Department of Justice

FOR RELEASE UPON DELIVERY
FRIDAY, APRIL 9, 1976

ADDRESS

BY

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BEFORE

THE NATIONAL CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE

8:00 P.M.
FRIDAY, APRIL 9, 1976
ST. PAUL RADISSON HOTEL
ST. PAUL, MINNESOTA

Mr. Chief Justice:

To summarize the views expressed on Topic One is to add my voice to what is now a thrice told tale. The organizers of this conference have taken a leaf from the oldest truth in education, or perhaps their model is appellate review. Anyway they obviously believe in the value of repetition.

I will attempt to describe primary themes, to identify points in common and differences in emphasis and views. The topic itself suggests that courts, or some courts, may be engaged in the resolution of disputes they are not well equipped to resolve, or that other institutions could resolve these kinds of disputes more efficiently and effectively. But the immediate phenomenon of concern is that the number of suits submitted for judicial resolution has increased dramatically. In addition, it is said litigation has become increasingly complex. Taken together, all panelists agreed that at some point the torrent and complexity of litigation may prevent courts from devoting to those matters, as to which their exercise of judgment is criticial, the necessary attention and care. Indeed it is suggested that increasingly courts are finding it difficult to act in their best tradition. For example, they are not alowing oral argument; they are deciding frequently without opinions. I believe all would agree that the courts exemplify

the reasoning tradition, of the application of standards to particular situations and do this in a way, as the Solicitor General said, that there is an accountability which comes at least from explanation.

Because of the volume of suits and their complexity, delays in the administration of justice have occurred. Judge Rifkind said that for some plaintiffs in some kinds of cases, the delaying effect of litigation may be the primary, perhaps the sole, reason for filing suit - simply to delay and impose expense on the other party. As Judge Higginbotham emphasizes in his paper, delay in litigation adversely affects not only the litigants, but also others - witnesses and jurors - who become involved in the system. Delay may allow the commission of further crimes or illegal actions by the defendant. Another consequence of delay and of the expense of complex litigation, Professor Sander wrote, is that potential litigants may be driven to avoidance; that is, to withdraw from situations likely to create disputes, that can be resolved only by resort to the courts. Such avoidance may entail heavy social or individual costs. Several speakers emphasized that costs and delays discourage potential plaintiffs from attempting to get redress for legal wrongs.

Contributing to the number and complexity of suits is the change in the use of the courts. It was suggested the traditional model of the judicial process - a dispute between two parties resolved through the adversary system with an allocation of the burden of proof and with the judgment directly affecting only the immediate parties - has, in substantial measure, collapsed. Courts now often are engaged, not in dispute resolution in this traditional sense, but in what Judge Rifkind termed "problem solving." This may be in part the result of the attempt to carry the burden of multiple litigation. Dean Griswold suggested the basically wise provisions for class actions may have been overextended. The tendency, perhaps the necessity, of dealing with disputes en masse and of providing mass remedies can profoundly affect the reality of the substantive law and its evolution. According to one account, this tendency has led, for example, to practical elimination of the reliance element in securities class actions; it has also led, I suggest, to the development of remedies like affirmative action in employment, imposed originally as an evidentiary device to compel compliance with anti-discrimination decrees, but now perhaps a measure of the substantive wrong itself.

The "problem solving" model of the judicial process was related not only to the mass-parties mass-remedies phenomenon, but also to the kinds of issues courts are called on to resolve. Courts have become, Judge Rifkind said, "jacks of all trades," dealing with extended variants of what Professor Sander termed "polycentric problems," which can implicate wide-ranging social and economic interests not fully or, conceivably, at all represented by the adversaries in court.

Procedural and substantive changes may be essential if the courts are to be effective and efficient. But the question then is the cost of what has been given up and whether other remedies are available. This is of course true of all the remedies suggested.

The vast growth in the dimensions and subjects of governmental concerns is undoubtedly among the chief causes of the increase in the volume of judicial business. The expansion of governmental concern may be in part the product of the decline in private institutions -- the church, the family, and the community were mentioned; one might add the schools -- that once imparted values and so controlled conduct. one of the consequences of that decline may have been the increase in the rate of crime, a phenomenon which unquestionably has played a major part in the burden on the courts.

