REMARKS OF THE ATTORNEY GENERAL
NINTH CIRCUIT JUDICIAL CONFERENCE
HOTEL DEL CORONADO
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It is a pleasure for me to meet with such a distinguished group of jurists and attorneys at the judicial conference of what I consider my "home" circuit. One of the main purposes of circuit conferences is to facilitate the exchange of views on judicial administration between judges and practitioners.

I am reminded in that context of an old story about a novice attorney and the guidance given him by a veteran trial judge. The judge had just appointed the fledgling counselor to represent an indigent defendant in a criminal case. The attorney was happy to have the work, but confided to the judge that he was inexperienced in criminal matters and did not know how to proceed in representing his new client. The judge smiled and assured the attorney that he would have no problem.

"Just retire with the defendant to that private room over there," the judge advised, "learn all the relevant facts, and then give the defendant the best advice you can."

The attorney and the defendant went into the room, but after a half hour only the attorney emerged. The bailiff rushed into the room to find an open window and no defendant.

"What on earth have you done?" demanded the outraged judge.

"Well," responded the lawyer, "I did just what you told me to do. After I learned all the relevant facts from my client, I gave him the best advice I could."

I'm confident that the exchange of views between judges and lawyers at this conference will have more beneficial effects than it did in that story.

One area that concerns all of us who are interested in the administration of justice is the burgeoning caseload of our federal courts. Since 1960 annual civil filings in the district courts have more than tripled.

In the same period appeals increased seven-fold. And the trend is continuing unabated. For the twelve-month period ending this March thirty-first, civil filings were up 12 percent and appeals were up 11 percent over the previous twelve-month period. In the Ninth Circuit, district court civil filings were up 8 percent and appeals were up 7 percent. In just the last five years appeals in the Ninth Circuit have increased by almost fifty percent.

These seem like dry statistics, but the judges in this room know what they mean in real terms. District judges today process fifty percent more filings than they did in 1960, and court of appeals judges hear four times as many cases as in 1960. Under the guidance of Chief Judge James Browning, the judges on the Ninth Circuit Court of Appeals have taken steps to increase their individual workloads even further and more efficiently dispose of the cases presented to them. The growing burden, however, is bound to have an effect on the judicial product and the quality of justice administered in this country.

The problems have not escaped the attention of the Department of Justice. We are actively supporting a wide range of legislative initiatives which will, if enacted, significantly lessen the burden on the federal courts. We support the abolition of diversity jurisdiction, which accounts for a quarter of the civil filings in the district courts and about 14 percent of appeals in the circuit courts. Leaving state law matters to the state courts is in accord with the federalism principles at the basis of this Administration's legal philosophy. There is no longer any persuasive rationale for diversity jurisdiction, and its abolition would free the federal courts for their primary task of interpreting and enforcing federal law.

We have also proposed a major revision of the federal habeas corpus laws, to impose a statute of limitations and provide that issues fully and fairly litigated in state court not be subject to relitigation in federal court. Our purpose is to restore finality in criminal law, but an incidental effect would be the removing of an unnecessary burden on the federal courts, since state prisoners filed over 8,000 habeas cases in federal courts last year. The only thing to commend the vast majority of those cases, to paraphrase Judge Learned Hand, "is the hardihood in supposing they could possibly succeed."

We are also considering the proposal to create special tribunals to decide certain types of factual disputes arising in the administration of welfare and regulatory programs. The resolution of many such disputes does not require the resources or expertise of an Article III court. The creation of such tribunals was proposed over five years ago by a Justice Department Committee headed by Judge Bork. The growing caseload of the federal courts makes renewed attention to the proposal imperative.

Attention must also be given, however, to the root causes of the litigation explosion. As the Chief Justice remarked in his most recent annual report on the judiciary, "Americans are increasingly turning to the courts for relief from a range of personal distresses and anxieties" which had previously not been considered the subject of legal redress. The problem is caused in large part by Congress, which legislates without sufficient thought to the burdensome litigation it may engender.

