Department of Justice

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INAUGURAL LECTURE

BY

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STRASBURGER & PRICE LECTURE SERIES
TEXAS TECH LAW SCHOOL

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LUBBOCK, TEXAS

I am honored to be the inaugural speaker of the newly established Strasburger & Price Lecture Series at this fine law school. While I was a judge on the United States Court of Appeals for the Fifth Circuit and when this law school was in its infancy, I became acquainted with the school's first dean, Richard B. Armandes. So the school is not new to me. It is certainly a step forward for this law school to have an established lecture series which will give its students, faculty and the lawyers of this area an opportunity to hear the views of the distinguished speakers that this series will no doubt attract.

I understand that the principal theme of the series is to deal with the area of trial advocacy. I was a trial lawyer for fourteen and one-half years before being appointed to the Court of Appeals in 1961. I then spent fourteen and one-half years on the busiest federal appellate court in the country reviewing decisions from federal trial courts all across the South. I returned to private practice in 1976 and remained there for just about a year before becoming Attorney General. Thus, I am well acquainted with the problems associated with the administration of justice in the trial courts. I would hope that through this lectureship series this law school can provide a meaningful forum for identifying and helping to resolve the issues connected with the fast, efficient, and economical delivery of justice that is so important to our judicial system.

It has been almost two years since I became Attorney General. I plan to outline for you today some of the things we have been doing during these two years toward improving the administration of justice and give you some idea of what our plans are for the coming months. I have always believed that lawyers have an obligation to work for the betterment of the judicial system, even if it sometimes means sacrificing short term benefits which in the long run are detrimental to the system. I have tried in my two years as Attorney General to be true to this belief. It is in this spirit that I have approached my job and that of the Department of Justice. The Attorney General and the Department of Justice must furnish sound leadership to this country's lawyers. I believe that in the past two years we have furnished this leadership and, perhaps more importantly, have reaffirmed a tradition of leadership that will endure in the Attorney General's office and the Department long after I leave.

The Department of Justice must be concerned with much more than investigating crime and prosecuting offenses and representing the government in court in civil cases. There must be a continuing, systematic concern with the judicial system as a whole. My first step in meeting this responsibility was the creation of the Office for Improvements in the Administration of Justice which was established in the Department of Justice in February, 1977. This was a recognition that the Department and the Executive Branch of the federal government have a responsibility for the quality of justice in this country.

To that end, we have been working since early 1977 to develop a broad and comprehensive program to combat the major ills that currently beset the justice system of the country. Perhaps because of my experience as a trial lawyer and a judge I know only too well that the efficiency and effectiveness of the courts are intimately linked to the enforcement of substantive legal rights and obligations. Our society's fundamental belief in equal justice under law will be in jeopardy if we do not address effectively the problems which continue to afflict the judicial system. Equal justice under law does not exist unless our people have access to justice -- access to a means of settling legal disputes which is convenient, prompt, effective, and available at reasonable cost.

Our justice improvements program comes in two parts, with several components in each. The first are legislative proposals. All were introduced in this past Congress and progressed to various stages in the two houses but were not enacted. All will be reintroduced in January and I believe we can achieve prompt enactment of these priority proposals. The second part of our program consists of a number of measures still under development but which we plan to have introduced in the next Congress.

Our "priority courts package" consists of four bills. Each enjoys widespread support in the Congress.

The first enlarges the civil and criminal jurisdiction of federal magistrates. Subject to the mutual consent of the parties, it authorizes magistrates to decide civil cases. This would speed the delivery of justice and improve the courts' ability to respond promptly in resolving disputes and help to reduce the delay and expense inherent in the system. Such a measure is vital if we are to meet the growing demands on our court system. The Magistrates Act passed both houses in the last Congress, but for procedural reasons unrelated to the merits of the legislation it did not emerge from the conference committee.

The second piece of legislation in this priority group would limit the diversity of citizenship jurisdiction of the federal courts. The bill we proposed eliminates a plaintiff's right to initiate a diversity suit in a federal court in his home state. Enactment of that bill could reduce by upwards of one half the number of diversity cases now filed in the federal courts. The House of Representatives passed a bill going even further than this by abolishing general diversity jurisdiction altogether. A bill of that sort will be introduced in both houses next session. The Conference of State Chief Justices, the Judicial Conference of the United States, and numerous other groups support reform of diversity jurisdiction. The only opposition to a step in this direction came from some groups of trial lawyers and the American Bar Association. It is understandable that trial lawyers want to have a choice of forums. But this attitude is inconsistent

with the broader public interest in an effective justice system and in the long run will be to the detriment of the legal profession. I am urging the lawyers of the nation to join the Department of Justice in supporting a modification of diversity jurisdiction.

