Department of Justice

ADDRESS

BY

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BEFORE

THE AMERICAN BAR ASSOCIATION

SECTION OF LITIGATION

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I am pleased to talk with you this evening about some proposals for change in the operation of our justice system that are of direct interest to this Section, to the legal profession generally, and to all persons who seek resolution of their many and varied legal disputes.

A few months ago, an interview with me appeared in Business Week under the title "A Plan to Cut Litigation." In retrospect, I believe that this title may draw attention to only one part of our overall efforts to improve the delivery of justice in this country. I like to think that our ultimate goal, as expressed in the Report of the Pound Conference Follow-Up Task Force, "is to make it possible for our system to provide justice for all." To the degree that we can improve the conduct of litigation and the operations of our courts, we will make progress toward that goal.

Last week I spoke at Vanderbilt Law School on the topic -- the Crisis in the Courts. All of us have heard the term "crisis" used frequently in the past years with reference to the courts and to the process of litigation. The law explosion, with the attendant overwhelming trial and appellate caseloads is a reality. Whatever the cause of the explosion -- whether Supreme Court decisions refurbishing the Constitution, the statutory expansion of jurisdiction, or the natural flow from the technological revolution: the shift from a rural to an urban society, or a manifestation of our litigious society, or a combination of some or all of

these factors -- it is here. The lines of Stephen Vincent Benet in "John Brown's Body" are apt: "Say not of this time that it is blessed or it is curst, only that it is here."

The pressures from the law explosion are severe, and the courts may not be equal to the task. Important rights may be lost. Defendants charged with crime may go free on bail, some to commit other crimes. Defendants convicted of crime may be free on bail pending delayed appeals. Business controversies may go unresolved because of the lack of a forum. Hapless plaintiffs with meritorious claims may go unpaid because of delay in trial and appellate courts.

Can these and other dire situations be avoided? The answer is yes, but it will not come easy.

I would like to talk tonight about the very real opportunity we have to address these problems, and I would like to propose some decisive change.

The popular conception of "crisis in the courts" describes the condition of the courts, particularly the increasing volume of disputes that are presented to the courts for resolution. Judge Aldisert of one of the busiest Federal circuits, the Third Circuit, has observed: "The reality is that today there is a mad rush to the Federal courts." This, of course is exacerbated by the heavy criminal docket and the speedy trial rule.

The result for the Federal courts has been large case-loads for judges and substantial delays for litigants.

Despite the efforts of overworked Federal judges, the quality of justice dispensed by our Federal court system is beginning to deteriorate. Unless checked, this deterioration will accelerate.

I would like to think that, as Attorney General, my concern with the problems of the courts continues an important and historical function of my office and the Department of Justice. As far back as 1790, Congress requested the recommendations of the first Attorney General, Edmund Randolph, on court reform following the First Judiciary Act of 1789. From that time until the creation of the Administrative Office of the United States Courts in 1939, the Department of Justice performed a range of administrative functions for the Federal courts.

Of course, close ties are still maintained by the service of the United States Marshals, and the Department's role in selecting Federal judges. And as the nation's law department, the Department's interest in the quality of justice dispensed by our Federal courts is inescapable.

Shortly after assuming office, I established a new unit in the Department, called the Office for Improvements in the Administration of Justice, to work on a number of court-related problems. We have developed a two-year plan of goals and programs to improve the delivery of justice in this country, with special attention given to the courts.

Already Congress is considering a number of the Department's legislative proposals, which represent the first of our proposed improvements. In addition, we have been working with Congress on other bills of great importance. I would like to talk briefly about some of this legislation.

Last week, the Senate Judiciary Committee approved a new Federal Criminal Code -- the most comprehensive revision of our Federal criminal law in the nation's history. This is a singular achievement for the committee members and their staffs and represents praiseworthy and singleminded devotion on their part.

I have every reason to be optimistic that the bill will progress on the Senate floor and in the House of Representatives. Subcommittee Chairman Mann and Chairman Rodino of the House Judiciary Committee share my optimism. They have made commitments to do their utmost to meet the Senate record and to enact the code into law.

Amid the publicity that has accompanied more visible Administration bills, the Senate's work on the Criminal Code can too easily be overlooked. It deserves recognition and applause as a vindication of the continued validity of our legislative processes. As many people have recognized over the past several years, if we are to have a fair and effective system of justice, the fairness and effectiveness must begin with the laws themselves. The proposed new code has now moved to a point where final enactment next year is a realistic goal.

Another major proposal, and it has already passed the full Senate, would expand the authority of the United States magistrates. Still another proposed bill would reform diversity jurisdiction by barring plaintiffs from bringing diversity suits in the Federal courts of their own state.

The proposals already advanced, and similar proposals nearing completion or under study, are set within a philosophical framework: We must insure that for every legitimate dispute which an American citizen has, there will be an appropriate forum in which he or she can get effective redress.

