Department of Justice

TESTIMONY ON THE STATE OF THE JUDICIARY
AND ACCESS TO JUSTICE

BY

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BEFORE

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COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON
COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION
OF JUSTICE

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It is a pleasure to appear before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice on the general issues of the State of the Judiciary and Access to Justice.

As requested, I would like to speak on these issues from the vantage point of my past experience as a judge on the Fifth Circuit Court of Appeals, as a practicing attorney, and, currently, as the Attorney General of the United States. As you may know, the issues which are the subject of these hearings have concerned me for a number of years before I became Attorney General. While a judge I was involved closely with the Federal Judicial Center, serving as Chairman of the Committee on Innovation and Development from 1968-1970; and then as a member of the Board of Directors of the Center from 1973-1976. Also, I have been privileged to serve on a number of American Bar Association groups concerned with judicial administration; in 1976 I was Chairman of the ABA Division of Judicial Administration.

A little over a year ago, the Judicial Conference of the United States, the Conference of Chief Justices, and the American Bar Association sponsored the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice. I was pleased to participate in that meeting,

and then to chair the Pound Conference Follow-up Task Force established by the American Bar Association.

This Task Force reported to the Board of Governors of the ABA in August, 1976. [copy of the report to be submitted for the record.] As you will see from reviewing the report of the Task Force, the subjects discussed at the Conference and the recommendations which resulted are many and varied.

In one of my first actions as Attorney General I created the Office for Improvements in the Administration of Justice, with responsibility for looking into the kinds of issues, problems, and proposals discussed by the participants in the Pound Conference and by other commentators on the administration of justice. Eight weeks ago, the head of the new Office, Assistant Attorney General Daniel J. Meador, appeared before this Subcommittee to discuss some of our initial thinking as to the functions and jurisdiction of our new Office for Improvements in the Administration of Justice. Since that time, after close and frequent consultation with me, Professor Meador has developed a two-year program for improvements in the administration of justice.

In a very real sense, the recommendations arising from the Pound Conference and the agenda that I have had prepared for the Department of Justice address the same issues of

assuring access to effective justice for all citizens and improving the operations of our judicial system. Many of the steps to be taken to address these issues are the same; but in several areas the Department of Justice, under my direction, is pursuing alternatives to the Pound Task Force recommendations, as well as addressing totally new issues. I believe that you will see, however, that the work of the Pound Conference and the agenda for the Department of Justice share the common aim of developing and implementing a national policy for the delivery of justice.

An important part of our program is an attempt to provide the proper forum for deciding disputes. The first goal on the Department's agenda is "to assure access to effective justice for all citizens."

In the federal system, not all disputes require an Article III judge, and we are seeking to give appropriate cases to magistrates.

Not all disputes require a federal forum, and we are seeking to return at least some diversity cases to state courts.

And not all disputes may require a court for their resolution. Some may be too big, and some may be too small.

In the area of matters that fall under state and local jurisdiction, we are seeking to provide national leadership where the same problems repeat themselves throughout the country.

All of these are items on an action agenda. I would like to discuss briefly some of the specific steps which I find particularly important to judicial system change and improvement, noting as I go the recommendations of the Pound Conference Task Force.

The Proposed Magistrate Act of 1977 is now before the House and the Senate. We hope to work with you on this bill in the Fall. In our estimation it is a good bill, providing flexible relief for court congestion caused by the kinds of cases which do not require District Court attention.

As you will see from the Department's agenda, our Magistrates proposal is one of the steps toward assuring access to effective justice for all citizens through more effective courts. Another area under examination would be to help witnesses by providing a new schedule of fees along with increased transportation and subsistence allowances. These are the sorts of changes that will improve citizen participation in the courts.

One of the efforts already underway to make the courts more effective is the President's program of panel selection of judges for the Circuit Courts of Appeals. The Circuit Judge Nominating Commission, established by President Carter in February, is composed of 13 nominating panels; nine panels already have been announced.

Also in the area of seeking to make the courts more effective, we should examine some mechanism, short of impeachment, which would permit the removal of federal judges who have become physically or mentally disabled or whose conduct on the bench does not comport with the Constitutional requirement of good behavior. We are living in a time when our public institutions are under examination and the courts should not be exempt. At the state level, judicial tenure and removal commissions, started in California in 1960, have been adopted in forty-four states, the District of Columbia and Puerto Rico. These commissions are operating successfully. I know full well the importance to our society of an independent judiciary, but I believe legislation which would create an avenue for citizen complaints involving federal judges and provide for investigation and action on those complaints is necessary and timely.

In the same area of assuring access to effective justice for all citizens, we have a number of projects under study to which I have assigned a high priority. First, we are developing a number of programs of non-judicial settlement procedures. Within the next few months we hope to have in operation three Neighborhood Justice Centers financed with federal funds. The Centers would be alternatives to the courts for settling a wide range of disputes by using such techniques as mediation, conciliation, and fact-finding. I would like to submit for the record a recent article in the Washington Post on this program. [Washington Post, June 13, 1977, Page A5]

As you will note, the Neighborhood Justice Center program is one of the major recommendations of the Pound Conference Follow-Up Task Force. Another one of the Pound Conference recommendations for new mechanisms for the delivery of justice is increased use of arbitration. We have been studying the experience of four states, California, New York, Ohio, and Pennsylvania, with compulsory and non-binding arbitration, in order to identify criteria by which to select federal cases which might aptly be referred to arbitration. Some of the criteria under consideration are the following: (1) cases seeking monetary damages, not injunctive relief; (2) cases in which a dispute-resolving rather than a law-declaring function

predominates; (3) cases which tend to use expensive court resources without any proportional benefit either to the litigants or to society; (4) cases in which a rapid decision is desirable to the parties but not generally available in district court; (5) cases in which the litigants have an alternative state forum available if they are dissatisfied with the procedures afforded to them in federal court. We are now in the process of selecting specific categories of cases appropriate for referral to arbitration under these criteria. I hope that our proposals in this area will help both to provide cheaper and swifter justice for the litigants and to relieve our federal courts of some of the burden of their civil caseload that can be dealt with appropriately by this alternative method of dispute resolution.

