Department of Justice

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LAW DAY ADDRESS

OF

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EMORY UNIVERSITY

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I am very pleased to have this opportunity to be with you here today.

The theme of this year's Law Day observance -- "The Law: Your Access to Justice" -- has a special significance for all Americans.

In addition, it has a particular importance for me and my colleagues at the Department of Justice.

One of my major priorities at the Department during the past 15 months has been to develop a series of programs to improve access to the justice system for all Americans.

Our goal is to make certain that the delivery of justice is a day-in, day-out fact of life for every citizen.

It is not an easy task. The obstacles are many. Antiquated systems must be overhauled. Reforms must be generated. Long-standing apathy -- both professional and public -- must give way to enthusiasm and enlightened improvements.

There can be no doubt of the need for all of those things. Our goal is a fair society. There is no way that anyone can guarantee justice being done in every dispute. But we can

make certain that there is access -- without regard for status or pocketbook -- to a forum for resolution of every dispute on a procedural due process basis.

In a relatively short time, we have developed a number of important new projects to improve the processes of justice, both at the Federal and state levels.

Those efforts, however, are only a small portion of the overall agenda charted by the Department in the past 15 months. To begin the process of system-wide reform, it has been necessary to take major steps to reform the Justice Department itself.

For many years, the Department did not have a clear enough idea of where it was going or what it should be doing.

I believe that progress is now being made on the basic problems that have beset the Department. Detailed improvement programs for two years or longer have been drafted for most of the 26 divisions and agencies in the Department. Significant reorganizations have been set into motion. An important measure of confidence has been re-established.

We have accomplished a good deal in the way of reorganizations in the Department as a whole, including the FBI. There is more, however, to be done. We still must

reorganize the LEAA, a painfully slow endeavor. We are studying a reorganization of the Civil Division, where there were approximately 25,000 civil case dispositions last year. We are in the process of naming, for the first time, an Assistant Attorney General for U.S. Attorneys and to greatly expand our trial advocacy school. The Executive Office for U.S. Attorneys has in the past been only a service office. I expect it to become a true liaison office between the Department attorneys and me. I need to know what is going on in those offices and whether good work is being done.

In addition, I still must devote some time to studying the DEA and INS.

And lastly, it is time now to begin assessing what we have done and how we are doing. I am thinking of having the assessment made by outside lawyers, such as calling in auditors to assess systems and internal operating controls.

It is never enough, though, to be able to point to plans on paper. Expectations, however great, mean little unless there is some achievement.

When I became Attorney General, the President asked me to determine the total number of lawyers in Government -- and their functions.

We found that there were 19,479 attorneys performing "lawyer-like" functions. You may be as astonished as I was to learn that only 3,806 of them work for the Justice Department. The other 15,673 work elsewhere in the Federal Government -- including 5,247 in the Defense Department.

The President's interest in all of this is more than academic. Last August, he directed his Reorganization Project to study the ways that the Government's attorneys are used. He said he wants better use of resources and improved procedures for conducting litigation. The Project's recommendations are expected to be submitted to the President in a few weeks.

I am not trying to pre-judge that report. But I would like to make a few brief comments about conditions today and improvements that should be fashioned.

The conduct of Federal litigation is reserved to the Department -- except as otherwise authorized by Congress. The problem is the number of exceptions granted by Congress.

The prosecution of all criminal violations is controlled by the Justice Department. But there is no consistent program for civil litigation. We seek a uniformity in Federal litigation positions, and some of the fiefdoms now in existence may not take kindly to that.

I realize that Congress intended some regulatory agencies and government corporations to be independent of the Executive Branch. The independence has extended to legal matters, and the price is high. Sometimes it results in two sets of government lawyers opposing each other at taxpayer expense. More importantly, it requires the courts to decide interagency disputes that might be better resolved through the mediation of the Justice Department.

I do not favor the independence of these regulatory agencies and Government corporations in legal matters. It is unseemly for two Government agencies to sue each other. It requires the Judicial Branch to decide questions of Government policy, a role never envisioned by the founding fathers. It is time-consuming and expensive.

I believe it would be possible to preserve the independence of these bodies even if they were represented by the Justice Department. Such a system would be more efficient and would reduce the amount of judicial intrusion into intra-Government disputes.

The Department of Justice can exercise a review and supervisory function in an effort to bring uniformity to

Government legal positions and still recognize the independence of the regulatory agencies' enforcement efforts.

My predecessors as Attorney General have shared my view that the Justice Department should represent the regulatory agencies. To date, however, Congress has been willing to pay the price of independent litigating authority for those agencies.

If separate litigating authority is going to continue for independent regulatory agencies and Government corporations, then we should at least devise a rational system for the conduct of such litigation.

