th Cong., 2d Sess. (1958). See also Note, New Federal Jurisdictional Statute Achieves Early Success in Reducing Number of District Court Case Filings but Presents Interpretive Difficulties, 58 Colum. L. Rev. 1287, 1289 n.19 (1958).

13 See Snyder v. Harris, 394 U.S. 332, 339-40 (1969).

14 Friedenthal, supra note 11.

15 Id. at 217.

16 See generally Note, Draft Reclassification for Political Demonstrations—Jurisdictional Amount in Suits Against Federal Officers, 53 Cornell L. Rev. 916 (1968).

17 See Note, supra note 12, at 1287 n.2. A comparison of the caseload for all federal district courts for August and September 1958 with the same months of 1957 showed only a 6% decline in federal question cases.

18 ALI Study of Jurisdiction Between State and Federal Courts, supra note 9, app. B, at 202.

the value of the matter in controversy.[19] Those factors that are relevant to whether a federal court should be available to hear federal question claims "have little, if any, correlation with a minimum jurisdictional amount,"[20] and instead involve such considerations as the desirability of a sympathetic federal forum, adequacy of state judicial relief, and necessity of a specialized tribunal. The statutory history of section 1331 includes a disavowal of any intent to convert federal courts into "courts of big business."[21] Nonetheless, the effect of the jurisdictional amount is to open federal courts to protect rights to tangible property but not to protect rights to intangible freedoms. Implicit in the jurisdictional amount is the notion that property rights are worthiest of protection, a notion recalling Anatole France's description of the magnificent evenhandedness of French justice by which rich and poor alike were forbidden to sleep under the bridges of Paris.

The legislative history of the amount provision of section 1331 indicates that Congress might not have been fully aware of the burden the jurisdictional amount requirement would place on civil rights suits against federal officers. It was repeatedly asserted that the only cases affected by the increase in the jurisdictional amount would be those involving the constitutionality of state statutes and those arising under the Jones Act.[22] There is, however, a third significant class of cases—suits against federal officers on claims of infringement of federal constitutional rights.[23] It is difficult, in light of the statutory history, to make an argument that Congress specifically intended to exclude from federal court plaintiffs who sought injunctions to federal officers in protection of their freedom of speech but were unable to assert the requisite dollar amount.

The jurisdictional amount limitation has been upheld as a valid exercise of congressional power to define the jurisdiction of the article III courts in cases involving rights not capable of valuation.[24] The ability to put a dollar value on the infringed right was seen as a prerequisite to invoking federal question jurisdiction.[25] A general rule[26] evolved that denied jurisdiction to hear claims of rights not susceptible of monetary assessment:

> [C]ases involving rights not capable of valuation in money may not

19 Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Prob. 216, 225 (1948): "I submit . . . that the amount in controversy has no place in judging the propriety of the original jurisdiction in any case involving rights asserted under federal law."

20 Friedenthal, supra note 11, at 217.

21 Hearings on H.R. 2516 and H.R. 4497 before Subcomm. No. 3 of the House Comm. on the Judiciary, 85th Cong., 1st Sess. 8 (1957) (statement of Representative Ashley).

22 S. Rep. No. 1830, 85th Cong., 2d Sess. 6 (1958).

23 See Note, Federal Jurisdictional Amount: Determination of the Matter in Controversy, 73 Harv. L. Rev. 1369, 1378 n.53 (1960).

24 Barry v. Mercein, 46 U.S. (5 How.) 103 (1847). This case, however, involved an appellate jurisdictional amount prerequisite for Supreme Court review of circuit court judgments. The distinction between requiring a showing of jurisdictional amount for the exercise of original jurisdiction and for the exercise of appellate jurisdiction may be significant in terms of the article III express authorization to Congress to regulate the Supreme Court's appellate jurisdiction.

25 Id. at 120.

26 See also 1 J. Moore, Federal Practice ¶ 0.92[5] (2d ed. 1964).

> be heard in federal courts where the applicable jurisdictional statute requires that the matter in controversy exceed a certain number of dollars.[27]

By allowing a jury to award damages of a sum sufficient to meet the amount requirement, an exception was drawn to the rule for cases involving voting rights.[28] Although the cases are silent on why a more flexible rule for computing the amount of the matter in controversy is applied to voting rights, arguably, voting rights merit special protection as rights that guarantee all other constitutional rights. The role of freedom of speech in preserving a functioning democracy would seem to demand that first amendment rights receive the same degree of protection.

It has been held that first amendment claims must meet the amount requirement or fail at the outset.[29] In *Carroll v. Somervell*,[30] plaintiff, a member of the Communist Party, was released from his federal job under an appropriations statute that forbade payment to communists and others defined as subversives. Among other relief, plaintiff sought an injunction against federal officials to stop enforcement of the statute. The court held that where violation of rights not susceptible of valuation results in loss of employment, the only damages that may be alleged are those resulting from the loss of job. Although the complaint was framed in fifth amendment terms, the issues included damage to plaintiff's freedom of speech and association, damage that extended beyond the loss of employment. In *Carroll*, the use of a strict rule for computing the amount of the matter in controversy in suits for injunctive relief is at odds with the current recognition of the utility of prospective relief to prevent chilling of first amendments rights.[31]

The rationale used to sustain the jurisdictional amount provision against constitutional challenge in one Seventh Circuit case was stated as:

> Congress could have withheld the jurisdiction entirely, as it did from 1789 to 1875. . . . But it limited the jurisdiction by including the element of the sum or value of the matter in controversy, and the Congressional will is that unless that sum or value is shown there is no "federal question" presented and no jurisdiction.[32]

The constitutionality of section 1331 is not so easily established. The ascertainment of congressional will does not terminate the inquiry into the constitutionality of the statute. Congress is bound by the fifth amendment due process clause,[33] article III,[34] and other constitutional provisions such

[27] Rosado v. Wyman, 414 F.2d 170, 176-77 (2d Cir. 1969), rev'd, 397 U.S. 397 (1970).

[28] Swafford v. Templeton, 185 U.S. 487 (1902); Wiley v. Sinkler, 179 U.S. 58 (1900).

[29] Hague v. Committee for Indus. Org., 307 U.S. 496 (1939) (opinion of Mr. Justice Roberts and Mr. Justice Black).

[30] 116 F.2d 918 (2d Cir. 1941).

[31] See Monaghan, First Amendment "Due Process," 83 Harv. L. Rev. 518, 548 (1970).

[32] Giancana v. Johnson, 335 F.2d 366, 368 (7th Cir. 1964).

[33] See discussion of due process limitations in Petersen v. Clark, 285 F. Supp. 700, 704-08 (N.D. Cal. 1968), rev'd on other grounds, 411 F.2d 1217 (9th Cir. 1969).

[34] Crowell v. Benson, 285 U.S. 22 (1932).

as the first amendment[35] when it limits the jurisdiction of the federal courts, and the courts must determine whether Congress has transgressed the constitutional limits on its power. Nor does the inquiry terminate with the assertion that the district courts at one time had no federal question jurisdiction. The due-process challenge is not, per se, in the denial of a federal forum, but in the denial of all forums. A historically focussed analysis cannot account for the current understanding of the first amendment and the rights and duties it embodies.

II. Jurisdictional Amount as a Violation of Due Process

The threshold restriction the due process clause places on congressional power to curtail jurisdiction is that some court be open to grant relief to a party with a valid claim of infringement of constitutional rights by the Government. To regulate jurisdiction so as to deny all remedies is another way to deny rights.[36] The threshold due process challenge to section 1331 that there be some judicial review would be satisfied by the availability of another jurisdictional statute on which to enter federal court. Alternatively, due process would be satisfied if another forum, a state forum, were open to give relief to a plaintiff seeking an injunction against federal officers on a claim of denial of a federal right. Should state courts not be open, the question remains which court, state or federal, if any, is under constitutional compulsion to assume jurisdiction and provide relief.

The availability of other jurisdictional bases that have no amount-in-controversy requirement has restricted the exclusive operation of section 1331 to a narrow group of cases. Actions of some administrative agencies may be subject to judicial review under section 10 of the Administrative Procedure Act,[37] although there is a conflict in authority as to whether section 10 is an independent grant of federal jurisdiction.[38] Some agencies such as the Selective Service System have provisions limiting judicial review of agency action.[39] Claims that the agency has acted unconstitutionally must meet the amount requirement of section 1331 in order to challenge the restrictions on review. When the relief sought is against a person who has acted under color of state law, suit may be maintained without a showing of a jurisdictional amount.[40] Likewise, mandamus to federal officials is obtainable without assertions of the amount in controversy.[41]

Although a generous interpretation of the scope of mandamus would do much to provide a federal forum for first amendment claims against fed-

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35 Monaghan, supra note 31, at 550-51.

36 See discussion in Hart, supra note 1, at 1386-400.

37 5 U.S.C. §§ 701-04 (Supp. II, 1967).

38 See Cramton, Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant, 68 Mich. L. Rev. 389, 437-46 (1970).

39 50 U.S.C. App. § 460(b)(3) (1964).

40 28 U.S.C. § 1343(3) (1964).

41 28 U.S.C.A. § 1361 (Supp. 1970).

eral officers,[42] it is not clear that courts will apply mandamus to "discretionary" acts by federal officials.[43] Where mandamus is inappropriate and where no other jurisdictional base is available, a plaintiff seeking injunctive relief against federal officers but unable to assert a $10,000 amount in controversy must seek relief in the state courts.

State courts have been called the primary guarantors of constitutional rights.[44] However, in cases where equitable relief is sought against federal officials, the ultimate guarantee that judicial review will be obtainable in state courts may not exist. The Supreme Court has held that state courts are powerless to issue mandamus[45] or habeas corpus[46] to federal officers. Although the Supreme Court has never been asked to resolve whether state courts can issue injunctions to federal officers, some state courts themselves have held that they are powerless to do so.[47] Some commentators have suggested that state courts do have jurisdiction to issue injunctions against federal officers,[48] indeed, that the supremacy clause may require it.[49]

The doctrine that state courts cannot enjoin federal officials may stem from a constitutional requirement of the supremacy of federal law or may inhere in a nonconstitutional calculus of federalism. If the doctrine does not have constitutional roots, Congress could direct state courts to exercise their general equity jurisdiction in suits against federal officers for injunctive relief.[50] This, or a decision by the state courts themselves that they have jurisdiction, if not invalidated by the Supreme Court, would provide a forum for the claim. Were the state courts open, removal to federal court by the defendant officer[51] would both open the federal forum without regard to a jurisdictional amount and provide some protection against bias from the state court.