In part, however, the judiciary has over the years brought this overload on itself. The judicial activism that has characterized the past two decades has invited far greater use of the courts to address society's ills. Through loose constructions of the "case or controversy" requirement and traditional doctrines of justiciability -- such as standing, ripeness, and mootness -- courts have too frequently attempted to resolve disputes not properly within their province. Other judicially created doctrines, such as expanded constructions of the judiciary's equitable relief powers and the multiplication of implied constitutional and statutory rights, have also invited more and more federal litigation.

Stopping and reversing the expansion of litigation in the federal system clearly requires the Congress and the Executive to re-visit some of the legislative and regulatory schemes that have given rise to large numbers of cases. It also requires greater doctrinal self-restraint by the courts themselves.

A major response to the rising caseload came in 1978, when Congress passed the Omnibus Judgeship Bill and provided 152 new federal judges. The effects of that bill are now being seen in a rising number of terminated cases emerging from the Courts of Appeals. In the twelve-month period ending March thirty-first, the Ninth Circuit terminated 17 percent more cases than in the previous twelve-month period. Nationwide the courts of

appeals terminated 14 percent more cases. That is, of course, good news. The whole idea of the new judges was to enable the courts to cut down some of the backlog that had been developing. The combination of steadily increased filings in the courts and the new availability of more judges to process them, however, has brought forth a new problem in the administration of the federal courts. Simply put, there is a serious question whether the Supreme Court will be able to keep up with the growing volume of cases decided by the lower federal courts.

In the term just completed, the Supreme Court decided 180 cases by full opinion -- an 18 percent jump from the previous term. During last term the Justices accepted some 210 cases for argument -- up 15 percent from the previous term, and up 36 percent from the term before that. The court has available for argument next term 24 more cases than it had at the start of last term, and an astounding 48 more cases than were available at the start of the term before last. The message behind these statistics is clear: the Supreme Court is being compelled to accept and decide more cases than ever before.

This problem was both predictable and predicted. Writing in 1978, the Chief Justice noted: "When the 152 newly created federal judgeships are filled and operational, decisions of those judges will likely generate a significant increase in cases subject to review on appeal or certiorari in this Court." That has in fact happened, and the ultimate result has been the further taxing of our most valuable and most limited judicial resource, the Supreme Court.

The increased burden on the Supreme Court cannot, of course, be met as the burden on the lower courts was, with the addition of more judges. The ability of the Supreme Court to decide cases is finite; the Court can adequately consider only a certain number of cases. Justice White has stated that the Court is performing at full capacity. As he put it, "we are now extending plenary review to as many cases as we can adequately consider, decide and explain by full opinion." What is truly disturbing about that statement is that it was made four years ago, during a term in which the Court disposed of 19 fewer cases by full opinion than it did last term and disposed of 600 fewer petitions.

I submit that this is a very troubling development for a judicial system dependent on the Supreme Court for

the final and authoritative resolution of questions of federal law. In the words of the Chief Justice:

> "It is not a healthy situation when cases deserving authoritative resolution must remain unresolved because we are currently accepting more cases for plenary review than we can cope with in the manner they deserve."

Not only may inter-circuit conflicts remain unresolved, but individual circuits may develop whole areas of law contrary to the views of a majority of the Justices. When those views finally do find expression in an opinion of the Supreme Court -- an expression delayed because of the press of the volume of cases on the Court -- the resulting disruption could well be severe.

One possible solution which has been discussed for some time is the creation of a National Court of Appeals between the circuit courts and the Supreme Court. Although we recognize the problems motivating this proposal, the Department of Justice opposes it. We think an additional court would actually increase the burden on the Supreme Court, and create more litigation. It would also diminish the prestige of the existing courts of appeals.

One proposal which has received the active support of the Department calls for the abolition of the mandatory jurisdiction of the Supreme Court. The Supreme Court could better supervise the development of law in the federal circuits if it had compete discretion over its own docket. Every case which the Supreme Court must hear because of mandatory jurisdiction represents one less case the Court could have heard because of its importance. Chief Justice Burger has urged that "all mandatory jurisdiction of the Supreme Court that can be, should be eliminated by statute," and the Department of Justice fully agrees.