One agency's case often will affect other regulatory agencies or Executive Branch departments. At the least, an agency should be required to alert the Justice Department in such cases so that the views of the Executive Branch can also be presented to the courts.

If a case could affect the entire Government, such as an employment discrimination claim or a Freedom of Information Act complaint, the Justice Department should have control of the litigation rather than the single agency which is party to the case. The position taken by a single agency on a question of general concern should not bind the entire Federal Government.

It also is my view that the Justice Department should represent all Executive Branch departments and agencies. The Department must, of course, work closely with its clients in a cooperative effort, recognizing the peculiar expertise and abilities of agency lawyers and delegating authority to agency lawyers in certain circumstances, but always retaining final control in the Justice Department.

It seems to me that the role of the Solicitor General's Office sets the example for how the Justice Department could exercise Government-wide litigation authority in the most effective, responsible manner.

It is clear that the Solicitor General must continue to perform his current function of representing all the Executive Departments and the independent regulatory agencies.

The Solicitor General is responsible for presenting cases to the Supreme Court in the manner that will best serve the overall interests of the Federal Government.

He is also responsible for deciding whether lower court decisions adverse to the Government should be appealed, and whether the Government should file amicus curiae briefs in cases to which it is not a party.

The Solicitor General's overview of these cases is critical to avoiding inconsistencies in the Government's positions. His responsibility to the entire Government helps him avoid litigating a significant legal issue with Government-wide impact in a case which is a poor vehicle because of its factual or procedural context.

An agency often does not see this broader picture, since vindication in the pending case may be viewed as more important than the long-range interests of the United States.

Solicitors General over the years have been careful in the exercise of their authority. The Office is well-respected by other departments and agencies for its expertise, independence, and objectivity. Although Congress has authorized several agencies to file petitions independently for a writ of certiorari in certain categories of cases, separate petitions have been relatively infrequent. They presently average only one or two a year. The Solicitor General's Office recognizes that control over the Government's

litigation is not intended to transform the Justice Department into a super-agency sitting in judgment on the policy decisions of other departments or agencies.

With a few notable exceptions -- antitrust, civil rights, Freedom of Information Act -- Congress has placed elsewhere the primary responsibility for most of the Government's policy decisions.

All 3,800 lawyers in the Justice Department can perform with the same degree of independence, objectivity, and litigation expertise as the 20 attorneys in the Solicitor General's office.

Agency lawyers are enmeshed in the daily routine of a specific Government agency, and cannot be expected to litigate cases with the broad perspective and objectivity that ensures proper representation of the best interests of the entire Government -- and therefore the people.

Justice Department lawyers do have the perspective and objectivity. But they must take care not to interfere with the policy prerogatives of our agency clients. An agency's views should be presented to a court unless they are inconsistent with overall governmental interests, or cannot fairly be argued.

Agency lawyers are often experts in their own regulatory and enforcement programs and statutes, and are often deeply involved in their agency's programs.

Justice Department lawyers and U.S. Attorneys are litigation experts, and perform a critical function in translating the agency's programmatic expertise into effective briefs and arguments for judges who deal with an almost bewildering variety of cases and problems involving the federal government.

I recognize that our lawyers must better utilize the expertise of our client agencies. Since taking office, I have recognized that we need to improve our day-to-day working relationships with other agencies.

We have taken steps to ensure advance consultation with client agencies before cases can be settled, and to ensure that our client agencies are properly informed of the progress of pending cases.

In short, we have tried to develop a new sensitivity to treating our client agencies as any private lawyer would

treat a client. To help nurture this sensitivity, we are devising a new system of evaluating the performance of our lawyers that will include consideration of comments from the agencies they have represented.

We are considering other steps to more effectively and better serve our client agencies. A number of agencies feel that the Justice Department has not devoted sufficient effort to affirmative enforcement of their programs because of the demands of an increasingly heavy civil defensive caseload.

One way to meet this problem may be the establishment of a group of attorneys who would litigate only affirmative agency cases.

I also believe that Justice can and should play a greater role in pre-litigation counseling of other departments and agencies.

After all, one of the principal functions of a lawyer is to "keep all clients out of court" -- and to advise how to accomplish objectives without leaving them vulnerable to suit.

This legal counsel role for government agencies is now generally performed by their own general counsels.

Functioning as a lawyer independent of the agency, the Department of Justice can provide the agency a dispassionate view of legal problems associated with policy objectives.

Moreover, as chief litigator for the government, the Department is able to apply the knowledge and experience it gains in that arena to anticipating potential legal difficulties presented by agency activities.

It is never enough, however, to strive merely for technical efficiency in the workings of the law. We must also work for what is right, for what is just. In that context, I would like to briefly discuss with you today one significant and carefully considered Justice Department position that has recently attracted significant public attention.