I would like to discuss first some considerations involved in choosing the forum for resolving disputes. Access to an appropriate forum for dispute resolution does not always require a public hearing of matters in dispute before a life-tenured judge operating under formal rules of evidence and procedure. Rather, many disputes are readily susceptible to resolution by more informal means, at less cost and inconvenience to the parties.

We have developed some proposals for alternative means of dispute resolution. For example, we have proposed legislation to authorize an experiment with compulsory but non-binding arbitration in certain types of Federal civil cases. Either party could reject the arbitration decision and go to court. But if the party demanding a trial de novo

in the district court failed to obtain a judgment more favorable than the arbitration award, he or she would be assessed the costs of the arbitration proceedings, plus a penalty amounting to interest on the amount of the arbitration award from the time it was filed. The experience of several states with similar systems indicates that we can expect a high finality rate from arbitration decisions.

In seeking a national program for the delivery of justice, all of our efforts are not concentrated on the Federal courts. We are establishing Neighborhood Justice Centers in three cities. These model centers will be an alternative to the local courts for settlement of many types of disputes -- including family, housing, neighborhood, and consumer problems -- through mediation and arbitration. We are, as well, working with Congress to provide a program of aid to the states for use in developing appropriate mechanisms for minor dispute resolution.

Each of these proposals contemplates the establishment of alternatives available to the parties to a dispute, with sufficient incentives for their use to cause many disputes to be resolved with more speed and lower cost. The choice of these alternatives does not emerge from any fixed consensus as to the "best way" to resolve conflicts; rather they are alternatives derived from experience in contemporary circumstances.

I believe that you will see that much of what I have just discussed is the result of a conscious policy to consider all aspects of dispute resolution, and to propose reforms that will make the delivery of justice more timely, less expensive, and more equitable.

One of the more important areas in which we are pursuing this policy is improving the conduct of litigation. In this regard, I would like to talk for a few minutes about reforms in the use of discovery and some changes in class actions.

When I left the practice in 1961 to go on the bench, the familiar statement of a trial lawyer was that "I am on trial" or "I will be on trial." Upon returning last year, it had changed to "I am on discovery" or "I will be on discovery."

To that I would add the statement of Judge Aldisert:

> "The average litigant is overdiscovered, over-interrogatoried, and overdeposed. As a result he is overcharged, overexposed, and overwrought."

In light of these observations, the recent report of your Special Committee for the Study of Discovery Abuse deserves careful consideration as an important move in the right direction.

As I wrote to Chairman Manning earlier this week, I am particularly pleased with the proposed change to Rule 26 narrowing the scope of discovery to the "issues raised," and

with the changes to Rule 30 permitting depositions to be recorded by other than stenographic means and providing for conducting depositions by telephone. Also, as I noted in the letter, I support the Rule 33 reduction in the number of interrogatories a party may submit, the Rule 34 change dealing with the production of documents, and the Rule 37 attempt to arm the trial judge with further sanctions aimed at abuse by all parties in the discovery process. I suggest, however, that we devote additional attention to the proposals concerning Rules 26 and 5, as I have discussed in my letter.

I have asked the Department's Office for Improvements in the Administration of Justice to study contemporary abuses in discovery. Your proposals will be an important part of this careful review. In addition, we are consulting with the American College of Trial Lawyers and other interested groups, so that all relevant views are considered.

The work of the Special Committee is an example of one of the more important roles of the organized bar: contributing valuable time and expertise to solving problems that involve widespread public interest and impact. No group has moved with such dispatch as yours -- to say nothing of the fine result achieved.

Another area in which we have benefited from consultation with the bar is in developing proposals for reform of class actions. While we are still formulating

our position in this area, I would like to discuss briefly the focus of our inquiry.

We are interested principally in Rule 23 (b)(3)-type class actions, especially where the alleged unlawful conduct affects many persons, such as claims for defective goods or fraudulent transactions. Often these cases involve small individual claims for only a few dollars in damages, but are large in the aggregate, involving millions of dollars.

In examining the problems of these cases, we are covering all sides: plaintiffs, defendants, and the courts. Plaintiffs frequently are concerned about adequate representation, adequate notice, and financing of the action. Defendants are concerned about suits where there is no merit to the plaintiffs' claim, but where the suit is only brought to extract a settlement, ill-defined issues, and abuse in the use of discovery. Finally, the courts are concerned with issues of manageability, since the administration of a class action may exceed the traditional capabilities of the courts.

The Department has been at work on these issues for several months. During that time they have consulted with the American Bar Association and with other groups.

We expect, as a result of this process, to forward a proposal to Congress in January. It is my hope that our proposal will ameliorate problems for the parties and the courts, simplify proceedings, and make the resolution of alleged mass wrongs less expensive and more fair.

As always, we solicit your comments and suggestions. We must continue to work toward our common goal -- improved delivery of justice to all Americans.

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