# Department of Justice

ADDRESS

BY

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BEFORE

THE FOURTH CIRCUIT JUDICIAL CONFERENCE

9:30 A.M.
FRIDAY, JUNE 24, 1977
THE HOMESTEAD
HOT SPRINGS, VIRGINIA

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. As you well know, 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.

Professor Daniel Meador is head of this office, and is assisted by Ron Gainer and Paul Nejelski, his deputies.

In a very real sense, the recommendations arising from the Pound Conference and a two-year agenda by Dan Meador address the same issues of assuring access to effective justice for all citizens. Many of the steps to be taken to address these issues

are the same; but in several areas the Department of Justice is pursuing alternatives to the Pound Task Force recommendations, as well as addressing totally new issues. In any event, 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.

A subject of much debate is the federal grand jury. A House Subcommittee will be holding hearings within a few days on a proposed bill to change many aspects of current grand jury practices, and the American Bar Association has scheduled the subject of grand jury reform for plenary consideration at its August meeting. The Department of Justice has studied all of the proposals for change, and we find ourselves in agreement with many of them.

For example, we support a requirement that a prosecutor disclose to the grand jury any evidence known to him which negates guilt -- and in fact, this is already the practice of our U.S. Attorneys and Criminal Division lawyers.

We support additional measures, beyond Rule 6(e), to ensure the absolute confidentiality of grand jury proceedings, including the identity of witnesses appearing before the grand jury.

We support a requirement that the judge who empanels the grand jury charge the grand jury of their duties and their limitations by means of a written charge.

But there are some suggested changes that I believe would be ill-advised. I preface my remarks on this subject with the caveat that I am expressing my personal opinion, which is not necessarily that which will be adopted by the Administration. Foremost among changes I believe ill-advised is a proposal that a grand jury witness be permitted to be accompanied in the grand jury room by his or her counsel.

My first concern is that this proposal would result in a "lawyers' relief act." We all know that a right to counsel leads inexorably under the court decisions and the Sixth Amendment to a right to appointed counsel. Pretty soon there would be a lawyer, many at public expense, sitting next to every peripheral witness in every case. Care would have to be taken to offer counsel to any witness who might remotely be a suspect, or later prosecution would be prohibited by the Sixth Amendment.

The proliferation of lawyers for grand jury witnesses would exacerbate the other problems with the proposal. It would create additional opportunity for breaches of grand jury secrecy. It would frustrate the grand jury's investigative function. From a simple procedure for factfinding, the grand jury process would be changed into a bulky, protracted, and ultimately ineffectual institution accomplishing little more than providing a forum for lawyers to "lawyer." No matter how the role of the lawyer is theoretically circumscribed, there is no way to avoid the disruption, confusion, and delay that would be caused by the objections, motions, and requests for judicial hearings that would be presented by these lawyers.

Moreover, this proposal is misguided: while its proponents are motivated by the spectre of a poor, ill-educated, petty criminal being bullied into inadvertent self-incrimination, I am convinced that the largest beneficiaries of the proposal would be those who are closely associated with the most serious and profitable criminal violations. These are the organized crime

and white-collar crime elements, who will surely provide counsel to all witnesses for no other purpose than to lawyer and lawyer and lawyer, in an effort to ensure that the grand jury finally expires or collapses without returning an indictment. In extreme cases, the grand jury process could be turned into a "secret trial," with the target of the investigation and his lawyer actually pleading the defense on the merits to the jurors. The public would never know what transpired.

Moreover, the putative defendant might lose because one can scarcely imagine a good prosecutor taking the chance on a grand jury "trial."

My strong opposition to counsel for witnesses inside the grand jury room does not mean that I am insensitive to the potential for prosecutorial abuse that now exists. Although my thinking on this point is not yet finalized, it may be that courts should, as a matter of discretion, be authorized to appoint counsel for the grand jury. This special counsel could act as a buffer against any excesses by the government's representative. This approach would meet any need for reform without undermining the important functions of the grand jury. One lawyer would suffice for the possible scores who would be necessary to represent witnesses during the usual grand jury session.

The proposed Magistrate Act of 1977 is now before the House and the Senate. 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.

One of the most important aspects of the approach of the Carter Administration to our justice system is the new method of selecting judges.