In the absence of such a congressional directive, and so long as the avail-

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42 For an argument that "the judiciary should . . . creatively develop review 'in the nature of mandamus' to be as rational and orderly as review by injunction, declaratory judgment, or statutory petition for review" see Byse & Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action, 81 Harv. L. Rev. 308, 319 (1967).

43 Byse & Fiocca, supra note 42, at 338 n.107.

44 Hart, supra note 1, at 1401.

45 McClung v. Silliman, 19 U.S. (6 Wheat.) 598 (1821).

46 Tarble's Case, 80 U.S. (13 Wall.) 397 (1871); Ableman v. Booth, 62 U.S. (21 How.) 506 (1859).

47 Wasservogel v. Meyerowitz, 300 N.Y. 125, 89 N.E.2d 712 (1950); Armand Schmoll, Inc. v. Federal Reserve Bank, 286 N.Y. 503, 37 N.E.2d 225 (1941), cert. denied, 315 U.S. 818 (1942); Fox v. 34 Hillside Realty Corp., 87 N.Y.S.2d 351 (Sup. Ct. 1949), aff'd mem., 276 App. Div. 994, 95 N.Y.S.2d 598 (1950). In the Fox case, a federal district court had already refused to hear the case on grounds of lack of the jurisdictional amount.

48 See Arnold, The Power of State Courts to Enjoin Federal Officers, 73 Yale L.J. 1385 (1964). But cf. Warren, Federal and State Court Interference, 43 Harv. L. Rev. 345, 358 (1930).

49 See Arnold, supra note 48, at 1401-02.

50 If the objections to state courts enjoining federal officials were not of constitutional dimension, Testa v. Katt, 330 U.S. 386 (1947) would require the state courts to provide a remedy where Congress has acted.

51 28 U.S.C. § 1442(a) (1964).

able state court declines jurisdiction, the state court remains closed. The constitutionality of the section 1331 jurisdictional amount requirement must be determined in federal court, and the relief granted must come from that forum.

III. Due Process Requires Some Review

Conflict between the jurisdictional amount and due process requirements has been suggested in recent cases. Dissenting in *Boyd v. Clark*,[52] Judge Edelstein noted that section 1331 might be unconstitutional as applied:

> Since plaintiffs cannot bring their action in a state court, if Section 1331 is used to cut them off from a federal forum they are left with a claim of governmental unfairness with no situs of adjudication. They have not even an administrative tribunal available to hear their complaint since the local draft board, the appeals board, or the national board are obviously without power to declare unconstitutional a portion of the statute which created them. Is it compatible with the fifth amendment's guarantee of due process to sanction such a state of affairs?[53]

The question, in its universal form, is whether Congress may constitutionally regulate jurisdiction to deny all judicial remedies to a plaintiff asserting a claim of constitutional right in the face of coercive governmental action. The hypothetical presents a variant in its suggestion that provision of some remedy is not sufficient to protect first amendment rights—that the first amendment itself requires that the remedy be in the form of prospective relief.[54]

The answer is not easy, particularly in the face of numerous declarations that the power of Congress to withdraw jurisdiction from the lower federal courts is unlimited. However, that proposition is open to some doubt:

> [T]heories as to inherent jurisdiction, jurisdictional fact, due process, separation of powers, and related doctrines may constitute peripheral qualifications on the otherwise unlimited power of Congress to withdraw, curtail or in some other manner qualify a jurisdictional grant.[55]

Separation of powers itself would make it illogical to assume that every exercise of congressional power save power over federal court jurisdiction must be in accordance with constitutional limitations.

The essential due process limitation, reflected in the reasoning of several opinions, is that there must be some opportunity for judicial review of government action alleged to threaten fundamental rights. Thus, congressional power to restrict the raising of a claim of unconstitutionality of a

52 287 F. Supp. 561 (S.D.N.Y. 1968). Suit was brought in Boyd on the claim that the Selective Service regulations on student deferments discriminated against persons unable to attend college. The majority dismissed on the grounds that the case was not ripe and on the grounds of lack of jurisdiction due to failure to meet the $10,000 amount.

53 Id. at 568.

54 Monaghan, supra note 31.

55 1 J. Moore, Federal Practice ¶ 0.60[2] (2d ed. 1964).

statute to a particular court and in a case of a particular posture was sustained in *Yakus v. United States*[56] with the comment:

> There is no constitutional requirement that that test be made in one tribunal rather than in another so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process . . . .[57]

This emphasis on the opportunity for judicial review echoes an earlier case also concerned with property rights, *Bradley v. Richmond.*[58] In discussing the reviewability of an administrative order classifying and taxing plaintiff, the court stated:

> If the right to appear and be heard and to obtain review should prove illusory, there would, under general principles of jurisprudence, remain the right to judicial review, if the result should violate either a right secured under the law of the State or that of the United States.[59]

The limits that the fifth amendment places on Congress were discussed in a Second Circuit case concerned with the restrictions embodied in the Portal-to-Portal Act:

> We think, however, that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the 5th Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law . . . .[60]

A kinship would seem to exist between this theory, that due process of law must be available to a party deprived of a constitutional right, and the guardianship theory of judicial review, which justifies judicial review as a necessary part of a system of checks and balances.[61] This kinship underlies the reasoning, which appears in several cases, that the ultimate decision as to the constitutionality of a statute belongs to the judiciary, not to a "government of bureaucratic character."[62]

This theme of the supremacy of law was taken up in *St. Joseph Stock Yards v. United States:*[63]

> The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied;

56 321 U.S. 414 (1944).

57 Id. at 444.

58 227 U.S. 477 (1913).

59 Id. at 483. Bradley involved review of state administrative action. It may be that the fourteenth amendment due process clause places more stringent limitations on state power to limit state jurisdiction than on congressional power to limit federal jurisdiction. See H.M. Hart & H. Wechsler, The Federal Courts and The Federal System 295 (1953). One rationale for this view may be that whatever restrictions Congress places on federal jurisdiction, state courts are usually open.

60 Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948).

61 See D. Currie, Federal Courts 31 (1968).

62 Crowell v. Benson, 285 U.S. 22, 56-57 (1932).

63 298 U.S. 38 (1936).

> and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality.[64]

The repeated emphasis is on the provision of a judicial remedy for a party claiming the Government has denied him a constitutional right. Without the remedy,[65] it would be unrealistic to speak of constitutional "rights" since the duty imposed on the Government by the Bill of Rights to refrain from acting in certain ways could not be judicially enforced.

First amendment rights may be abrogated by the "chilling effect" of government action long before criminal sanctions are employed. It has been cogently argued that the first amendment itself embodies certain "due-process" requirements, including a requirement that prospective relief be given where necessary to protect freedom of speech.[66] This requirement of affirmative relief, coupled with the due process requirement that some court be open to hear the claim and give relief, assuming of course that the claim is justiciable, throws doubt on the constitutionality of denial of jurisdiction for failure to meet the jurisdictional amount.

It is less clear that denial of jurisdiction for failure to meet the amount requirement is a violation of article III.[67] The theory that Congress may not under article III interfere with the judicial function in the guise of regulating jurisdiction[68] is inapposite. By imposing a jurisdictional amount, Congress was not attempting to prescribe a rule of decision retroactively. The question presented in the hypothetical is not one of the proper scope of review, nor one of how article III and due process act to preserve the judicial character of the article III courts, but is the threshold question of whether Congress may impose a jurisdictional limitation that effectively denies an individual any opportunity for relief against government action threatening a constitutional right.

IV. Conclusion

In situations where access to any court is foreclosed by failure to meet the amount requirement of section 1331, and an individual seeks relief against government officers who are abridging his freedom of speech and cannot, consequently, obtain relief, the due process clause may be violated. In such situations the amount requirement should be construed as not hav-

64 Id. at 84.

65 The hypothetical case could involve a plaintiff who was a potential defendant and who would, if prosecuted, have a remedy available in the form of his criminal defense. There is some authority for reasoning that to relegate a party, in the situation of the hypothetical, to the sole remedy of his criminal defense would violate due process because of the heavy risk imposed on the exercise of the right. See St. Joseph Stock Yards v. United States, 298 U.S. 38 (1936) and Wolff v. Selective Serv. Bd. No. 16, 372 F.2d 817 (2d Cir. 1967).

66 Monaghan, supra note 31.

67 See Murray v. Vaughn, 300 F. Supp. 688 (D.R.I. 1969).

68 United States v. Klein, 80 U.S. (13 Wall.) 128 (1871).

ing been intended for application to suits involving first amendment rights, and the federal district courts should assume federal question jurisdiction.

SANDRA L. LYNCH

The Massachusetts Courts In Crisis:

A Model For Reform

BOSTON BAR
ASSOCIATION

**The Report of the Boston Bar Association
State Court Study Committee**

June 1991

PREFACE

Responding to the mounting public and professional concern with the operations of the state courts, I appointed the State Court Study Committee in November 1990 to conduct a critical examination of the management and condition of those courts. The Committee, composed of attorneys with extensive trial experience at every level of the judicial system and a certified public accountant, undertook a study of the structure, organization and management of the Massachusetts court system. This Report presents the findings and recommendations of the Committee.

The study and recommendations are directed to institutional arrangements embracing organization, jurisdiction and procedures governing the courts which are prescribed primarily by the Legislature. However, it is to both the Executive and the Legislative branches of government that most of the major recommendations are addressed, although a number of the recommendations can be implemented by actions of the Justices of the Supreme Judicial Court under their general superintendency powers.

The Committee's comprehensive examination of the state court system has yielded information bearing on measures for fundamental reform. In some quarters the Report may be viewed as a call for radical reform of our court system. The Boston Bar Association is prepared to advocate this position because, as the Committee found, it is critical to implement its proposals now in order to salvage a court system in crisis rather than attempt incremental measures of reform. The proposed reforms are essentially structural and managerial. Both approaches are vital. We respectfully urge the three branches of government, the executive, legislative and judicial, and indeed the public at large to whom access to justice is a most precious right, to appraise these proposals on the merits.

