Department of Justice

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ADDRESS

OF

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BEFORE THE

AMERICAN LAW INSTITUTE

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The Chinese calendar system ascribes symbols to each year -- one year is known as "The Year of the Horse," the next as the "Year of the Dog," and so on. Judging by the first few months, I believe 1978 might come to be known as "The Year of the Lawyer" in the United States. I cannot remember another time when so much national media attention has been directed at our profession.

It all began in February with the great debate over the Chief Justice's proposition that half of the trial lawyers in the country were incompetent. Just as that furor began to subside, the President gave his speech and the national spotlight again focused on the lawyers.

To be honest, that spotlight has revealed an unflattering characteristic of our profession. Some of the bar's reaction to the criticisms has seemed overly defensive -- like the fellow who would rather be ruined by praise than saved by criticism.

The Chief Justice and the President were not attacking lawyers. They were pointing out shortcomings in a profession that strives for excellence, and exhorting it to do better. I know this to be the spirit in which both men spoke.

I have long agreed with the Chief Justice that trial lawyers need training beyond the fundamental law school education. Advocacy is a special skill. It is folly to assume that every lawyer becomes an effective advocate by attending law school and successfully completing the bar.

Rather than contest the Chief Justice's figures, the bar should admit the substantial accuracy of his criticism and meet the challenge that he has laid down. There are several good training programs for trial advocacy, but they are too few to serve the great majority of lawyers. Every organization of lawyers should set as a priority the expansion of existing training programs and the establishment of as many new ones as may be necessary.

At the Department of Justice we are moving to meet the Chief Justice's challenge. In 1973 the Department established the Attorney General's Advocacy Institute to train a select number of Assistant United States Attorneys in trial and appellate advocacy. During the first year some 200 Assistants completed the basic course. In 1976, the year before I became Attorney General, 247 Assistants and staff lawyers in the Justice Department were trained.

In my first year the number of attorneys receiving the basic advocacy course increased by one-third, to 328. In addition, specialized training was offered for the first time. For example, 25 Assistant U.S. Attorneys received instruction in complex antitrust litigation. We project for 1978 a 100% increase over last year in the number of attorneys completing the basic course, and we are constantly adding new areas of specialized training as well.

The training offered at the Institute is intensive and effective. The basic course consists of a week of lectures, workshops, and mock trials in which each attorney works in a small group and is exposed to at least nine different experienced advocates as instructors. It is my intention, however, to expand this basic course to three weeks, and to model it as much as possible on the National Institute of Trial Advocacy program. That program is generally considered the best in the country, and I believe that lawyers representing the United States should receive training equal to the best available.

Although press coverage focused on the criticisms, the President in Los Angeles also laid down four specific challenges which, like the Chief Justice's, are worthy of being met. Those challenges were, first, to make criminal justice fairer and more certain; second, to strive to make the legal system totally impartial; third, to increase the access of all persons to justice; and fourth, to reduce our nation's reliance on the adversary system and to speed up that litigation which remains.

I would like to share with you a few of the projects we are pursuing at the Justice Department to meet these challenges.

Our major effort to make criminal justice fairer and more certain is a direct outgrowth of a significant earlier effort by the American Law Institute. I refer to our support of the current attempt by Congress to recodify and reform the federal

criminal code. This project began more than 12 years ago, when Congress established the National Commission on Reform of Federal Criminal Laws. Building upon the excellent work of the Institute's Model Penal Code, this Commission produced a working draft of a new federal criminal code in 1971. The ensuing seven years have seen various drafts of the code, with the current one a clear improvement over its predecessors.

As a result of efforts by Senators Kennedy and Thurmond, the late Senator McClellan and others, the Senate approved the current draft of the code in January of this year. After a dozen years and almost as many drafts, the nation stands only a step shy of the most significant contribution in history to fairness and certainty in its federal criminal justice system.