The third measure is a proposal to use arbitration in the federal courts for certain types of civil cases involving money damages only. Here is a good illustration of how the federal courts can profit from the experience of the state courts in the use of innovative techniques. This legislation is modeled on arbitration plans already being used successfully in several states. It would allow federal district courts to adopt a procedure requiring the submission to arbitration of tort and contract cases involving less than $100,000. Three federal district courts are now testing the process under local rules. It is already clear that both litigants and the courts are profiting from the procedure; cases going to arbitration are being resolved faster than they otherwise could be and at less expense to the parties.

Although the bill provides for mandatory arbitration it does not make the arbitrators' decision binding. Either party, if dissatisfied with the result, maintains the right to return to court and get a jury trial. Arbitration provides a fair, prompt, and less costly means of resolving certain types of disputes. Its use in selected types of cases must be increased if courts and our judicial system are to withstand the onslaught of the public's desire for dispute resolution by some neutral

body as opposed to resolution by simple agreement of the parties concerned.

The final item of this priority package is a bill that converts the Supreme Court's appellate jurisdiction almost entirely to a certiorari basis. This bill eliminates obligatory appeals except in three-judge cases. Opposition to this approach has yet to surface. This would give the Supreme Court greater control over its docket and thus foster a more economical use of the court's resources. The distinction between discretionary review by certiorari and review of right is artificial anyway, and there is no reason not to get rid of it.

Enactment of these four bills would be one of the most significant, comprehensive steps ever taken by Congress to improve the functioning of the federal judiciary. Without question, this is necessary if we are to avoid having to return to Congress within a few years to ask for still more judges. The Omnibus Judgeship Bill just passed must be regarded as only the first step in improving the delivery of justice in the federal courts. Standing alone, it is simply not enough.

In addition to these four priority bills our justice improvement program consists of various other proposals still in the developmental stage. I will mention only a few of the more important.

Medical malpractice problems are high on our agenda. These problems have reached troubling proportions in several ways: the cost of medical care is substantially increased;

inflation is fueled; and expense and delay in litigation are exacerbated. The cost of malpractice insurance adds considerably to the cost of medical services to the people of the country. Last year the nation's hospitals alone spent approximately 1.2 billion dollars for malpractice insurance. This represents a six-fold increase over the past five years. The malpractice costs by themselves add approximately $5 per day for every person who requires hospitalization. Moreover, existing litigation procedures do not always assure that meritorious claims are compensated or that physicians and hospitals are adequately protected against unmeritorious claims.

In an effort to get at this problem, we will send to the Congress a proposal to improve the process for resolving medical malpractice claims. The experience of several states shows that patients, doctors, and hospitals all benefit from a system that provides screening of malpractice claims and which is tied to improved professional discipline procedures.

The use of screening panels provides a means of weeding out unfounded claims and encouraging prompt and fair settlement of those which are meritorious. We are going to propose national minimum standards for procedures to resolve malpractice claims. Within those national standards, the states would be free to shape individual systems to fit local needs and conditions. We believe this proposal would have a substantial effect in both reducing the cost and improving the quality of medical care.

We are also examining the possibility of comparable programs for other professions, including the legal profession, and we may be presenting additional proposals in the future.

Other ideas currently under development include a proposal to create a new federal intermediate appellate court by merging the Court of Claims and the Court of Customs and Patent Appeals into a single U.S. Court of Appeals. The appellate jurisdiction of those two courts would be retained. It would also have jurisdiction to hear all appeals from throughout the country in patent and trademark cases, civil tax cases, and a few other categories of cases. Studies and testimony of recent years indicate that patent and civil tax litigation have produced especially troubling problems of unevenness and uncertainties in the administration of federal law. A major function of the new court would be to enhance nationwide uniformity in patent and tax law.

Unlike other proposals over the last decade for a new court of appeals, this court would not be an additional fourth tier within the federal system. The new court would be on the same level with the regional courts of appeal. Its jurisdiction would be fixed by Congress and could be varied from time to time in response to changing needs.

Class actions present some of the most difficult procedural problems now afflicting the courts. The Office for Improvements in the Administration of Justice has spent more than eighteen months studying these problems and working to develop better procedures for class damage suits and has

developed a bill which would substitute two new statutory procedures for Rule 23(b)(3). Although not yet formally approved by the Justice Department or the Administration, an initial round of exploratory hearings were held in the Senate Judiciary Subcommittee on Improvements in Judicial Machinery.