There has been an increasing turning to the courts by the legislature. Not only have new categories of legal obligations been confided to the courts for enforcement, but obligations come surrounded with legislative indefiniteness. The turning to the courts is evidenced in the legislative use of the courts as a means of monitoring the activities of the executive by insisting on judicial review, and through the device of private litigation against government, encouraged by both the courts and the legislature, to attempt to ensure conformity with a vague legislative will or to give new substance to individual rights.

Pound recognized the need for new governmental instrumentalities and social action in his remarks seventy years ago. Pound spoke, as Judge Higginbotham reminded, of the courts' posture, then, in thwarting legislative attempts to remedy social and economic injustice - a posture altered only through the long history of legislative effort and judicial reappraisal. All three panelists emphasized that the situation, whatever the dissatisfaction with the administration of justice may be, is vastly different today; they differ somewhat in their appraisal of the present and indeed of the past. All would recognize, I suppose, that the courts today have not stayed legislative

reform, at least in the areas of concern to Pound; they have not in the same sense created a void equivalent to a no-man's land for social regulation.

But new constitutional rights do ban certain kinds of legislative action; traditional and present doctrines do ban some legislatively attempted remedies. Referring to these rights and doctrines, Judge Higginbotham suggested that Pound in important respects, overlooked injustices which should have been recognized as causes of dissatisfaction. Judge Higginbotham described, in particular, the legal development between Pound's time and our own, in the fields of race relations and the rights of women and voters. His point was that the courts, in upholding or ratifying state actions and attitudes that denied fundamental rights, participated in creating the conditions that have since taken extended efforts, including those of the judiciary, to remedy. Several speakers emphasized the growth in the use of the courts as mediators between the government and individuals or groups, and observed that the courts now have moved to fill voids created by the default or failure of other governmental institutions -- particularly the failure to respond to the demands of individual rights or to take positive steps to achieve social justice. At this

point one must recognize that concepts are slippery -- one agency's determinations may be viewed by another as default. The question cuts deep. It raises the issue of ultimate responsibility.

Another kind of legislative lapse was described -- the failure to take steps to remove from the courts, through appropriate changes and simplification of the substantive law, categories of disputes where judicial resolution is now unnecessary to the public interest. It was suggested that there has been a comparable failure by the courts to take sufficient steps, when they can, to simplify procedures and also to establish clear substantive rules that, as Dean Griswold said, could be administered elsewhere, including in the lawyers' offices where understanding and explanation are essential to the system. Moreover, as Judge Rifkind said "when law is so unpredictable that it ceases to function as a guide to behavior, it is no longer law." Lack of clarity in the scope and application of the law is one of the primary generators of disputes.

In short, the speakers described a spreading judicialization of relationships, the enlargement of the use of governmental power to control and channel private activity;

the concomitant increase in the necessity of creating and enforcing limitations on that power, and the increased use of the courts as the instruments to those ends. We are in what Grant Gilmore has termed a "romantic period" of the law's development, a period of instability about its reach, content, and dimensions. Perhaps it is right to say that the expansion in the law and in use of the courts is a mark of judicial success and that dissatisfaction came not because judicial decision was too often invoked, but, (because of delays and expense,) it could not be invoked often enough.

Judges, particularly under the rule of constitutional judicial review and the American tradition, are, in a special sense, law makers. They always have been. Access to the courts, in comparison with so much of the rest of government, is relatively easy. The court can be the target or focus for action, and that they are. Lawyers often find that target a more attractive one than efforts to reach other law making bodies. The courts can be compelled or at least are willing to decide complex issues as a matter of law or right, in circumstances in which the legislature or executive has avoided or deferred decision, perhaps because the legislature or executive has determined that the data for decision are unavailable, or has decided governmental action should not reach that far.

At the same time the judicial remedy may raise expectations and generate dissatisfaction when the expectation is not fulfilled. Indeed dissatisfaction may result even when the expectation is fulfilled in this way. If we move from a consideration of the most effective administration of justice to an inquiry into the sources of dissatisfaction, then I think we have to admit we are in an area where the creation of some remedies, or the way they are created, may spread feelings of dissatisfaction. It is one thing to improve by legislation the social organization of the state; it is another thing to accomplish reform by a court-created constitutional condemnation of prior behavior as violative of the fundamental rights of man. This does not mean the condemnation has not been properly given; it does mean that a powerful weapon has to be used with care.