All of us who are concerned with the administration of justice owe an immense debt of gratitude to the members of the State Court Study Committee who have contributed so much of their knowledge, experience and time to this important effort. None was more dedicated to this arduous task than the chairman, R. Robert Popeo, who by his leadership and commitment established a standard of excellence invaluable to the work of this Committee. I wish to offer our thanks to his firm, Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, for generously providing its support and resources to the Committee. I also wish to specially acknowledge the extraordinary contribution of Sandra L. Lynch, who chaired the drafting subcommittee. Finally, this project could not have been sustained without the unflagging assistance of staff

members, and I acknowledge with deep appreciation the efforts of our Executive Director, Francis S. Moran, Jr.; Sara Romer, Government Relations Director; and Michael F. Connolly and Joseph C. Hegarty of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo.

John P. Driscoll, Jr.
President
Boston Bar Association

Over the past seven months the Boston Bar Association State Court Study Committee has conducted an extensive analysis of the condition and management of the Massachusetts court system. The Committee focused particularly on the administration, authority and governance of the Trial Court. It is a system characterized by antediluvian management resources and serious lack of accountability. We arrived at the inescapable conclusion: the management of the Massachusetts court system is broken and needs to be fixed.

OVERVIEW

We found judges and court personnel demoralized and often working under conditions like those deplored by Charles Dickens more than a century ago. But we believe the situation is not irremediable. We offer this brief overview of the problems we found and the solutions we think are feasible.

THE PROBLEMS

The problems are fundamental:

1. There is almost no accountability.

No single entity or office has responsibility and authority for management of the courts, so no one can be, or is, held accountable. To the question "Who's in charge here?", the answer is "No one."

2. The legislature and the governor intrude excessively into the management of the courts.

Although the courts are one of the three branches of government intended to be co-equal, in fact the courts have not been treated as such. The legislature exerts pervasive control over the courts through line item budget control and a vast array of legislation that reaches deep into the day to day operation of the courts. As a result, patronage rather than need has often dictated the number and identities of personnel hired. Not infrequently, political factors have kept open unneeded court facilities while those crushed with business are ignored. The governor's direct appointment of various non-judicial court personnel means ultimately that the courts do not control those who should be working for them.

3. The present administrative structure of the courts is too complex and diffuse.

The present Kafkaesque system -- seven different trial court departments, each with its own Chief Administrative Justice, overlaid by the bureaucracy of the Office of Chief Administrative Justice, underpinned by 69 Presiding Justices of the District and Boston Municipal Courts and supported by a cadre of non-judicial staff which is often neither hired by nor accountable to the judges -- can make accomplishing even the most basic task a nightmare.

4. Support personnel do not report to and frequently do not in fact support the courts.

Courts depend on their support personnel -- clerk magistrates and other clerks, probation officers, court officers, stenographers and others -- to get their work done, but these support personnel too often literally do not work for or report to the judges. In some instances the relationship between the courts and support staff resembles guerilla warfare.

5. The needs of children and families are not adequately served by the existing structure and that situation will only get worse.

Except for certain specialized courts available only in certain locales, the particular needs of children and families are ill met by courts neither trained nor equipped to handle their situations.

6. The mechanisms for judicial accountability are unclear.

Judges must, in a manner consistent with judicial independence, be held accountable, and must be given the tools to effectively manage the courts under their responsibility. The Chief Judges of the courts involved must clearly have the power to discipline judges for abuses, such as some of those described in press reports in 1990. Judges must also be subject to some form of qualitative evaluation.

7. The budget process has little relevance to management objectives.

The present budgetary process provides at best a "maintenance" budget based on prior expenditures plus inflation, and not a realistic assessment of how best to run a system with limited resources.

8. The legislature and governor have ignored the impact on the courts of enactment of new laws, thereby exacerbating the court system's problems.

The explosion in the workload of the courts results directly and primarily from the expansion of rights, crimes and penalties through enacted legislation. Yet the courts have not been given a corresponding increase in resources.

RECOMMENDATIONS

The problems identified are not beyond solutions. We recommend the following as realistic, attainable principles for change.

1. The courts must be given the tools to manage themselves and then they can and must be held accountable.

Courts must have the power to transfer funds, transfer positions and personnel and close courts, powers the legislature traditionally has reserved to itself. The courts must have the power to appoint and remove court personnel, including those traditionally appointed by the governor.

2. The legislature must give up its control over the courts by relinquishing its control over the line items in the courts' budget. The governor must give up his power to appoint non-judicial court personnel.

The historic pattern of systematic intrusion into the management of the courts by the legislature through line item budgeting and by the governor through appointment of court support personnel must end.

3. Ultimate oversight of the management of the court system must be lodged in the Supreme Judicial Court.

Responsibility and accountability for management should ultimately rest in the Supreme Judicial Court, which should, however, not be required to exercise line management.

4. Responsibility for day to day management of the court system must be implemented by units closer to the actual operation of the courts involved.

The Chief Justices of the Trial Court should be vested with broad managerial responsibility and charged with accountability for their departments.

5. The present Office of Chief Administrative Justice should be abolished and a new Administrative Office reporting directly to the Supreme Judicial Court should be created.

A new Administrative Office of the Supreme Judicial Court should handle the irreducible minimum of centralized administrative functions.

6. The Trial Court must be streamlined for management, administration and accountability purposes into fewer operating units.

The present seven departments of the Trial Court should be reduced to three: the Superior Court, the District Court and a new Family and Juvenile Court. Responsibility for management of these courts should be in the Chief Justices of those courts.

7. A new statewide Family and Juvenile Court should be created out of a merger of the present Juvenile Court and some functions of the present Probate and Family Court.

The best way to insure that the special and interrelated needs of children and families not get lost in the system and to enhance the delivery of justice to them is to consolidate matters directly involving them into one statewide court with the needed expertise and services.

8. Complete unification of the Trial Court is not desirable.

The specialized functions served by particular courts are valuable and should be retained. Accordingly, the Land Court should become a Division of the Superior Court and the Housing Court a Division of the District Court. At the same time, non-judicial functions and unnecessary historic artifacts should be eliminated or diverted to appropriate administrative agencies. Accordingly, many of those Probate Court functions not assumed by the new Family and Juvenile Court should be absorbed by the Superior Court or given to non-judicial administrators. The anomaly of the Boston Municipal Court existing as a court separate from the District Courts should be eliminated.

9. The court system must have responsibility for and authority over all support personnel within the court system.

The three Chief Justices of the Trial Court must have control -- including the power to hire, fire, discipline and transfer -- over all non-judicial personnel in the system: all clerk-magistrates and other clerks, probation officers, court officers, court reporters, stenographers, law clerks and others.

10. There must be built in mechanisms to insure accountability.

The three Chief Justices of the Trial Court must be given the power to discipline judges and to do so quickly. The courts must implement methods to evaluate qualitative judicial performance.

11. The budget process must be changed so that it becomes a management tool and expresses management objectives.

Especially in an era of tight public resources, the courts must move from an accretion-to-prior-expenditure method of budget preparation to a budget which reflects defined needs and objectives.

12. Before enacting new laws the legislature and governor should consider the impact of those laws on the courts.

Civic responsibility requires that if more work for the courts is generated by new legislation, an assessment of the impact on the courts be made for each new law and resources be allocated and funds appropriated to the courts accordingly.

There is a major caveat to these recommendations. Unless adequate funding is provided to the courts, nothing, much less these recommendations, will save the system from collapse.

WHY THE SYSTEM IS IN CRISIS

Virtually every Chief Justice, Associate Justice and user of the court system interviewed by the Committee has agreed that the Massachusetts Trial Court is in crisis. For example, Superior Court Chief Justice Robert L. Steadman has stated:

> [T]he Massachusetts courts now sit on the brink of crisis . . . . By crisis I mean the courts' inability to discharge [the courts'] mandate of affording to the people of the Commonwealth a fair, impartial, speedy, and inexpensive resolution of their disputes, be they criminal or civil.

These sentiments have been echoed throughout all segments of the Massachusetts judiciary, from the Chief Justice of the Supreme Judicial Court to the Chief Justices and Associate Justices of the Juvenile and District Courts, among others.

A common theme running through the Committee's interviews with more than a hundred judges and others is the inability of the court system to manage and govern itself. Although a separate and equal branch of the Massachusetts government, the judiciary has been shackled by legislation which strips it of any effective ability to govern itself and manage its resources. This lack of ability to manage is seen most clearly when applied to the smallest segments of the court system: the individual courtrooms which deliver the services to the public. The following is a sample of some of the management problems which currently plague the courts of the Commonwealth.

First, a number of the Presiding Justices in the various District Courts across the Commonwealth have no authority to coordinate or control their individual courts. The three most important people in these courthouses are the Presiding Justice, the Clerk and the Chief Probation Officer. Many times all three of these individuals are appointed for life and, after relationships deteriorate, they refuse to work cooperatively with one another again. For example, the Committee was informed that in one county, one out of every four head clerks simply refuses to work. Since these clerks are appointed by the governor, the Presiding Justices have no authority to compel them to work. Thus, the Presiding Justice is in effect precluded from administering justice. An extreme, but revealing, example, which occurred this past year, involved a dispute between a clerk and a Presiding Justice which resulted in a physical confrontation between court officers and the clerk whereby the clerk was removed from the courthouse in handcuffs by the police.

Similar problems arise from the relationships between superior court judges and clerk's staffs. The problems are exacerbated by the fact that superior court judges rotate through the counties on a regular basis and the clerks and administrative personnel of the various courthouses stay in place. Add to this mix the fact that the Chief Justice of the Superior Court does not have any control over the hiring, firing and discipline of the courtroom personnel, and the situation emerges where no one is in control. One Chief Justice describes the position as a "ceremonial ornament." More than one judge interviewed by the Committee expressed concern over the lack of authority over the non-judicial personnel who work for the court system. Given the heavy caseload of the courts, this situation is intolerable.

Although the National Center for State Courts recommends that the maximum caseload in a trial court session not exceed 1000 cases, the Massachusetts Superior Court sessions routinely handle many more cases than that. To give but a few examples, in Lowell, there are 2400 cases per judge; in Essex, the caseload is 2300 cases per judge; in Worcester, it is 2100; in Barnstable it is 2000. In contrast to the burden on the Superior Court, in the U.S. District Court for Massachusetts, the federal judges handle caseloads ranging from 350 to 525 cases per judge. One study has concluded that the Massachusetts judiciary has the least support staff of any state in the nation.