We are also looking at means of providing more effective procedures in civil litigation. A priority project in this area, which is addressed in the Pound Conference report as well, is the improvement of class action procedures. We are now in the process of a comprehensive review of this matter which will include broad consultation with a variety of persons and groups who are concerned with class action suits. We expect to be able to recommend some improved procedures which will facilitate the handling of class action cases by the courts and afford broader access for citizens to seek redress

through the class action device. We are also exploring the possibility of certain types of alternative and innovative ways of handling some of these suits more effectively.

In the same area of procedural reform we are beginning studies of pretrial procedures, especially discovery, with the goal, as stated in the agenda, of reducing expense and delay and to increase fairness in the use of these procedures. I should add that correcting abuses in the use of discovery is one of the major recommendations contained in the Pound Conference report.

Another proposal in the area of procedure is a bill which would repeal all statutory provisions that accord priority calendar status to civil cases before a federal district court or court of appeals other than habeas corpus matters. Instead of the current list of more than thirty civil statutes which provide priority calendar status to cases brought under them, under our proposal each court would establish its calendar priorities under the supervision of the Judicial Council of the circuit.

I have directed Professor Meador's Office, along with the Office of Legislative Affairs, to develop an administrative proposal for judicial impact statements. This would be a means of predicting litigation impact on the judicial system of

various types of proposed legislation in order to improve judicial planning and resource allocation. The Chief Justice has expressed his interest in this area, and I look forward to progress on these impact statements.

The second major goal of the Department's agenda is to reduce the impact of crime on citizens and the courts. While most of our current efforts in this area are characterized as substantive reforms in federal law, I would like to note that the revised Federal Criminal Code recently has been introduced. I believe that this bill is an example of the type of substantive law reform that will improve the effectiveness of criminal proceedings by simplifying and centralizing the federal criminal law which today is found in the 50 titles of the United States Code and thousands of judicial interpretations.

The third goal on the agenda of the Department is to reduce impediments to justice unnecessarily resulting from separation of powers and federalism. In the area of reallocation of federal and state authority, a bill developed by the Department would limit diversity jurisdiction by precluding a plaintiff from invoking diversity jurisdiction in any district in a state of which he is a citizen. The Pound Conference report contains a general recommendation for the reduction or elimination of diversity jurisdiction. As noted in the report:

> The high quality of justice dispensed in state courts makes resort to removal to the federal courts unnecessary; moreover, today parochialism is hardly the problem it once was, if it can be said to be a problem at all. The change would have little impact on the total volume of litigation in state systems, but would provide significant relief to the federal courts. 1/

Another project under the third goal which is now being considered would be the convening of a Federal Justice Council. The Council would have members from the executive, judicial and legislative branches. It would provide a forum for discussion of court-related problems, and it would be the catalyst for improving the courts and their related functions. Similar proposals have been made before by Chief Justice Burger, the Hruska Commission on Revision of the Federal Court Appellate System, and a Departmental committee which was chaired by former Solicitor General Robert Bork. I expect to receive a more complete paper on this idea within the next few days, and I will be glad to keep you informed of further developments on it. I believe that the idea behind the creation of the proposed Council reflects much of the force behind the Pound Conference itself: that there should be full communication and discussion between the three branches on all aspects of judicial system functioning.

1/ American Bar Association, Report of the Pound Conference Follow-Up Task Force, 37-38 (August, 1976).

Finally, I would like to mention some of the efforts now underway to increase and improve research in the administration of justice, the fourth goal on the Department's agenda. We are looking forward to passage of the FY 1978 appropriations bill for the Department of Justice which will provide for the first time research funds to be used for studies of many of the issues contained in the agenda that I have discussed today.

In another area, the Pound Conference Follow-Up Task Force recommended the creation of "A Federal office for the collection of data relevant to judicial administration and to dispute resolution generally." [2/] The Department of Justice now spends approximately $40 million annually on statistics about crime and justice. I am examining our activities in this area with the goal of making changes which would fulfill many of the functions recommended by the Pound Task Force. I would hope that the Department would be able to move soon on this important matter and I am giving decisions in that area a high priority.

In closing, I would like to return to the central theme which has guided both the Pound Conference Follow-Up Task Force and the development and implementation of our program for

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2/ Id. 7-8, 44-45.

improvements in the administration of justice. As stated in the Pound report:

> It is important to keep firmly in mind that neither efficiency for the sake of efficiency, nor speed of adjudication for its own sake are the ends which underlie our concern with the administration of justice in this country. The ultimate goal is to make it possible for our system to provide justice for all. 3/

These are imposing words, but in fashioning a national policy for the delivery of justice, I believe firmly that "justice for all" must be our guiding principle.

3/ Id. xi.