By Executive Order last February 14 President Carter established the United States Circuit Judge Nominating Commission. That commission consisted of 13 panels to cover the 11 circuits, with both the Fifth and Ninth Circuits split into two panels.

Each panel consists of a chairman and no more than 10 other members charged with submitting five names to the President within two months of notification by the White House that a judicial vacancy exists.

Eight panels are already in operation and the panel for the Fourth Circuit is now ready to be announced.

Several other Executive Orders also involve the commission approach to the selection of judges. One expands the District of Columbia Circuit Panel's responsibilities to include the District Court for the District of Columbia.

Another creates a Committee on Selection of Judicial Officers which will, in effect, be a panel for providing candidates for the Court of Claims and the Court of Customs and Patent Appe

In addition, Senators in 14 states are using similar commission-type approaches as a selection procedure for District Judges; indeed, several include United States Attorneys as well.

The new Administration has, of course, been criticized for not adopting merit selection across the board -- for District Court Judges and United States Attorneys, as well as for Circuit Court Judges.

Let me say that by no means have we abandoned that goal. But politics and patronage being what they are, it will probably take some time. We believed that the wisest and, to be frank, the most prudent course was to start with the United States Circuit Courts. After we have proved that the merit selection system can operate effectively to provide highly qualified candidates, it will be much easier to expand it into other areas. Meanwhile, it may be that the Senators, through similar approaches, will resolve the problem. I must add, however, that the future must include the removal of U.S. Attorneys from the patronage system with their appointments being made by the Attorney General who is now responsible for their conduct.

One of the recommendations of the Pound Conference Follow-up Task Force was for the increased use of arbitration.

Four states -- California, New York, Ohio and Pennsylvania -- have had experience with arbitration, either compulsory or non-binding. We studied their experience and tried to identify criteria to use in selecting federal cases which might appropriately be referred to arbitration.

Among the criteria which suggest themselves are:

- cases involving money damages rather than injunctive relief;
- cases which threaten to drag on and use up substantial court resources without resulting in

any significant benefit either to the parties or society;

- cases in which the parties need a quick decision but the court process would take substantial time to resolve;
- cases where the parties have an alternative state forum available if they aren't satisfied with the procedures offered in federal courts.

We are now trying to select specific categories of cases which would be appropriate for referral to arbitration under these criteria. We will be sending Congress a proposal embodying our recommendations, both on these categories and the procedures which should govern arbitration.

I hope that such a proposal will help to provide swifter and less expensive justice and a lighter civil case load in the courts.

Another recommendation of the Pound Conference which we are implementing is our Neighborhood Justice Center Program. Within the next few months we expect to put three of these centers in operation with federal funds, to operate as non-judicial settlement systems.

This would be an alternative to the courts, principally the state courts, for settling a wide variety of disputes using such techniques as mediation, conciliation, and fact-finding. Such centers might allow the satisfactory resolution of such

matters as domestic quarrels, claims by customers against merchants, landlord-tenant arguments, disputes between neighbors, and the like. Short of resolution at the center, the complainant would be forced to go on to the courthouse. In fact, my thought is that the most successful centers will be those operated by the state court clerk's office as an adjunct to the clerk's office.

These services would be available to anyone as an alternative to court proceedings, but they would be particularly helpful to those who could not afford litigation and would otherwise be denied any likelihood of redress.

These centers would offer an opportunity to resolve such matters as incompetent service or an excessive bill for auto repairs, where the courts would demand too much of the time from the person who feels he or she has been victimized.

It can fairly be argued that such centers will not necessarily relieve a case burden on the courts, since many of the disputants probably would not go to court in any case, because of either the time or money required or both. That analysis, however, overlooks an important value such centers can offer.

Present tentative plans call for a center in the West, probably Los Angeles, one in the Midwest, and one in the South.

The funds would come from the Law Enforcement Assistance

Administration -- about $150,000 apiece for the centers and perhaps another $300,000 to evaluate them, since they are intended as a pilot project.

We are doing many other things at the Department of Justice to improve our system of justice. A top-to-bottom revision of the criminal code is now before both Houses of Congress, partly as a result of work done at the Department of Justice.

We also have a bill limiting diversity in federal courts.

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 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.

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.