There is little doubt that comprehensive revision of the current procedures is needed. Class damage actions produce unmanageable, protracted, expensive litigation. They have also produced thousands of pages of ambiguous and conflicting case law. Current procedures have been needlessly criticized by everyone involved with them: plaintiffs, defendants, attorneys for both sides, and trial and appellate judges.

What I have described for you here is only a small portion of the work in which we are engaged to improve the administration of justice. Among the other subjects we have under study are possible modifications in the Speedy Trial Act, better means of providing federal review of state convictions, suggestions for the shifting of attorneys fees in litigation with the government, and other measures to reduce cost and delay. For the first time in our history we have undertaken to provide in the Executive Branch the resources for continuous, systematic attention to the needs of the nation's judicial systems. I have given the Office for Improvements in the Administration of Justice a broad mandate to pursue the problems comprehensively and it is doing that. We are putting forward for the consideration of the Congress and the country a coordinated program on justice improvements and not simply a

collection of unrelated proposals. The problems are so substantial and pervasive that they must be attacked in this integrated, comprehensive way.

I have spoken about court reform, but that alone will not be sufficient to improve the quality of justice in our courtrooms. We must also work on improving the quality of the lawyers who practice in those courtrooms, and we are doing that in a major new effort in the Department of Justice.

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 that first year some 200 Assistants completed the basic course. In 1976, the year before I became Attorney General, only 247 Assistants and staff lawyers in the Justice Department were trained.

During 1978, we tripled the number of young attorneys who took the basic advocacy course, reaching the record number of 660. Of these, 418 were Assistant U.S. Attorneys and 242 were young attorneys from our litigating divisions. In addition, the Advocacy Institute conducted 16 separate advanced courses that trained over 1,000 lawyers in the Department. These specialized courses covered such diverse federal subjects as program fraud, surface mining, public corruption, and FOIA litigation.

We have received overwhelming praise for the Institute's programs and have therefore laid the plans for substantial

curriculum expansion of the basic trial course in 1979. Those plans are still being worked on, but I can discuss with you today the outlines, so that you may follow our progress and perhaps model your own courses in continuing legal education on the Institute's example and on the other fine program I know of, the National Trial Advocacy Institute, and hopefully some of you will consider coming to work at the Department and participate first hand in this program.

Our basic trial course is only one week in length now, but we hope to expand it to two weeks in length for Part I and an additional week about six months later for Part II.

Part I, the first two weeks, will consist of two six-day sessions. The first four days of each session will be divided into morning and afternoon components. There will be morning lectures by our instructors on such standard subjects as documentary evidence, opening statements and summations, and other practical "nuts and bolts" subjects. Each afternoon the students will then break up into smaller workshops to practice what they have learned using videotape equipment, so that the students can see themselves performing. The students are divided between a civil course and a criminal course, so that their training is most appropriate for their practice.

Part II is set for about six months after the students have finished Part I. In those months, the young attorneys will have had an opportunity to use their initial training "in the field" and to accumulate experience from which they will have further questions. Part II is intended to be

conducted in seminar fashion, so that the instructors can address those questions in detail. They will also examine the special problems of modern federal practice, such as jury misconduct or extensive voir dire, and the unique types of cases which are handled by the Department, such as racketeering or environmental regulation.

In addition, we plan to continue giving advanced courses for our attorneys. These courses assure us that the Government's lawyers are as good and as well-trained as any lawyers they will face from the private sector, thereby guaranteeing that the public interest will be fairly and firmly represented.

I might add that the turnover of the Department's attorneys is, as should be expected, substantial. In allocating these resources to train our lawyers -- which is a very small item in our Department's budget -- we are investing in the future of the legal profession as a whole. What we teach our young lawyers will, in turn, be taught by them when they enter private practice. In this way we hope to improve trial advocacy in the bar generally.

We need the help and cooperation of the bench and the bar of the country. While it is undeniably true that some segments of the profession have persisted in opposing needed reforms, it is also true that many others have been in the forefront of creating, proposing and supporting much needed improvement.

Canon VIII of the Code of Professional Conduct expressly requires every lawyer to work to improve the system. Many lawyers, however, are caught in a serious conflict of interest with this Canon. They are often so submerged in their client's interest or their own economic interest that they find it impossible to consider the public interest in a balanced, effective justice system.

If the system does not work for the ordinary citizen, if costs and delay continue to grow, then more and more people will face an effective denial of justice. The practicing bar in its own enlightened self interest cannot afford to obstruct efforts to bring our justice system in line with the circumstances of the times. Thus I call on you to join with us to help bring about those changes which will make the administration of justice fairer and more effective for all Americans.