The Chief Justices of the Trial Court at present have not been given functional managerial authority to run their courts. There is limited authority for the Chief Justice of a department to discipline or otherwise control the non-judicial personnel. The Chief Justice cannot even transfer an uncooperative court clerk or other non-judicial staff member to another court to solve these problems, in part due to collective bargaining agreements and other employment arrangements. In fact, the individual judge presiding over the courtroom many times will not even be able to require the employee to perform the appropriate filings or other administrative services required for the administration of justice.

Just as a Presiding Justice is many times unable to control the non-judicial personnel, the Chief Justice is severely limited in the ability to control the presiding and associate justices. For example, one Trial Court Chief Justice has in the past disciplined various judges for minor infractions, but always with the consent of the perpetrating judge. Although these judges accepted the discipline and the problem was solved for the most part, the Chief Justice, in disciplining these judges, was doing so without explicit authority. Therefore, a judge engaged in an improper activity may ignore the reprimand of the Chief Justice and continue as he or she pleases. The only recourse for the Chief Justice is to transfer the judge to another location.

This problem is compounded when the complaint or complaints pertain to a Presiding Justice in a District Court. Because Presiding Justices obtain their positions based on seniority and retain those positions for life, these judges are essentially uncontrollable. In fact, the Chief Justice of the District Court met with one such judge to inquire about that judge's attendance record and the judge responded to the Chief: "Look, you have no right to call me in. Your job is to get the better jury instructions and better forms. I don't see anything else in the statute which gives you any more than that." Without the proper authority of the Chief Justice over judges and non-judges alike, running an efficient and effective department of the court system is virtually impossible.

Chief Justices also have problems in attempting to transfer non-judicial personnel for reasons other than discipline. Because of the collective bargaining agreements entered into between certain unions and the Office of the Chief Administrative Justice ("OCAJ"), a portion of the staff supposedly serving the judiciary cannot be transferred to another county or court where there may be a much greater need for their particular services. This problem reached heightened proportions in February of 1991 when the Presiding Justice of the Brockton District Court, acting in his capacity as a Regional Justice, was forced to close down the Fall River criminal and civil courts due to a shortage of court officers.

The inability of the departmental Chief Justices to run their respective departments is highlighted by the lack of control over the necessary finances. After the Chief Justice prepares the budget for his or her department, it is submitted to the OCAJ. The departmental Chief Justice usually will not see that budget again. The OCAJ submits the budget to the Executive Office of Administration and Finance and it is then forwarded to the House and Senate Committees, which develop line-item recommendations for each department or court. These line items are subsequently voted on by the legislature. The various court departments then receive their funding in the form of line-item budgeting and they are required to adhere to those line-item allocations, with no ability to transfer funds, positions or personnel between departments or, in some cases, among courts without legislative approval.

This system forces the Chief Justices to adhere strictly to the legislative line-items, which, in turn, promotes serious inefficiencies. For example, if one court house is extremely light on business and has unused resources and personnel, the Chief Justice is unable to close that court or even transfer funds allocated to it by the line-item budget to a neighboring court in distress. This issue is exacerbated by the fact that the relative budget allocations to various courts may have little relationship to the difference in workloads handled by different courts. This legislative control of the courts' purse string is, in effect, crippling the effective and efficient operation of the system.

Another problem arising out of the legislative control of the court budget is the inability of the individual Chief and Presiding Justices to control their own facilities. In fact, under the current management system the judges themselves are many times precluded from working past a certain hour, often 4:30 p.m., and on weekends, because funding is not in the budget. Thus, this lack of financial flexibility clearly adversely diminishes the administration of justice.

The way the court system prepares the budget also creates problems. The budget requests are developed based solely upon the current year's level of activity and expenditure. Personnel costs are estimated by taking currently authorized staffing at currently authorized pay levels plus anticipated increases. Non-personnel expenditures are budgeted based upon the current year level of expenditure, less clearly non-recurring costs, plus an inflation factor. Thus, the budget that is produced is effectively a maintenance budget. The budget projects expenditure levels in the next fiscal year assuming that everything except cost levels will stay the same. It is not clear that any attempt is made to anticipate changes in external factors (such as caseload) which will require changes in expenditure levels, nor does it appear that any meaningful attempt is made to anticipate management actions which will increase efficiency or otherwise affect expenditure levels. This situation may be a result of a belief on the part of managers within the court system that they do not have the ability to make any real impact upon the allocation of the resources available to the courts.

Further, because the court system does not have a clear process by which management objectives are developed, the budget does not reflect those objectives. An effective budgeting process should be not only a vehicle for estimating spending levels but also a tool for management. The overall objectives for the system should be set and communicated to the operating units, which should then set their own specific objectives with which to accomplish the larger objectives of the system. Only then should the budgeting process begin, as it is the method by which the court's management objectives are translated into the estimate of the resources necessary to achieve the objectives. The managers in the system should then evaluate spending plans in relation to prioritized objectives to reach a final management plan and spending budget. However, little can be done to improve the effectiveness of the Trial Court's budgeting system until the more basic management deficiencies have been addressed.

The enactment of legislation which increases the work of the courts without a corresponding increase in resources is a major concern. The legislature has passed and the governor has signed numerous laws of recent vintage which have drastically increased the business of the courts. One example is the expansion of mandatory sentencing. Because of the negative effect of a mandatory sentence on plea bargaining, the number of criminal cases which go through a complete trial has substantially increased. Similar judicial-intense legislation which involved no assessment of or provision for the impact on the courts include the consumer protection statute (G.L. c. 93A), abortion petitions for minors (G.L. c. 112, §12S), and petitions to stop cruel and abusive treatment (G.L. c. 209A). The enactment of legislation -- without input from the courts and without proper planning -- simply creates more work and requires more resources from our overworked, overutilized court system.

A different problem arises from the poor physical condition of many court facilities. The facilities in which the courts must work are often deplorable. One judge told of roaming the halls of the courthouse attempting to find a courtroom with adequate heat. The jury simply could not be attentive to the trial in a freezing cold courtroom. During the winter many judges and court personnel in older courthouses must work with their coats on to keep warm. The Boston Juvenile Court is crammed into the same facilities made available to it in 1906 although the workload has increased many times over. Portions of the Boston Municipal Court still operate on direct current thus preventing the use of many electrical devices.

Administrative support is also lacking. Many courts have no computers and are drowning in a sea of paper. Some judges do not even have ready access to law libraries. Judges tell stories of deciding cases, only to wait weeks before their decisions are typed. In frustration some judges type their own decisions or issue handwritten orders, but then cannot get copies made. Once the decisions are typed and copied, they sometimes sit in the clerk's office because there is no money left in the postal line item in the budget to mail the decisions to the parties in the case. Another example is when judges attempt to hear cases after 4:00 p.m., only to find that the papers are unavailable because the clerk's office locks up the docket and file rooms at 4:00 p.m. Files are often lost and lawyers now routinely bring an extra set of papers to court so the judge can have them.

Many judges and court support personnel use ingenuity and wit to maneuver the system so that they can get their jobs done. They are forced to expend time and energy on things that in any normal working environment would happen automatically. The inadequate resources provided to the courts and the chaotic management directly increase the transaction costs to those who use the judicial system. The costs of litigation are driven upward, thus effectively closing down the courts as a place to obtain justice to the many who cannot afford these costs.

Demoralization of the Massachusetts trial court judiciary is a major issue which has resulted from the deterioration of the judicial system. Massachusetts' judges are clearly among the best qualified and most devoted in the entire country. Our Supreme Judicial Court is the oldest continuously sitting, and certainly one of the most prestigious, state appellate courts in the country. The Superior Court -- the great trial court of the Commonwealth -- is considered to be among the finest in the United States. Notwithstanding such high reputations, Massachusetts trial judges suffer from judicial burnout. For example, one Chief Justice informed the Committee that it was not uncommon for bright, dedicated young judges to completely burn out after 10 years of sitting on a district court bench hearing near identical prostitution, sexual assault, petty larceny and drug cases day after day. These judges, plagued with inadequate or sometimes unhelpful staffs and scarce resources in an antiquated and dilapidated building, are responsible for the delivery of justice to the citizens of Massachusetts. It is no wonder the court system is on the brink of disaster.

RECOMMENDED CHANGES IN ORGANIZATION AND ADMINISTRATION OF THE MASSACHUSETTS TRIAL COURT

Assuming adequate funding[1] for the courts, we believe the problems are capable of solution. The solution must start with the recognition that the present confused and irrational "system" for managing the courts is no system at all. There is no head of the system, in either practice or theory, who has the power to manage and who can be held accountable. The Massachusetts courts have not been given the tools to manage themselves. The single most important step that can be taken is to give the courts the legislative power to operate the system without excessive interference and then hold them accountable for the results.

Certain powers now asserted by the legislature, and especially the power over the purse string in all but the most general way, should be transferred to the judiciary. Other powers, now asserted by the governor, to appoint and remove court support personnel should be transferred to the judiciary. The

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1 Recent appropriations have failed to provide the funding which is necessary to operate a truly effective and responsive court system.

judiciary can neither manage nor be held accountable for what it does not control. This transfer of powers to the courts is the key concept underlying the proposed court reform legislation of the Supreme Judicial Court (Senate 718) and we specifically endorse that concept. Historically the legislature has set budgets and restricted expenditures by rigid line items for each aspect of the operation of the court system. The legislature thereby has controlled the number, location, positions and sometimes the personnel employed by the system, as well as the funds to be spent in different areas. Such powers must be transferred to the judiciary itself. We believe the judiciary should be given a total dollar budget, not a line item budget, should have the powers to transfer personnel and positions within the system, to transfer funds[2] and to close court facilities. It should have the power to appoint and remove court support personnel.

The transfer of budget and managerial powers and responsibilities from the legislature and governor to the courts is the essential first step. But there must also be established a realistic system of management to insure accountability and the efficient use of limited resources. Five basic principles should guide the allocation of power and responsibilities within the court system:

1. The ultimate oversight of the management of the court system must be lodged in the Supreme Judicial Court.

2. The Trial Court must be streamlined, for management, administration and accountability purposes, into fewer operating units.

3. Responsibility for the day to day management of the court system must be decentralized to units closer to the actual operation of the courts involved.

4. The court system must have responsibility for and authority over all of its support personnel and facilities.

5. There must be built-in mechanisms to insure accountability.

We briefly review these principles.