The Senate Judiciary Committee came to approve the new code after several years of consideration. The House Judiciary Subcommittee, under the leadership of Congressman Mann, has held comprehensive hearings and is now marking it up. This subcommittee must compress its remaining consideration into only a few more weeks, if the full committee and the full House are to consider a modern body of criminal law in this Congress. I have every confidence in the House subcommittee in charge, in the full Judiciary Committee, and in the House leadership. I believe that we will be successful this year.

I would also like to say a word about grand jury reform. We have accomplished several reforms within the Justice Department to improve grand jury practices. But we are resisting the ABA's idea of giving every witness in the grand jury a lawyer. This, in my judgment, is an ill-conceived notion. For example, there was no thought given to the fact that most witnesses are indigent and some arrangement would have to be made to provide them with attorneys. I have gotten the American College of Trial Lawyers to work with some of my people on this issue and grand jury reform generally and progress is being made.

The President's second challenge was a call for impartiality in our legal system. As the President noted, one important area in which impartiality must prevail is the selection of federal judges and prosecutors.

Last year I spoke to you at some length about this subject. I noted the progress we had already made in establishing Presidential nominating commissions to assist in filling courts of appeal vacancies. Such commissions add to the quality and impartiality of justice in two ways. First, the commission system opens up the selection process and makes it possible for anyone to be considered for nomination regardless of his or her lack of political connections. Second,

the review of all candidates by a panel of independent citizens ensures that a minimum level of competence will be exhibited by all of the persons from whom the President eventually chooses his nominee. In the past year ten circuit judges have been nominated through the commission process and confirmed by the Senate. The universal judgment is that all of them have been appointments of the highest caliber.

We have also encouraged individual Senators to use nominating commissions to aid in selecting district judge nominees. Since I spoke to you last year, President Carter has written personally to a majority of the Senators to urge the use of such commissions, and we have doubled the number of states in which they are being used at the district court level. As a result, nominating commissions have been used in filling over 60% of the district court vacancies in this Administration. Indications are that several additional Senators will use some form of nominating commission when new district judgeships are created by passage of the Omnibus Judgeship Bill.

We have also begun a long process of making the office of United States Attorney more professional and therefore more impartial in appearance as well as in fact. There are now a number of states in which nominating commissions are used to assist in recommending U. S. Attorney candidates. We have

appointed only men and women who were willing to try cases actively and who pledged to run their offices in a nonpolitical fashion. We have been replacing carry-over U.S. Attorneys in a careful manner, with many having been asked to serve out their terms. In fact, there are still 20 U.S. Attorneys serving from the previous Administration.

We have also insisted on professional and impartial treatment of Assistant U.S. Attorneys. There was a time, fortunately now ended, when the wholesale turnover of Assistant U.S. Attorneys followed a change of Administrations. For the first year of this Administration, the turnover was half of that in the last changeover year, 1969, and only slightly more than the normal turnover rate. In short, we are institutionalizing professionalism and impartiality in the position of federal prosecutor.

The President's third challenge was to increase access to justice. I have made this goal one of my highest priorities since arriving at the Justice Department.

Last year I told you about three of my ideas in this area. All of them are now well on their way to realization through Congressional action.

A bill to expand the jurisdiction of magistrates, and permit more expeditious treatment of all cases filed in the federal courts, has passed the Senate by virtue of the bipartisan efforts of Senators DeConcini, Thurmond, and Byrd. It is scheduled for mark-up in the full House Judiciary Committee on June 6, and with the help of Chairman Rodino and Congressmen Kastenmeier and Railsback we hope to see full House approval this summer.

A bill providing for mandatory but nonbinding arbitration of selected civil cases in the federal courts has been sponsored by Chairman Eastland and Chairman Rodino of the judiciary committees, and is being considered by appropriate subcommittees. In the meantime, the Department is working with the federal judiciary on pilot projects in three federal district courts under local rules. Selected civil suits are referred for arbitration by lawyers who are paid a nominal fee but really act from a sense of public service. Arbitration has worked in the states, and with the help of the bar it promises to offer a simplified, inexpensive and satisfactory way of resolving many disputes that reach federal court.