Even the salutary step of increasing the Supreme Court's control of its own docket, however, will only moderately alleviate the problem of the Court's declining ability to supervise the development of federal law in the circuits. The surge in litigation and the increase in judicial resources to handle this litigation mean that a progressively smaller percentage of cases will be reviewed by the Supreme Court. More and more the courts of appeals will, for practical purposes, have the final word. As Justice Stevens noted in 1981:

> "The federal judicial system is undergoing profound changes. Among the most significant is the increase in the importance of our Courts of Appeals. Today they are in truth the courts of last resort for almost all federal litigation."

Circuit judges must nonetheless apply the law in accordance with the views of the Supreme Court. The fact that Supreme Court review is more unlikely because of pressures on that Court's docket does not mean that circuit courts may be any less sensitive to following the positions of the Court, to the extent those can be discerned. Quite the contrary. Since review by the high court will probably not be available, circuit courts must be particularly careful to avoid striking out on new paths that create tensions the Supreme Court may not readily be able to resolve.

Of course, following the guidance of the Supreme Court is not always the easiest of tasks. The Court often paints in broad outlines, leaving it to the lower courts to fill in the details. Division on the Court also often prevents the announcement of concise rules. As Justice Frankfurter noted, the task of an inferior federal judge is often "to interpret the mysteries and the mumbo-jumbo of the nine Delphic oracles, and, at the pain of a spanking, find clarity in darkness." For our part, the Department of Justice will urge principles upon the courts that enhance the quest for clarity -- for example, by avoiding a reliance upon loose and expansive interpretations of law grounded primarily in personal predelictions of judges rather than meaningful principle and distinction.

The problem of the overload of the federal judiciary is a serious one not only for the federal judiciary as an institution but for the quest for justice itself. We are fast approaching a time -- if we have not reached it already -- when the litigation burden on the federal court system will overrun the ability of that system to generate a coherent body of law. The current pressure on the federal courts threatens to result in an uncoordinated and inconsistent body of federal law. As the sharp increase in its workload demonstrates, the Supreme Court is struggling to keep up.

As the Supreme Court becomes less able to oversee the development of federal law, however, it also becomes important for the federal district and circuit courts to pay greater attention to the process of judging itself.

Judicial restraint must become an ever-present consideration for all federal judges. I do not mean to suggest that the size of the docket should affect the decision in any individual case. I do mean to say, however, that the current burden on the courts should sensitize all judges to the always present need to exercise restraint in formulating new rights or expanding doctrines. For if we continue down the present path, the federal judicial system will -- through sheer overload -- lose its historic capacity for protecting our most basic rights and freedoms. If the volume of cases prevents the development of an authoritative and coherent body of federal law, we will have forfeited our proud claim to live under a government of laws, not men.

Things have reached a point where I am reminded of a story about the great John Marshall. The Chief Justice was trying to dislodge a particular law book from a high and tightly packed shelf. He succeeded instead in dislodging the entire row of books, which struck him on the head and knocked him to the floor. A librarian instantly rushed to his aid, but the venerable old Chief was unhurt and answered the offer of assistance by saying:

> "I am a little stunned for the moment.
> I have laid down the law often, now
> this is the first time the law has
> laid me down."

Today, the multiplication of implied rights, the blurring of legal distinctions, and the dramatic increases in cases, threaten to lay low our legal system itself. The greatest exercise of restraint by all three branches will be necessary to ensure that we are stunned only for the moment.

Finding solutions to the problems we face will require the best efforts of all three branches of government. The concern of the Department of Justice in this area begins at the beginning: since January 1981, we have been deeply involved in the appointment of 53 district judges, 14 circuit judges, and, of course, one Supreme Court Justice. We have supported the creation of new judgeships on the basis of the careful and non-partisan assessment of need by the Judicial Conference.

There are other problems confronting us besides those I have touched upon today. To cite one prominent example, we must devise a new bankruptcy system in the

wake of the Supreme Court's recent conclusion that the present system is unconstitutional. And we must have that new system in place by October 4, when the Supreme Court's mandate will issue. That pressing problem, and the others I have discussed today, demand a full and frank dialogue between the judiciary and the Department of Justice. I have participated in just such a dialogue at the Williamsburg Conferences and am happy to continue the process by meeting with all of you here today. I have brought with me my assistant, Jonathan Rose, who as head of the Office of Legal Policy assists me in confronting issues of judicial administration and reform. Together we would be happy to address any questions you may have.