First, we agree with another concept in the Supreme Judicial Court's proposed court reform legislation (Senate 718): the Supreme Judicial Court should be explicitly recognized as having <u>ultimate</u> managerial authority and control over the judicial system. If a corporate analogy were to be used, the Supreme

[2] Limited transfer powers were provided in Chapter 341 of the Acts of 1990, but much more flexibility is needed.

Judicial Court should be the parent corporation with ultimate control over the Trial Court operating entity subsidiaries.

Second, the Trial Court should be organized into three operating departments: the Superior Court, the District Court, and a new Family and Juvenile Court of the Commonwealth. This would replace the present seven department Trial Court structure.

Third, responsibility for day to day management of the Trial Court, subject to the overall supervision of the Supreme Judicial Court, should be vested in the three departments. The Supreme Judicial Court is and historically has been, far removed from the day-to-day operations of the trial courts. Accountability is best achieved by requiring that management be accomplished at levels close to the courts involved and that the role of the Supreme Judicial Court be one of ultimate oversight, not line management. The details of how this decentralized management would operate are set forth below. There are, however, certain irreducible minimum support functions to the entire court system which should not be decentralized. Those discrete and limited functions should be allocated to a small administrative support organization which operates as an adjunct to and under the direct authority of the Supreme Judicial Court. The present Office of Chief Administrative Justice of the Trial Court would no longer be needed and should be abolished.

Fourth, it is essential that all support personnel, including clerk-magistrates and other clerks, probation officers, secretaries, court officers, stenographers, maintenance personnel and others come under the direct control of the judiciary, since they are key components of the system.

Fifth, as to accountability, the Chief Justices of the Trial Court must have the power to discipline and to create performance evaluation procedures.

THE SUPREME JUDICIAL COURT

The Supreme Judicial Court should have ultimate authority over and responsibility for management of the courts of inferior jurisdiction. The general superintendence powers inherent in the Supreme Judicial Court should be recognized explicitly by legislation. However, direct managerial authority over the Trial Court departments should be vested in the Chief Justices of these courts, who would be appointed by and could be removed by a majority of the Supreme Judicial Court.

Appointment Powers

The Chief Justices of the Superior Court, the District Court and the Family and Juvenile Court departments should be appointed from the respective courts by a majority of the members of the Supreme Judicial Court. Those appointments should be for a five year term, which could be renewed. We recommend that those Chief Justices of the Trial Court may be removed from those offices only upon a determination by a majority of the Justices of the Supreme Judicial Court that such removal is in the best interests of the administration of justice. We recommend no change in the appointment of the Chief Justice of the Appeals Court.

The sitting Chief Justices of the Superior Court, the District Court[3] and the Juvenile Court should continue to serve out their present appointments up to a maximum of a five year term. They would, however, be subject to the removal powers of the Supreme Judicial Court, described above, upon enactment of the enabling legislation. The present respective Chief Justices of the Juvenile Court and the Probate and Family Court should continue to serve until the Supreme Judicial Court has, by order, as described below, created a unified Family and Juvenile Court. Upon unification, the Chief Justice of the Juvenile Court should become Chief Justice of the unified Family and Juvenile Court for the remainder of his five year term. Thereafter, the Chief Justice of that Court should be selected by a majority of the Supreme Judicial Court Justices.

SJC Budget Powers

The responsibility to propose a budget to the legislature for the operation of the entire Massachusetts court system should be vested in the Supreme Judicial Court. That proposed budget, in turn, should be based upon the budgets for their respective courts submitted to the Supreme Judicial Court by the Chief Justices of the Appeals Court and the three Trial Court departments. Once the legislature has appropriated a budget for the Court system, it would be the responsibility of the Supreme Judicial Court to be the final arbiter of allocation of that budget among the various courts in the system and to see that the system lives within the budget. A fuller description of budget recommendations is set forth below.

Powers to Transfer Funds and Personnel

The Supreme Judicial Court would, from the appropriated budget, establish budgets for each of the three Trial Court departments. In the ordinary course, it would be the responsibility of the departmental Chief Justice to live within that budget and to transfer personnel, positions and funds within the departmental budget in order to do so.

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3 Should an amendment to the Massachusetts Constitution, Amend. Art. XCVIII, be necessary in order to alter the term of office of the three Chief Justices given life terms by the 1978 legislation, then the Committee recommends that such amendments be made.

In such extraordinary circumstances as would lead to a severe, adverse impact on the administration of justice or public safety, non-consensual transfers of personnel, positions and funds may be made by a majority of justices of the Supreme Judicial Court from one department of the Trial Court to another. This power would be in addition to the disciplinary powers of the Supreme Judicial Court over court personnel.

Administrative Office of the Supreme Judicial Court

The Supreme Judicial Court should establish and appoint an Administrative Office. Its functions would include: collective bargaining, computerization, purchasing, payroll, budget preparation and analysis and such other functions as deemed appropriate by the Supreme Judicial Court. We concur with the recognition in current law of the benefits to a judicial system of a centralized administrative office, see G.L. c. 211B, § 9, and that the functions of such an office are not necessarily judicial in nature. See G.L. c. 211B, § 6.

As to facilities management, upon a declaration by any of the three Chief Justices of the Trial Court closing a facility in his or her department, the Administrative Office should consult with the other departments concerning whether they need to use the facility. The Supreme Judicial Court should have the power, after determining that a facility is not needed by the court system or too costly to maintain, to declare the facility surplus. If necessary, the Massachusetts Constitution, at Pt. 2, C. 1, § 1, Art. 3, should be amended to recognize explicitly in the Supreme Judicial Court the power to close courts. In the interim, we recommend that the Supreme Judicial Court be empowered to close courts upon notice to and approval by the legislature.

The Administrative Office should also assist the Supreme Judicial Court in exercising its rule making powers to eliminate as judicial functions the many functions now performed by judges which could be performed by non-judicial personnel. We can no longer afford to have judges spend their time doing tasks which do not require judicial skills.

Unlike the present OCAJ, the new Administrative Office should be directly under, and responsive to, the Supreme Judicial Court. To that end, its Administrator ought to be appointed by the Supreme Judicial Court, and he or she should serve at the pleasure of the Court. Further, the role of the Administrator, and the office he or she runs, ought to be strictly administrative and should not, as now, have duties and functions which encroach on the judicial aspects of the operation of the system. In short, the Administrative Office should coordinate, regulate, manage and control those functions which can best be handled by a centralized office serving in a support role to a state-wide judicial system, while at the same time avoiding encroachment upon the judicial and management functions of the Chief Justices of the various departments.

The Administrator should perform functions that are non-judicial in nature and, as such, she or he need not be a judge. Judges are selected for their skills and abilities of a judicial nature, not because they are accomplished at, or even have a desire to revel in, the administration and management of a large enterprise. Consequently, it is expected that the Administrator will be selected from the ranks of persons trained in the special nuances of court administration, having administrative and political skills appropriate for the task. At the same time, the position will be one of importance and should be endowed with stature and compensation fitting of the task.

Communications Function

We observe that communications among the various levels of the court system need substantial improvement. We recommend that the Justices of the Supreme Judicial Court meet on a monthly basis with the three Chief Justices of the Trial Court. We also strongly recommend that the Supreme Judicial Court regularly convene Judicial Conferences of the court system, to which members of the bar should be invited to participate from time to time. The sense of fragmentation and balkanization already prevalent in the system, the poor morale, and the feeling of disenfranchisement require that there be regular and better communications. The judicial branch as a whole needs to operate and support its operation with a much greater sense of common purpose.

THE TRIAL COURT

Reorganization of The Trial Court

The Trial Court should be reorganized from the present seven departments into three: Superior, District, and Family and Juvenile. We believe that the present Trial Court organization into seven court departments does not best serve the interests of the public and reflects history, rather than the needs of our present society. There are many functions now being performed by judges which need not be, and different methods should be used to address those functions. When the core functions of the Trial Court are analyzed, we think it is most sensible to have only three separate courts.

THE SUPERIOR COURT

The Superior Court, presently composed of 76 judges, is our court of general jurisdiction handling both civil and criminal cases. Criminal cases of a more serious nature are usually tried in the Superior Court, as are most civil cases involving substantial sums or issues. Traditionally its judges have "ridden circuit", or rotated among the counties. The Superior Court should continue as a court of general jurisdiction.

The Superior Court should also encompass the litigation aspects of the Land Court, now a separate court department, as a specialized Division and should assume some of the litigation functions presently performed by the Probate and Family Court.

Land Court Reorganization into Division of Superior Court

The Land Court has statewide jurisdiction and is presently composed of 4 judges and expert support personnel. It sits only in Boston but handles land registration and cases concerning real estate located throughout the Commonwealth. We recommend that the Land Court be reorganized into the Land Court Division of the Superior Court, and come under the direct administrative control of the Chief Justice of the Superior Court. Many of the cases handled by the Land Court involve the dollar value and complexity of matters handed by the Superior Court, making it appropriate to link it with the Superior Court. In addition the Land Court has a specialized staff of engineers and surveyors and has considerable expertise in specialized areas of law, warranting its becoming a specialized Division of the Superior Court. We recommend that the governor continue to make appointments of judges to the Land Court Division, but that cases in the Division could, when appropriate, be heard by other justices in the Superior Court department.

Probate and Family Court Reorganization

The Probate and Family Court has 43 justices, at least one court in each county, and handles adoptions, divorces, family matters, the probate of wills and related issues.

We recommend that the present family-related jurisdiction of the Probate and Family Court be transferred to a new Family and Juvenile Court, as described below. All contested estate, trust and guardianship matters should be transferred to the Superior Court. Consistent with Pt. 2, C. 3, Art. IV of the Massachusetts Constitution, the Superior Court should by rule or other process set times and places for handling of probate of wills and administration of estates. The disposition of all uncontested probate matters should be assigned to a non-judicial section of the courts. In light of our recommendations, we do not see a need for the Probate and Family Court to continue as a separate entity.

States where the Uniform Probate Code is in force and other jurisdictions, including the United Kingdom, do not treat uncontested "probate" matters such as the allowance of wills, appointment of fiduciaries, allowance of their accounts and the like as matters requiring the intervention of a judge. All of these matters can be dealt with by what the Uniform Probate Code (which the Committee neither endorses nor opposes as such) calls a Registrar. In fact, present Registries of Probate would need to change only in their organization to effectively transition into this role. The Registrar would be an official, preferably appointed in the manner of the clerks of the Superior Court, authorized to perform routine quasi-judicial acts. When a proffered will or account is contested, or when a fiduciary is sought to be removed, or a trustee seeks instructions, to give a few examples, the matter would be assigned for trial in the Superior Court. Eventually, with the expenditure of adequate funds this system can be made to provide for centralized repositories of documents and other information, accessible by electronic means from remote locations as well as on site.