The conference, I believe, came quickly to a realization there was no one overall cure which should be used to answer the problem of the overcrowding of the courts, and the attendent issues of the costs of litigation, a possible decline in judicial standards, and thus a change in the quality of justice. As part of the answer, Judge Rifkind and Professor

Sander focused on an analysis of the nature of the judicial process and an identification of its distinctive features. On the basis of this traditional model, it was suggested that the jurisdiction of courts be preserved for those disputes that they have historically handled best -- the resolution of concrete disputes where the law is unclear. By contrast, where the task is largely ministerial or routine, involving the repetitive application of settled principle, then some other form of dispute resolution mechanism should be substituted. Through this allocation, the courts would retain their primary role as a formulator of positive law.

The second principle to guide reform was that courts should continue as the protector of basic constitutional or human rights. Judge Higginbotham and others placed primary emphasis on this point, noting that individual rights would go unprotected if courts were to be removed from this area. They called for an inquiry as to whether proposed reforms might work to the disadvantage of the poor, the weak, and the powerless. I think it is correct to say that other panelists, commentators, and small group spokesmen expressed agreement with the point. Although doubts were expressed about the competence, resources or remedial powers of courts to run mental hospitals,

schools or welfare departments, there was consensus that courts cannot decline jurisdiction where serious denials of constitutional rights are at issue. The example repeatedly mentioned was Judge Johnson's order in the Wyatt case placing the mental health system of the State of Alabama under the supervision of the federal court.

There is tension among the criteria presented for judicial reform. There is doubt about the courts' competence or authority to become a problem-solver for society and a desire that courts confine themselves to their traditional role. At the same time, there is great reluctance to deny access to the courts, or to deny protection of rights when, as it is said, other institutions have defaulted. The tension is understandable. But the dilemma of what happens when the theory meets an actual situation seems to point to a defect in our governmental structure.

Several speakers addressed the most obvious solution to the problem of court overload -- increasing the number of judges. An immediate need for additional judges was recognized. Professor Johnson described the relatively low investment in judicial resources in this country, compared to other industrialized societies. But the view was expressed

that increasing the number of judges could not be a long-range solution to the problem. It is difficult to find a sufficient number of judges qualified by experience, intelligence, and judgment to perform the demanding task of a judge; increasing the number of judges will affect their prestige, making it more difficult to persuade outstanding lawyers to accept the great responsibility and lower salary of judicial office, (even though the point was made, as I recall, that judges were paid more than some physicists) A decline in prestige of judges may also affect the respect in which their decisions are held by the general public.

An effort must be made to achieve greater clarity and simplification in the law. Judge Rifkind commented on the excessive complexity of laws relating to securities, antitrust, and taxation. Much could be done to reduce the caseloads of courts if legislation were more carefully drafted, or if the operation of legal rules were simplified. A more mechanical legal rule would also allow disputes to be resolved by a clerk or some other non-judicial mechanism.

Another approach would be to adopt new ways to deal with certain social problems to remove the need for judicial

resolution. Several speakers advocated the no fault approach to personal injury claims, and suggested the extension of workmen's compensation laws to cover seamen and railroad workers. At times it was suggested that all negligence cases be removed from the court system, on the stated theory that an alternative was available and that accidents were a necessary risk of our society. Perhaps I may be permitted to remark it was this recognition of the risk as well as a belief in the effect of responsibility which created the law of negligence in the first place. Another possibility, mentioned by Judge Rifkind, is the British practice in handling corporate take-over disputes. The divorce laws, and the attendant laws governing alimony and property settlement, were also identified as possible areas for simplification. Finally, there were areas that do not warrant governmental intervention at all. It was suggested that "decriminalization" should be considered for certain "victimless" crimes, such as drunkenness, prostitution, and gambling. It was questioned whether such behavior is still an appropriate subject for governmental regulation, or at least for regulation by the courts.

