Department of Justice

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ADDRESS

BY

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BEFORE THE

MISSISSIPPI BAR CONVENTION

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BILOXI, MISSISSIPPI

It was kind of you to invite me here today, and I am honored by Senator Eastland's introduction.

Let me say at the outset that I am certain I speak for all of us in thanking him for his long service in the Senate and to our nation. He is a patriot in every sense and I will miss him.

We are friends of long standing and during the 17 months I have been in Washington, he has been of immense assistance to me and to the Department of Justice.

To begin with, he has supervised our entire legislative program in the Senate Judiciary Committee.

He has been interested in the needs of the Justice Department and the FBI. He has shown exceptional leadership in the confirmation process for Department officials and for nominees to the Federal courts. He is a wise man and welcome counselor.

There has been a growing movement for some years to give litigating authority to many government agencies. Senator Eastland has been instrumental in helping to preserve litigating authority for the Justice Department, where we feel it basically should rest.

In addition to general oversight of our legislative program, Senator Eastland has sponsored a number of important Justice Department bills.

The measures include the proposed reform of diversity jurisdiction and a landmark effort to develop a new arbitration program for the Federal courts. I will discuss

those at greater length later. In addition, Senator Eastland has sponsored amendments to the Federal Tort Claims Act, which we feel will be of great assistance to Federal law enforcement officers in the proper performance of their crucial duties.

I am grateful to Senator Eastland for all these efforts to improve the justice system, and I am particularly grateful for his friendship.

Let me turn now to a matter that I'm certain you are all keenly aware of -- the growing attention being paid to attorneys.

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.

At the Department of Justice we are moving to meet the 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 percent 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 Justices, 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 purusing at the Justice Department to meet these challenges.

Our major effort to make criminal justice fairer and more certain is in our support of the current attempt by Congress to recodify and reform the federal criminal code.

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.

A House Judiciary Subcommittee 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.

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.

Notable progress has already been made by 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. 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 percent 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.

Before moving on to other aspects of improvements in the selection process, I would like to mention a few things about the Judgeship bill.

Some eight years have passed since legislation was enacted to create additional district or circuit court judgeships. Yet, the workload of the courts has continued to increase by sizable proportions. To take one statistical example, the number of new cases filed in the district courts grew from 92,000 in 1950 to 172,000 in 1976.

A similar need exists for new circuit judgeships. Filings in the courts of appeals increased from 8,000 in 1967 to 18,000 in 1976. The numbers of filings and terminations per appeals court judge has about doubled in the past 10 years.

Of course, additional judges alone will not solve all problems.

We must also take steps which anticipate and cope with growth, and we have founded a number of important efforts at the Justice Department.

Another important matter also is involved in the Judgeship bill. It concerns proposals to divide the Fifth Circuit into two Circuits.

For a number of reasons, I favor creating a new circuit to be composed of at least Texas and Louisiana, with the Fifth Circuit to continue with Mississippi, Alabama, Florida, and Georgia.

Such a division will lend itself to the better administration of the court from an operations standpoint. In addition, the members of the court and the members of its bar will be better able to keep up with the law of the circuit. I am not persuaded at all by suggestions that this proposal will result in courts any less "federal" or less sensitive on issues of individual rights.

Creation of a new circuit of course is neither an ideal nor a long-term solution. I know of no ideal solution. If there were one we would all have agreed to it long ago.

In proposing that the circuit be divided I would ask that we not close the door on further long-term efforts to relieve these problems.

For example, the Department of Justice has been examining alternative structures for the appellate courts. In the future we may wish to come to the Congress with new proposals.

One additional question on this matter relates to whether Mississippi should be a part of the Fifth Circuit or the new Circuit. In terms of caseloads, it makes little difference. Mississippi contributes only a small portion of the caseload of the Circuit in any event -- ranging from 4 percent to 5.7 percent over the past five years. An essential point in my view is that the people of Mississippi desire to be a part of the new Fifth as proposed in the pending bill. This is reflected through their representatives in the Congress. I would agree to this.

It will make little, if any, difference from a philosophical or civil rights vindication standpoint. The Fifth Circuit today is generally considered to be one of, if not the most, liberal of the Circuit courts. And most of the 15 judges on the Court come from Florida, Georgia, Alabama, and Mississippi. This demonstrates the dedication of these judges to the Constitution and the law. Otherwise, the record of the Court would be different. Moving one state from one Circuit to another is a matter that rests entirely with the Congress. Thus there is little risk, if any, of irreparable harm simply from the placing of Mississippi in one Circuit rather than the other.

In the end it is not states but judges to whom we must look to safeguard constitutional rights.

I hope that the Judgeship bill does not become bottled up in Congress. We need to get on with vital work. We need more judges. I also agree with Senator Eastland's view that we need two circuits from the Fifth Circuit.

Let me return now to another aspect of improving selection of key justice officials.

We have begun to make 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.

A number of them are well advanced in Congress.

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. 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 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 -- in Los Angeles, Atlanta, 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 Center's 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.

The organized bar was instrumental in developing the concept of Neighborhood Justice Centers, as well as these three pilot Centers. It 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 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 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 in 1906 to the American Bar Association. Many in the bar missed its message, because of their reaction to its criticism. But, the speech had positive and lasting effects.

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.