We recommend that the Supreme Judicial Court request the present Chief Justice of the Probate Court to prepare a plan, in consultation with the Chief Justice of the Superior Court, for the transition of these probate functions to the Superior Court and non-judicial officials within a two-year period (to be contemporaneous with the transition period for a new Family and Juvenile Court).

THE DISTRICT COURT

The District Courts are the community based courts of the Commonwealth, and hear criminal cases and smaller dollar value civil cases, care and protection and other cases affecting families, traffic and driving under the influence cases, among others. At present there are 168 district court judges, located in 68 district courts in different communities. Each community district court has a Presiding Justice.

We recommend that the District Court be one of the three Trial Court departments and that it encompass within it both the Boston Municipal Court and, as a specialized Division, the Housing Courts. The District Courts should be explicitly vested with full equity jurisdiction, to resolve any issues which may now exist as to the extent of that jurisdiction. Because the Housing Court has such equity jurisdiction, the merger of the Housing Court into the District Court also requires such empowerment.

Merger of Boston Municipal Court Into District Courts

The Boston Municipal Court functions like a district court but has a territorial jurisdiction limited to a portion of the City of Boston. It has 12 judges. We believe, along with Suffolk University Dean Paul R. Sugarman, that there is no justification for maintenance of the Boston Municipal Court as a court independent of the other district courts and the Boston Municipal Court should be merged into the District Court.

Housing Court Reorganization

The Housing Court is presently composed of 6 judges and various support personnel. It was created in 1972. Its three divisions are located in Boston, Worcester, and Springfield. New divisions of the Housing Court, to open in July 1991, will be located in Taunton and Lawrence. It should become the Housing Court Division of the District Court. As such, it would be subject to the direct administrative control of the Chief Justice of the District Court. The Presiding Justice of the Housing Court Division would be selected by the Chief Justice of the District Court as of the effective date of the reorganization legislation.[4] Because the Housing Court serves continuing specialized needs, it should continue as a specialized court and judicial appointments to the Housing Court Division would be made by the Governor. The Chief Justice of the District Court would have authority, inter alia, to transfer judges into or out of the Housing Court Division as the needs of justice required.

THE NEW FAMILY AND JUVENILE COURT

Massachusetts was extremely progressive in 1906 when it established the Boston Juvenile Court, recognizing that neither children nor society are well served by treating family and children's issues as indistinct from other matters handled by the court system. Today, the Juvenile Court Department, with 12 judges, has courts in Boston, Worcester, Springfield and Bristol County. Where it does not have territorial jurisdiction, its functions are performed by the District Courts. Since 1906 the laws concerning children and families have increased geometrically, as have the strains on families and children. The number of children who are before the courts -- because they are abused, because they need care, because they have become delinquent, and because their family units have dissolved -- has, sadly, increased. Moreover, we have just begun to realize the profound impact the drug crisis has had on this system.

We strongly recommend that the Commonwealth once again recognize that the needs of children and their families are special and reorganize its courts to address those needs in today's society. We cannot, as a society, afford to lose children in the maze of cases handled by an already over-burdened court system.

The Juvenile Court and certain aspects of the Probate and Family Courts should be merged into a new statewide Family and Juvenile Court. The Supreme Judicial Court should have responsibility for the transition of these courts to a unified court, and that transition should be completed within two years. The present Chief Justices of the Juvenile Court and the Probate and Family Court should continue to serve during the transition

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4 See footnote 6.

period; thereafter, the Chief Justice of the Juvenile Court should become the Chief Justice of the new unified court for the remainder of a term of five years from the date of enactment of court reform legislation.

The new Family and Juvenile Court would hear the matters which occupy most of the time of the present Probate and Family Court judges, all of the time of the Juvenile Court judges and some of the time of the District Court judges. The new Family and Juvenile Court would have full civil and criminal jurisdiction. This proposed new court would centralize and maximize utilization of the expertise of these specialized judges, and to a considerable extent, that of non-judicial personnel.

Moreover, the many diverse aspects of a matter affecting all members of a family would be addressed within one specialized forum, a forum where the most relevant talent, expertise and connection to extra-judicial resources is available. This would provide greater focus and, therefore, efficiency to the services brought to bear in support of family issues; reduce the problem of conflicting approaches and results in related family matters pending, under the present system, before different courts and judges; permit the Family Service Office mechanism the greatest latitude in assisting in family resolutions, investigation and evaluation, and delivery of extra-judicial services; and result, we hope, in less expensive litigation for parties. The merged court should use clinics and other support services of the type presently used by the Juvenile Court.

The matters which the Committee would recommend fall into the jurisdiction[5] of the new Family and Juvenile Court would include, but not necessarily be limited to:

- Divorce and related matters (G.L. c. 208)
- Separate Support and related matters (G.L. c. 209)
- Adoption and related matters (G.L. c. 210)
- Abuse prevention and related matters (G.L. c. 209A not exclusive)
- Interstate custody and related matters (G.L. c. 209B)
- Paternity and related matters (G.L. c. 209C)
- Abuse and neglect of children, children in need of services and related matters (G.L. c. 119)
- Juvenile Delinquency (G.L. c. 119)
- Matters relating to special education (G.L. c. 71)
- Guardianship of minors (G.L. c. 201)

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[5] Those areas of the present Probate and Family Court subject matter jurisdiction which the Committee would recommend being transferred elsewhere, include, but are not necessarily limited to: uncontested estate administration matters, will contests, account contests, removal of fiduciaries (except guardians of persons), change of name, non-family land disputes.

Guardianship of the person, including medical emergencies (G.L. c. 201)
Civil commitment proceedings (G.L. c. 201)
General equity (G.L. c. 215, § 6)
Non-support (G.L. c. 119A not inclusive) (excluding criminal)
Uniform Reciprocal Enforcement of Support Act (URESA) (G.L. c. 273A, §§ 6, 9)

Implementation of this proposal will take time, because of the variety and complexity of the subject matters and because of the typical lengthy life of cases in this area. Certain matters will be relatively easily handled, but others will be more difficult and will try the ingenuity of all concerned. For that reason we believe that a two-year transition period will be necessary.

The location of the Family and Juvenile Courts would be in the present location of the Probate and Family Courts and the Juvenile Courts and as established by the Supreme Judicial Court. However, we recognize the importance of community services as well as the desirability of maximizing local access to the courts, particularly in matters relating to abuse, care and protection of children, and children in need of services. Therefore, we recommend that the Supreme Judicial Court be granted the power to designate portions of District Court buildings to be made available to the Family and Juvenile Court for the purpose of periodic sittings for specifically identified matters. This would also permit non-judicial personnel such as family service officers to travel to District Courts for the purpose of providing services to litigants.

POWERS AND RESPONSIBILITIES OF THE CHIEF JUSTICES OF THE TRIAL COURT

Hand in glove with the need to streamline the Trial Court into fewer and more sensible administrative and managerial units is the need to provide the tools to manage those units. We view the Chief Justices of each of the three Trial Court departments as strong executives whose job it will be to manage that court and who will be held accountable for the results. That person cannot do the job unless control is given to her or him over court support personnel such as clerks, court officers, and others. We have attempted to identify those specific powers which should be vested in the Chief Justices of the Trial Court, subject always to the ultimate oversight of the Supreme Judicial Court.

Each Chief Justice of a Trial Court, under the ultimate authority of the Supreme Judicial Court, must be given the line authority to make all relevant decisions for his or her court. There must be a system where an individual is responsible for all activities of that court. Responsibility necessarily involves the power to control the court. This is the key to both the problem and the solution. The Chief Justices of the Superior Court, the District Court and the Family and Juvenile Courts should have at least the following powers over their respective courts and personnel.

1. The power to hire, fire, discipline, evaluate and transfer non-judicial personnel, including all clerk-magistrates, clerks, probation officers, court officers, court reporters, law clerks and other support personnel. The Massachusetts Constitution should be amended as needed to eliminate the election and gubernatorial appointment of clerk-magistrates.

2. The power to transfer judges within their respective courts, subject to the judge's right to appeal that transfer to the Supreme Judicial Court.

3. The power to discipline judges within their respective courts as described below.

4. The power to set the days and hours during which their respective courts will be open for business.

5. The power to determine that certain court facilities are not needed by their courts or cannot be operated within the budget, to declare those facilities surplus and turn them over to the authority of the Administrative Office of the Supreme Judicial Court.

6. The power to recommend budgets for their courts to the Supreme Judicial Court.

7. Upon receipt of an appropriated budget sum from the Supreme Judicial Court, the power to administer that budget, including transferring funds and positions among various line items.

8. The power to establish geographic, venue and legal jurisdictional lines for courts within their departments in consultation with the other Chief Justices. This will permit more even and efficient distribution of the workload of the courts.

9. The power to recommend to the Supreme Judicial Court a performance evaluation system for judges and other personnel within their departments.

10. The Chief Justice of the District Court should have the power to appoint the Presiding Justices of the various courts in the District Court and of the specialized Housing Court

Division,[6] after the expiration of the terms of those Justices. The Chief Justice of the District Court should have the power to remove all such Presiding Justices as of the date of enactment of enabling legislation. All such justices shall serve at the pleasure of the Chief Justice. The Chief Justice shall have the power to define the jobs of the District and Housing Court Presiding Justices.

11. The Chief Justice of the Superior Court should have the power to define administrative regions and to appoint Regional Administrative Justices and the Presiding Justice of the Land Court Division, to serve at her or his pleasure. The present Presiding Justice of the Land Court shall serve out his term, subject to the power of the Chief Justice of the Superior Court to remove him in the best interests of the administration of justice.

12. The Chief Justice should have the responsibility to make comprehensive annual reports to the Supreme Judicial Court, which should be made public, concerning the operation of her or his court.