Procedural reforms were proposed, including the way the issues in a case might be sorted out and priority given. The increased use of alternate dispute-resolving mechanisms was emphasized. Mediation and conciliation were thought by

Professor Sander to be especially appropriate for disputes that arise in long term relationships. He also suggested the use of ombudsmen. Special emphasis was given to arbitration - a form of adjudication, but more informal. Indeed, there was a suggestion that arbitration clauses in contracts be required. Screening devices were discussed as means to filter out frivolous cases or to encourage settlement at the start of the court process. Some of these devices involve the allocation of litigation costs. Judge Rifkind, for example, mentioned the English practice of imposing the expense of attorneys' fees on the losing party, but noted that our history is opposed to such a rule. Other devices involve the requirement of posting a bond for defendant's costs. Professor Sander described the Massachusetts system for medical malpractice cases under which a plaintiff, before being allowed to proceed further in the court process, must convince a three-man board, composed of a doctor, lawyer and trial judge, that his claim has "prima facie" merit or, failing that, post bond for the defendant's costs. Professor Sander also described the Michigan Mediation System, under which a panel of a judge and two lawyers determinesdamages in tort cases in which liability is acknowledged. If the plaintiff or defendant refuses to settle

for that figure determined by the panel, he is taxed for costs and attorney's fees, unless the judgment is substantially more favorable to him than the panel's estimate. Judge Rifkind suggests that a civil litigant be required initially to show "probable merit" in his claim before the case proceeds to lengthy discovery and trial. He also mentioned the variety of gates (traditionally used, although perhaps somewhat battered) to exclude some would-be litigants from the courthouse.

It was recognized that these screening devices are in tension with the notion of free access by aggrieved citizens to the courts. Care must be taken to ensure that a screening device does not work to exclude individuals for adventitious reasons. The importance of judicial resolution, to society as well as the litigant, may have no relationship whatever to the size of the claim. Professor Sander added the further point: The creation of alternative dispute resolution mechanisms may result in an actual increase in the number of disputes to be resolved governmentally. The availability of these mechanisms, including those non-coercive in nature, may serve to "validate" claims. This may induce individuals to invoke the mechanisms even in cases where private negotiation

and compromise would eventually have produced a resolution satisfactory to the parties. The very availability of alternate dispute resolution mechanisms may result in more disputes to be processed, if not by the courts, then at least by governmental institutions. I assume there may be responsibility, which ought to be thought about, for creating less, not more, disputes in our society. There is another side to this, but I do not think the question is an easy one.

Dealing with the particular problems of the federal judiciary, several speakers advocated elimination or reduction of diversity jurisdiction and use of three-judge courts. The Solicitor General proposed a novel system of special or administrative courts to deal with the large volume of repetitive cases that arise under certain federal legislation.

Several speakers agreed that a major part of the solution to the problem of court overload lies in encouraging the legislative and executive to remedy their defaults, which have led to judicial intervention, and to change the manner in which they respond to difficult social and economic problems. In Judge Rifkind's words, "the courts should not be the only place in which justice is administered." The difficulty, however, is that if the government is involved, as it has been

in the recent past, then the courts are likely to be involved. Perhaps what is intended is an emphasis on those solutions which can be carried out ministerially, or on greater reliance on the private sector in response to new rules, or on statutory revision which itself clarifies existing legislation or does away with abuses.

From the description of the points made, the ideas advanced in yesterday's discussion, one point is evident. The discussion, like the topic, touched on an enormous range of phenomena. The phenomena and the problems undoubtedly vary, from the federal system to the states, and among the states. In the description of the problems, we may be giving, as Professor Nader suggested, only a soft look. The data are soft; we should look for better. As Professor Nader knows, however, it is not easy to get the data. The softness may extend to assumptions of judicial success, as well as failure, to public satisfaction as well as dissatisfaction.

Perhaps Dean Pound was right in his suggestion, seventy years ago, that the growth of government action was the inevitable consequence of an advanced and increasingly interdependent society, generating and accelerating the development of what Dean Pound termed "the

collectivist spirit of the age." In many cases, the government has proved to be an instrument of progress, and its intervention has been necessary to the resolution of complex social and economic problems.

I think there would also be agreement, however, that not all aspects of modern society or individual action are best controlled by the government. Many of the great injustices in our history were caused or confirmed by governmental action. The assumption that government by its nature will inevitably be an instrument of good, or that its judgments will always be wise, is not the necessary product of experience. So, too, our history disproves the notion that private institutions cannot also be effective agents of progress and justice. That there are areas where progress is accomplished non-governmentally is a thought that comes easily, if I may be permitted to say this, to the former president of a private university. Diversity and creativity have at least an alternative home in the private sphere. When the President of Columbia University says to this group, not entirely in jest, that he has been sued frequently for doing his duty, he is making this point.