I refer to the Snepp case. You may or may not agree with our position, but it is an important case.

Frank Snepp is a former CIA employee who wrote a book about the agency's activities at the end of the Vietnam war. We recently filed a civil suit against him. It seeks all or part of his profits from the book in damages, on the grounds he violated his written contract to let the CIA review writing dealing with the agency.

Any understanding of the Snepp case begins with the premise that there are legitimate national secrets.

Not many people realize the few means we have to protect national secrets. We can only do two things: one, we can have a contract, as in Snepp; or two, we can criminally prosecute.

Besides being even more of an onerous threat to whistleblowers and the most intrusive of all approaches to individual freedoms, the criminal prosecution approach provides no reasonable alternative. You cannot prosecute if it's much of a secret because you may, and must consider the prospect that you will, have to make "The Secret" public in order to prosecute.

Clearly the most important and reasonable device we have to protect legitimate secrets is by contract. Our motive in filing this suit, therefore, is uncomplicated: if the contract is a valid one, it should be enforced, to prevent others from ignoring it, perhaps in far more serious circumstances. If it is not valid, then we should not try to guard important government secrets with contracts that offer no protection.

If the validity of the contract approach is sustained by the courts, there are things that can be done to improve the contract and make it even more reasonable. There was no opportunity, of course, in the Snepp case for the CIA to respond to a request to review his proposed book. There is a commitment in this Administration to review reasonability and act in a timely and prompt fashion to preclearance requests for publication by intelligence agency employees and promotion, as the President has urged, of the concept of "whistleblowing."

I believe that if the contract approach is sustained we should consider new proposals to ensure that such review is timely and the possibility that some outside agency would do the reviewing. Plainly, our interest is only to prevent the disclosure of that information that is legitimate national secrets -- not simply the embarrassing.

It is also my view that a broader question from which cases like Snepp flow is our use of classifications generally. It might be useful, for example, to create a kind of inspector general to sample classifications and make sure that the government was not placing "secret" or "top secret" labels on material that should be made public.

The issues involved in the Snepp case do not involve the government's blocking the publication of Mr. Snepp's book or the reasonableness of the agency's review in either time or manner. Neither does it involve any "cover up" or attempt to "cover up" problems in intelligence activities during the fall of Vietnam. The suit is simply for breach of contract, and it is carefully and narrowly drawn in order to determine the validity of the contract approach to protect legitimate national secrets.

The Justice Department has to be a place of openness. We make all information available that can be made available within the strictures of law and ethics.

We insist on absolute integrity. We expect the highest standards of professionalism on the part of all of our employees.

We expect restraint in the use of power, for we know that power is often abused. My rule is that the best use of power is not to use it at all except when absolutely necessary, and then to use it sparingly.

We teach fundamental fairness in the sense that there are levels to be reached in dealing with American citizens that go beyond due process in terms of decency and civility.

Our client is the government. But in the end we serve a more important constituency -- the American people.

These and the many other issues our country faces are difficult and complex. Their difficulty, however, cannot be a basis to avoid them. We must in Adlai Stevenson's words approach them with both warm hearts and cool heads.

In closing I would like to tell you briefly about one of the eulogies given to Abraham Lincoln following his assassination. This particular tribute is told in Carl Sandburg's classic biography.

The tribute I am referring to was paid to Lincoln by the great Russian author and philosopher Tolstoy, who was a contemporary of Lincoln. Tolstoy was traveling in the mountains of Russia some time after Lincoln's death and was the guest of the chief of a remote Russian tribe. The chief

and his tribesmen requested that Tolstoy tell them of great statesmen and great generals. Tolstoy at first told them of the Russian czars and about Napoleon. Then the chief rose and begged Tolstoy to tell them about Lincoln, and promised him the best horse in the tribe's stock if Tolstoy could explain the greatness of Lincoln.

Tolstoy waxed eloquent about the American President, saying that he was greater than Frederick the Great, Napoleon, or Washington. He explained that Lincoln always operated on one motive: the benefit of mankind. He emphasized that Lincoln had wanted to be great through his very smallness. And he explained that all of Lincoln's actions were rooted in four principles -- humanity, truth, justice, and pity. According to Tolstoy, it was these things that earned Lincoln his preeminent place in history.

I would add that no man and no country can be great except on these principles -- humanity, truth, justice and pity. But I would add the rules of conduct I have frequently mentioned that are our operating principles at the Department of Justice: restraint, fairness, and civility, as well as integrity. These are in the nature of discipline, and I end on the note of discipline.

We must beware of indulging ourselves. It was said of General Lee that a woman with a son in her arms said to him, "What can I do to make my son great." The General

replied, "Teach him to deny himself." This admotion will help us all, whether as individuals or, collectively, as a government.