THE BUDGET PROCESS

A brief description of the present budgetary process may be helpful. Responsibility for the preparation of the Trial Court's annual budget now rests with the OCAJ, which prepares the guidelines and instructions for the individual budgetary units, reviews their submissions, and ensures that the submissions are made in a timely fashion. The OCAJ then consolidates the individual unit budget submissions and adds items for certain centrally controlled functions and services. In the process, trial departmental Chief Justices and the Administrator of Courts may confer with the budgetary unit and cause an amendment of its initial budget requests. However, departmental Chief Justices are not usually consulted again on the budget after the initial submission. In a mechanical sense, the budget system administered by the OCAJ appears to be appropriate from a monetary control aspect.[7]

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[6] The present Chief Justice of the Boston Housing Court, should serve a five year term in that position, subject to the powers of the Chief Justice of the District Court to remove him in the best interests of the administration of justice.

[7] A flaw that was noted in the existing system centered on the budgeting for services controlled centrally, such as facilities, utilities, capital expenditures, etc. These items are not budgeted by the individual budgetary units, but are budgeted by OCAJ based upon input from the budgetary units as to amounts and types needed.

The budgeting process is designed to fit into the state budget appropriation process in two ways. All budgeting is done on a standard, state-wide chart of accounts. The timing of the process is designed to provide to the governor's office a fully reviewed and reconciled budget by late November, so that the governor can include it with his budget recommendations to the legislature.

For fiscal year 1991-92 the governor has submitted to the legislature a single amount for the Massachusetts court system. In prior years, amounts were submitted for each of the individual spending categories. This year's budget request was for an amount substantially less than the summarized budget prepared by the Administrator of Courts. Historically, the legislature has tended to micro-manage the court system budget process in that it enacts a state budget which may contain amounts for individual spending categories different than those requested. However, in the current fiscal year the Trial Court has received temporary legislative approval to transfer funds among appropriated line items.

Perhaps the most important improvement in the budget process would be the development of a clear set of objectives for the system. These can be both subjectively and objectively measurable criteria, and they should derive from a clear "mission statement" for the system as a whole. That mission statement is best defined by the courts themselves.

Other management steps which need to be taken include the development of a clear organizational structure (each level of which would have its own measurable objectives), and the establishment of clear lines of authority over management matters with true accountability at appropriate levels of the organization. Once these steps have been taken, the budget system can then become the means by which management decides how to allocate resources (i.e., money and people) available to it in a manner that most efficiently meets the court system's overall objectives of fairly administered justice.

It is strongly recommended that the objectives of the system be clearly articulated in the budget submission to the legislature, thus encouraging review of the objectives in conjunction with allocation of the Commonwealth's monetary resources. This would also help the legislature to focus on the fact that changing levels of monetary resources allocated to the court system implies that the achievement of the objectives must be changed as well. Furthermore, the court system management must recognize that, if the legislature changes the level of resources allocated, that must trigger a further management review of the system's objectives to make explicit the change in objectives needed to accommodate the altered level of funding.

Certain basic principles would need to be observed. These include:

1. Each budgetary unit (i.e., each of the three Trial Courts) should have control over all line items in its budget. Central services, such as facilities, personnel, case management, and the like should be charged to each budgetary unit using an internal pricing mechanism so that each budgetary unit will have the capability to make intelligent allocations of its resources in the light of its objectives.

2. The process should have some iterative capability built into it. While this currently appears to exist in the budget process, it should also include the setting of objectives, as the two should be integral parts of the same process. Additionally, the iterative process must be driven by the increasing levels of authority and responsibility culminating in a final budget for the system. The process must focus not only on monetary aspects but also on the objectives which the monetary resources can support (i.e., a high priority for one budgetary unit's objectives may require additional funding, and since funds available to the court system are not infinite, a lower priority objective in another budgetary unit may force a reduction in that unit's budgeted resources).

3. The departmental Chief Justice, who has overall management authority for the unit, should have as much flexibility as possible over transfer and utilization of resources available to allow her or him to meet the needs of his unit as efficiently as possible.

4. There should be a separate planning, budgeting and evaluation capability, reporting to each departmental Chief Justice, responsible for managing the budget process and advising the Chief Justice on the evaluation of the effectiveness and efficiency of each manager in the system in meeting his or her operational and economic objectives. This function should be managerially separate from the central support service functions in order to maintain an appropriate independence of performance evaluation. Ultimately, however, the responsibility for all functions belongs to the Chief Justice who then reports to the line management his findings so that remedial action or rewards for performance can be implemented.

JUDICIAL DISCIPLINE

Important to the principle of accountability and sound management is the need to provide each Chief Justice of a department with limited summary power to discipline judges within that department. Such limited power should be exercised in response to certain incidents of judicial conduct, in or out of court, which require immediate and effective action but do not justify energizing the lengthy and expensive administrative process of the Commission on Judicial Conduct ("Commission"). It is in the public interest and that of the judiciary that the Chief Justices of the departments have such disciplinary powers so that they may act swiftly and responsively and thereby not only deter any future similar conduct but bolster the image of a sound well-managed judiciary.

The difficulties inherent in providing the Chief Justice of each department with disciplinary powers lie both in defining and limiting the powers given, and in meeting the contentions of favoritism or leniency that invariably arise in the public mind whenever judges discipline other judges. Nonetheless if the Chief Justice is to be held accountable for the management of his or her department, the judges in that department must remain accountable for their conduct to the Chief and be subject to his or her summary disciplinary power.

We therefore recommend that the Chief Justices of each department be given limited summary power to impose immediate discipline on judges in their department, including the power to fine, suspend, transfer, and take other disciplinary action, in certain instances of judicial misconduct which bring the judiciary into disrepute or lowers the public confidence in the judiciary. The precise nature of the conduct for which this summary disciplinary power should be utilized must be developed on a case by case basis in conjunction with the Commission, which has been empowered by statute to act in this area and whose jurisdiction should remain as presently constituted.

This grant of disciplinary power is intended to supplement, not supplant, the power and jurisdiction of the Commission. In general, the institution of proceedings by the Judicial Conduct Commission should involve more serious, substantial or repeated instances of misconduct than those intended to be dealt with by the proposed summary disciplinary power.

The disciplined judge should have the right to appeal the discipline to the Supreme Judicial Court and the actions of the Supreme Judicial Court should be binding upon the Commission. All such departmental disciplines, whether consensual or not, must be reported to the Supreme Judicial Court. Consistent with the provisions of G.L. c. 211C, any such discipline should remain confidential unless the disciplined judge agrees it shall not be confidential or unless the Supreme Judicial Court decides it is in the public interest that it be made public.

JUDICIAL EVALUATION

For judges to be truly accountable, there must be a program by which quality of judicial performance may be evaluated. This program should not focus on statistics or quantitative measures, but on the overall quality of judicial performance and overall excellence in the execution of judicial duties.

In 1989 the Advisory Committee on Judicial Performance Evaluation, appointed by the Supreme Judicial Court and chaired by Justice Wilkins, issued its report and recommendation as to whether a program of judicial performance evaluation should be adopted in Massachusetts. The Advisory Committee, with some dissenting judges, recommended "the adoption of a program for the enhancement of judicial performance in Massachusetts if it can be operated with absolute confidentiality".

The Advisory Committee recommended that a program be developed in each Trial Court department and approved and supervised by a committee of the Supreme Judicial Court. The Advisory Committee recommended that the Chief Justices of each department be instructed to prepare a program for judicial performance enhancement within their department and submit the program to the supervisory committee. That committee was then to report its conclusions about the various programs to the Supreme Judicial Court.

While we endorse these recommendations of the Advisory Committee, we believe that the judiciary must go beyond a program of judicial enhancement to a program of qualitative judicial performance evaluation. We recommend that the Supreme Judicial Court require the Chief Justices of each department to submit a program for qualitative judicial performance evaluation and that the Supreme Judicial Court decide upon and implement an evaluation program.

JUDICIAL IMPACT STATEMENT

The Committee observes that over the last several decades, without correspondingly increasing the number of judges and support to the court system, the legislature and governor have, through the enactment of various laws, including but not limited to expanded mandatory sentencing, greatly increased the workload of the courts. Unlike a private sector corporation, the court system has virtually no control over the amount of work it is required to perform. We believe it is critical, therefore, that before any new law is enacted which will increase the workload of the courts, that that law should include a judicial impact statement to make clear whether that legislation increases the need for resources to the court system, so that appropriate funding may be included.

CENTRALIZED CRIMINAL COURTS

The Committee recommends, as did the Boston Bar Association Task Force on Drugs And The Courts, that the Supreme Judicial Court require creation of a centralized criminal court for Suffolk County. We believe that should this court prove successful it would then become the model for centralized criminal courts in other major urban areas.

In order to understand the reason for the recommendation, a brief description of what is involved is in order. Every year thousands of arrests are made in Suffolk County, particularly in the City of Boston. Each arrest leads to multiple court appearances before the matter is resolved. At each court appearance the accused has a right to be present, and prosecution and defense counsel are necessary. In addition, quite often needed in court will be the police, the victim and other witnesses, reports from the laboratory, probation officers and all of those other officials necessary to make the system run.

Most criminal cases start and end their journey through the court system in the District Court. Some move from District Court probable cause hearings to the Superior Court or arrive at the Superior Court initially because of direct indictments. Additionally, if there is a review of bail set in the District Court, that review proceeding is held in the Superior Court.

In Suffolk County, which encompasses Boston, Chelsea, Revere and Winthrop, there are eight District Courts, as well as the Boston Municipal Court, the Boston Juvenile Court and the Suffolk Superior Court, all of which are located in various buildings sprinkled throughout the County. There are a number of different police agencies as well. The District Attorney's office must send its lawyers to 11 different courts. Similar logistical problems exist for the defense lawyers, the police, other witnesses -- and, most significantly, for the accused, who unlike the others, often cannot travel freely to court. The accused, in the custody of the Sheriff's Department, must be delivered under controlled circumstances from the jail to the particular court, kept under guard, and returned to the appropriate jail after the proceeding is concluded. The logistical problems for the Sheriff's Office, and the costs involved, are immense.

The location of the Public Health Drug Analysis Laboratory which serves most of the drug related cases in Suffolk County causes problems. Situated in Jamaica Plain, it is not near any of the busiest courts. All too frequently, after all of the participants -- police, prosecutors, defense counsel, probation officers and the defendant -- are assembled in court, it is learned that the report from the laboratory is not ready or not available. Everyone is then sent home or back to jail, only to be reassembled on another day.