I believe we must recognize that courts can become, not agents of progress, but an obstruction to progress. Judicial entry into an area previously reserved to the legislature may displace the legislature as the primary formulator of social policy. Professor Nader's soft data point bears on the formation of rights and remedies. Change on many fronts must be tentative, experimental- qualities that can characterize legislative solutions. Constitutional rules move much more in the realm of the absolute. Moreover, the effect of judicial assumption of these responsibilities can be that the legislature and executive will refrain from serious discussion and decisive action with the risk-taking which responsibility imposes. Where the decisions are difficult, there is always the temptation to avoid confronting them, to let that responsibility pass to others. Even where there is the possibility for legislative and executive resolve, the "freezing effect" of the constitutional rule imposed by the courts may frustrate an effective response by these institutions.

Responsible democratic government has a duty to articulate our goals as a society, although certainly not all the goals for private individual or even for all collective action. In a special way, courts share in that governmental responsibility. The mission of courts involves not only the resolution of disputes

but also the explication of the general principles that inform decision. Those principles are grounded in law, but their meaning is often an evolving one, influenced and shaped by the changing circumstances of their application. The nature of the judicial process requires that courts proceed with care, through articulated reason, in applying these general principles and rules. The process of change is slow, interstitial, in the fashion of an artist creating a great mosaic, as Judge Rifkind described it. These qualities are important, for they are the qualities of a reasoning society, which ours is supposed to be. To demonstrate and exemplify this is an important role for our courts. Change, of course, does not always come this way in the courts. Constitutional law, while it is a great common law, sometimes has more abrupt and decisive turns. Yet, an important reason for the respect in which courts are held is the perceived constancy of the principles which govern them and which they apply.

The present reality, as described by the panelists, is that the courts are now deluged with business. It may well be that courts are no longer able to discharge their traditional function but will be required instead to assume a new role. If so, the loss will be great. Courts are like other important

institutions in American life; they share the commitment to attempt to achieve appropriate excellence. There are times, however, when the nature and processes of institutions must change because their responsibilities must change. This has been the case with other institutions in American life and it may also be the case with the courts. It is possible, after all, to conceive of courts as mini-legislatures. But if courts are to function as mini-legislatures, then they must adapt to the requirements of the political process. Public opinion and political responsibility inevitably become important factors in the decision-making process. This is always the case, but the change will make the courts more vulnerable, and their service to the country will be of a different kind. One has to weigh the costs.

Dean Pound observed the deficiencies in American jurisprudential theory. He created a jurisprudence of interests that took into account the ideal of social engineering. A major difficulty today has been the lack of discussion within society as to the basic problems we face. Our political institutions have often placed a premium on ambiguity in policy formulation, an ambiguity which is itself a cause of our present dissatisfaction.

The responsibility thereby placed on courts-to discover and implement social policy-is certainly difficult if not intolerable. There is an exigent need for our other institutions -- and not only governmental -- to clarify paramount issues and to develop remedies which work with least social cost. If the courts are to become problem solvers, and not dispute solvers, then perhaps one has to think of new kinds of cooperative inter-relationships among the courts and other agencies, governmental and private, which would be improper or strange if courts maintained their traditional role.

I feel compelled to note that our society presently finds dissatisfaction a powerful motive force. Ironically, it finds a certain satisfaction with dissatisfaction. The panelists have been eloquent on some of the matters to be dissatisfied or at least worried about. There is some reassurance in knowing that we are not complacent. There is great wisdom in having the opportunity to rethink our direction, although the nature of government often makes that process difficult. There is always the danger that the purpose of reassessment will be misunderstood. It is regrettable that the world is such that proposals for judicial reform today must always be followed by the disclaimer that the proposals are not a suggestion that deprivations of human rights be countenanced.

They should not be. Courts must continue to be, as they have been in the past, indispensable prosecutors of our basic freedoms. They have accomplished much, and they are highly regarded for that work. But the problems we face as a society are often not susceptible of judicial resolution. To rely on the courts alone, or even primarily, for the solution to our problems may itself be to countenance our eventual default, as a people, in our commitment to the establishment and preservation of equal justice for all.