A third bill would remove from federal diversity jurisdiction cases filed in the plaintiff's home state. The House already has

passed an even more far-ranging bill which eliminates all diversity jurisdiction, and a Senate subcommittee has held three days of hearings on the question.

Following the President's speech I had occasion to peruse again Dean Roscoe Pound's famous speech entitled "The Causes of Popular Dissatisfaction with the Administration of Justice." Among those causes Dean Pound included this one:

> Even more archaic is our system of concurrent jurisdiction of state and federal courts in causes involving diversity of citizenship; a system by virtue of which causes continually hang in the air between two courts, or, if they do stick in one court or the other, are liable to an ultimate overturning because they stuck in the wrong court.

It is noteworthy that that speech was delivered in the year 1906. After seven decades it is even clearer than when Dean Pound spoke that no justification remains for the great bulk of the diversity jurisdiction.

The President's fourth challenge was to reduce the need for the adversary system and make that system itself more efficient. The President noted that the excesses of the adversary system can entail societal costs, in the form of delayed or unequal justice, in addition to being prohibitively expensive.

The Justice Department has taken several steps to reduce the excesses of the adversary system. We have supported a bill to empower the Attorney General to institute or intervene in civil litigation in which persons in mental hospitals or other institutions allegedly have been deprived of constitutional rights. We have successfully insisted there be included in the legislation a strong pre-suit negotiation requirement which we hope will lead to successful conciliation in most of these disputes.

We are seeking to reduce the abuses of pretrial discovery in the federal courts. When I left private practice in 1961 to go on the bench, the familiar statement of a trial lawyer was that "I will be on trial." When I returned to practice in 1976, it had changed to "I will be on discovery." Judge Aldisert of the Third Circuit has observed that "the average litigant is over-discovered, over-interrogatoried, and over-deposed. As a result, he is over-charged, over-exposed, and over-wrought."

The American Bar Association has also recognized the excesses of discovery and has recently recommended reform, including a narrowing of the scope of permissible discovery. The Justice

Department is giving this problem further study in order to develop additional solutions. This is clearly an area in which the bar can make considerable contributions not only through creative thinking about reform but also by restraint in the use of the existing discovery procedures.

I want to turn now to a particularly laudable example of the bar's responding to the challenge to better serve the cause of justice in this country. I refer to the bar's contributions to the development and implementation of the Neighborhood Justice Center program.

The concept of Neighborhood Justice Centers emerged from a 1976 conference in which various bar leaders considered the contemporary relevance of Dean Pound's address which I mentioned earlier.

I attended that conference, and one of my first actions as Attorney General was to direct the development of a Neighborhood Justice Center program. We now have three Centers in operation. A week from today I will participate in the formal dedication of the Center in Atlanta. The other Centers are in Los Angeles and Kansas City, Missouri.

These Centers are designed as low cost alternatives to the courts for resolving everyday disputes fairly and expeditiously. Community residents are specially trained to serve as mediators and arbitrators for minor disputes arising within the community.

The Centers have been open for less than two months, but the initial results augur well for their future success. In the first six weeks of their operation, approximately 200 disputes have come through the Centers' doors. In 67 of those cases mediation agreements were reached or arbitration awards made. Moreover, the Centers appear to be increasing their case volume as they become better established.

Let me recount to you the types of disputes which these Centers resolve. A tenant had paid $800 for repairs to his apartment and was paying reduced rent until the cost of the repairs was offset. A new landlord took over the building and wanted the tenant to move out to make room for one of his personal friends. The tenant refused to move and wanted reimbursement for the repairs. In a session conducted by a single mediator, the tenant agreed to vacate the apartment within a specified period of time. The landlord and tenant also reached a settlement regarding an amount of money to be reimbursed to the tenant for the repairs.

Not all the disputes that come to the Centers are so simple. In one case, a long-standing dispute existed between the adults of two neighboring families, stemming from problems that arose when the children and grandchildren of both families had been playing together. The strained relations escalated into name calling, complaints to the police, harassing phone calls, two attempted hit and run incidents, and finally a major brawl between the two

families involving a piece of lead pipe, a pool cue, and a rifle. A mediation session was conducted by three mediators involving 12 disputants and lasting six and one-half hours. As a result, one of the families has decided to move, and both families have agreed not to bother each other until the move is completed. For this kind of case, a Neighborhood Center is a much more effective and efficient forum than a formal court.