Another cause for continuances is the lack of availability of judges or support personnel in the particular court on a particular day. Yet another, and all too common, reason for continuance is that busy police officers are often needed in more than one District Court on different cases on the same day. These numerous continuances greatly undermine public confidence in the system, as victims and ordinary citizen witnesses are burdened by returning to court again and again and again on the same case.

A solution to this chaotic, inefficient, and wasteful process is the creation in Suffolk County of a single centralized criminal court in one building in a location convenient to the jail for pre-trial detainees. The soon-to-be vacated Registry of Motor Vehicles building on Nashua Street, next to the new jail and just a few short blocks from the District Attorney's office in Pemberton Square, seems an ideal site. An enclosed ramp can be built from the jail to the new courthouse so that the Sheriff's Department can simply walk the prisoners to court, thus saving immense costs for transportation, personnel and safety.

The courthouse should include sessions from the full array of courts -- Superior, District and Family and Juvenile -- complete with judges, clerks, stenographers, probation officers and other support staff who can be moved about the building on an as-needed basis. Probation records could be located in the same facility. Additionally, it would be advantageous to have the Drug Analysis Laboratory located in the same building so that the necessary scientific evidence, and the witnesses who accompany it, would be readily available.

With such a centralized facility the coordination of all aspects of the criminal justice process would be maximized at a significant monetary savings and, of even more importance, a much greater ability to provide swift, fair and certain justice to all involved.

THE STATE COURT STUDY COMMITTEE ITSELF

In December, 1990, Boston Bar Association President John P. Driscoll, Jr. appointed twelve experienced attorneys and one certified public accountant to serve as members of the Boston Bar Association State Court Study Committee. Additionally, six attorneys were asked to serve ex-officio on the Committee.

The Committee is chaired by R. Robert Popeo, of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. The other members of the Committee are: BBA past-President Edward J. Barshak of Sugarman, Rogers, Barshak & Cohen; Ruth R. Budd of Hemenway & Barnes; Thomas E. Cargill, Jr. of Cargill & Associates; Harvey A. Creem of Coopers & Lybrand; Thomas E. Dwyer, Jr., of Dwyer, Collora & Gertner; Jerome P. Facher of Hale and Dorr; John M. Harrington, Jr. of Ropes & Gray; BBA Vice-President Sandra L. Lynch of Foley, Hoag and Eliot; BBA past-President Rudolph F. Pierce of Goulston & Storrs; BBA past-President Richard W. Renehan of Hill & Barlow; Martin R. Rosenthal of the Criminal Justice Institute of Harvard Law School; and Edward A. Schwartz, President of the New England Law Foundation and former General Counsel to Digital Equipment Corporation.

Appointed ex-officio to the Committee were Joan A. Lukey of Hale and Dorr, Chair of the BBA Litigation Section; William M. Levine of Lee, Levine & Bowser, Chair of the BBA Family Law

Section; John K. Markey of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., Chair of the BBA Criminal Law Section; Allan van Gestel of Goodwin, Procter & Hoar, Chair of the BBA Administration of Justice Section; and Leslee Klein of Cambridgeport Problem Center and Nicholas U. Sommerfeld of Gaston and Snow, Co-Chairs of the BBA Delivery of Legal Services Section. The Committee members collectively have more than 500 years of first hand experience with the Massachusetts court system. The Committee also gratefully acknowledges the assistance of Francis S. Moran, Jr., BBA Executive Director; Sara Romer, BBA Government Relations Director; Michael F. Connolly and Joseph C. Hegarty of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.; and William B. Ford of Coopers & Lybrand.

Together, the members of the Committee have contributed the resources of their respective law and accounting firms on behalf of the study. Moreover, the Committee members individually have expended approximately 3,000 volunteer hours on Committee work, including research, analysis and actual interviews with numerous Massachusetts state court judges, attorneys and other users of the court system.

The Committee has had the benefit of numerous reports and studies on court administration as well as the recent reports relating to the court systems in other states including New York, Arizona, Alabama, and Connecticut. These sources include materials prepared by the National Center for State Courts, National Judicial College and American Bar Association. In addition, the Committee has reviewed numerous law review articles and other materials relating to the efficient management and organization of court systems.

Of special note, the Committee is particularly grateful for the analyses and findings set forth in a number of studies specifically relating to the Massachusetts court system: "Report on the State of the Massachusetts Courts," by the Governor's Select Committee on Judicial Needs (December 1976); "An Analysis of the Suffolk County Civil Clerical Support System" by the National Center for the State Courts (December 1989); "Record Management Practices in the Suffolk County Civil Clerk-Magistrate's Office," by The National Center for State Courts (September 1990); the reports of the Boston Bar Association Task Force on Drugs and the Courts (May 1989 and March 1990); the reports on the Massachusetts Trial Court (1976-1990); "Agenda 90: Modernizing the Judiciary" by the Senate Committee on Ways and Means (1987); the "Report of the Governor's/Massachusetts Bar Association's Commission on The Unmet Needs of Children" (1987); and "Justice Endangered: A Management Study of the Massachusetts Trial Court," prepared for the Coalition for the Courts by Harbridge House, Inc. (April 1991).

Finally, the most significant contributions to this study came from the written reports and interviews with the judicial and non-judicial personnel of the Massachusetts Trial Court. The Committee has conducted extensive interviews with the Chief Justices of the Supreme Judicial Court, Appeals Court and many of the Trial Court departments, as well as with a number of the associate justices from the various trial court departments. The Committee has interviewed in excess of 100 judges and received written materials from many more. In addition, the Committee has contacted and interviewed numerous non-judicial personnel, attorneys and other users of the court system. Primarily through the information gleaned through these interviews and written materials, as well as the extensive personal experiences of the Committee members, the Committee has unanimously come to the findings and recommendations set forth in this report.

The Committee is also preparing legislation embodying the recommendations contained in this report.

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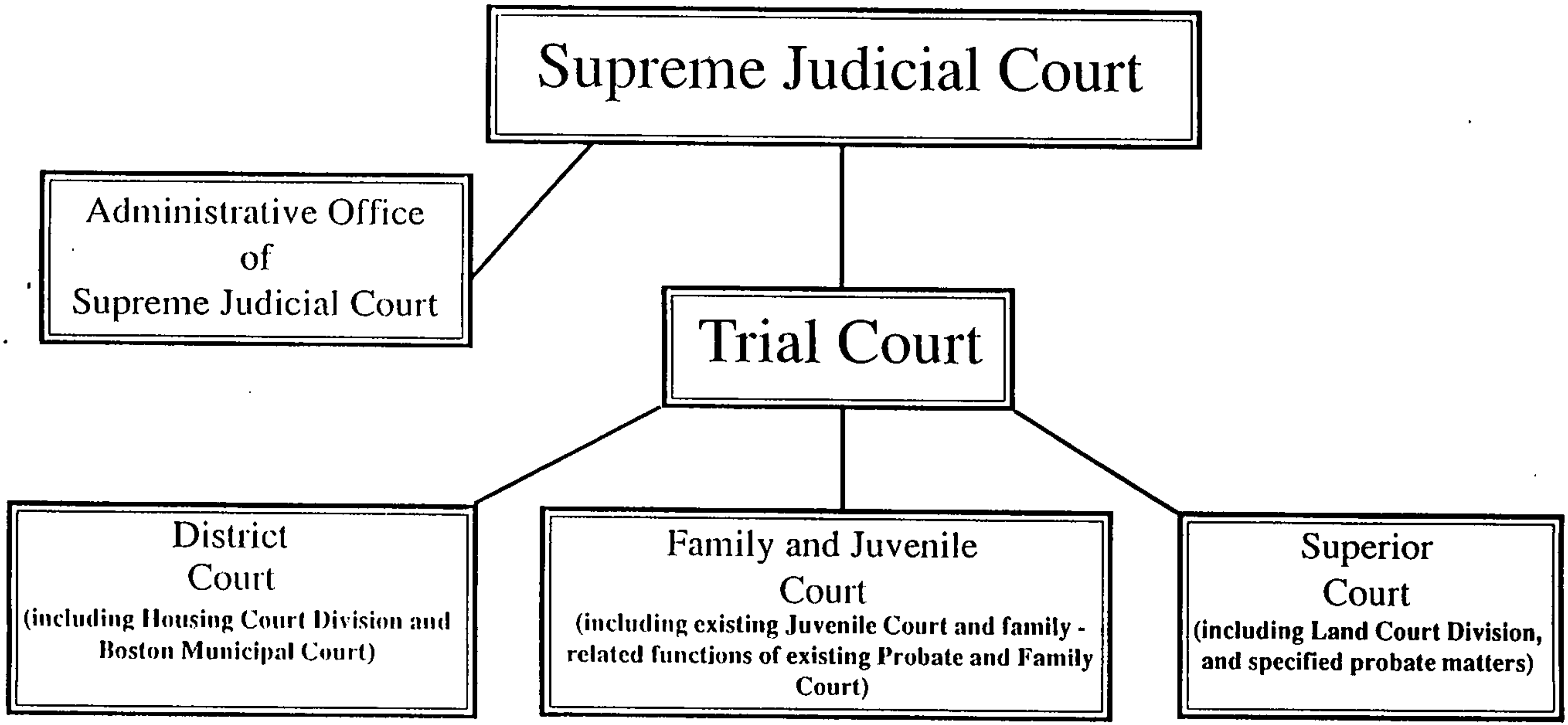
Boston Bar Association State Court Study Committee
Massachusetts Trial Court System
Management Structure



Boston Bar Association State Court Study Committee
Massachusetts Trial Court System
Responsibilities of Chief Justices of the Trial Court

Chief Justices of the Superior Court, District Court, and Family and Juvenile Court

- Hire, fire, discipline and transfer non-judicial personnel, i.e., all clerks, probation officers, court officers, court reporters and law clerks.
- Transfer judges within the Court.
- Discipline judges subject to appeal to Supreme Judicial Court.
- Set courthouse hours of operation.
- Close courts.
- Recommend budget for the Court.
- Administer the budget of the Court, including the ability to transfer funds, personnel and positions.
- Establish venue and jurisdictional lines.
- Recommend an evaluation system for judges and other personnel.
- Make annual reports to the Supreme Judicial Court.
- Appoint Presiding Justices in Court.

Chief Justice of the Superior Court:

- Defines administrative regions and appoints Regional Administrative Justices and Presiding Justice of the Land Court Division.