The organized bar was instrumental in developing the concept of Neighborhood Justice Centers, as well as these three pilot Centers. Justice Department personnel met repeatedly with the American Bar Association's Special Committee on the Resolution of Minor Disputes. That Committee's diverse membership and rich experience in the minor dispute field made their contributions most valuable.

The bar has also given of its services in the implementation of the program. Each of the three Centers has an arrangement with the Young Lawyers Section of the local bar association under which the Center can call upon any member of a panel of young attorneys to obtain necessary legal advice.

I take this opportunity to commend the bar for its cooperation in this project.

The Neighborhood Justice Centers will serve as models for other efforts to reduce reliance on the adversarial model of dispute resolution. A bill sponsored by Senators Kennedy and Ford,

among others, and supported by the Justice Department, would establish a national resource center to provide State and local governments with information, technical assistance, and seed money grants for developing Neighborhood Justice Centers, small claims courts, and other such mechanisms. I am hopeful that this legislation will receive prompt attention from the Congress.

I mentioned earlier the famous speech which Dean Roscoe Pound delivered as a young law professor in 1906 to the American Bar Association's summer convention on "The Causes of Popular Dissatisfaction with the Administration of Justice." This speech received wide press attention at the time because of its critical scrutiny of our system of justice and its strong challenges to the bar. The late Professor Arthur Sutherland described Pound's speech as a

> . . .dispassionate analysis, hostile to no one, unsparing only of deficiencies in the legal process. . .no accusation of failure, but. . .an exhortation to establish justice; not a scolding of laggards but a sounding of the call for an advance.

Notwithstanding its description as "hostile to no one," this speech and its attendant publicity struck as a bolt of lightning the organized Bar.

While many members of the bar at that time had recognized and were working on judicial reform, there were many lawyers who were susceptible to such criticism. Dean Wigmore described this

group of lawyers who listened to the young Pound that night as follows:

> The profession was a complacent, self satisfied, genial fellowship of individual lawyers--unalive to the shortcomings of our justice, unthinking of the urgent demands of the impending future, unconscious of the potential opportunities, unaware of their collective duty and destiny.

Many in the bar who heard the speech missed its message, because of their reaction to its criticism.

However, the speech had positive and lasting effects. The very next day a small group which included Pound, Wigmore, Everett Wheeler, and William Draper Lewis met on the steps of the Minnesota Capitol to discuss what could be done about the problems. Three years later, a special ABA committee headed by Wheeler issued an unprecedented report making extensive recommendations to prevent delay and unnecessary cost in litigation. Three years after that, the American Judicature Society was founded to deal with such issues. Shortly thereafter, the ABA established its Judicial Section, now the Section of Judicial Administration. Finally, in 1923, this great Institute was founded with William Draper Lewis, one of that original Capitol steps group, as one of its earliest and brightest guiding lights. The Charter of this Institute reads in part that its purpose is "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of jus-

tice and to encourage and carry on scholarly and scientific legal work." The impact of Dean Pound's address is unmistakable to the historical eye.

As a profession, we now look back on Dean Pound's speech with pride as one of the high moments in judicial reform -- a catalyst to creative and conscientious work delivered by one of our own and pursued by many in our profession. But the rough reception his speech got from many in the bar at the time shows that its message took some time to be embraced.

It is not difficult to draw parallels between the content and spirit of Dean Pound's address and the recent speeches of the President and Chief Justice. And it is also not difficult to draw parallels between the immediate reaction of the bar to Dean Pound's speech and the recent reactions of the bar. In future years it may well be that we will look back on these speeches with the same respect and responsible pride that we now look back on Pound's speech of some 70 years ago.

I hope that our response as lawyers in the days ahead will be in the spirit of your charter and the rich tradition which you represent of our profession responding to challenges.