Department of Justice

FOR RELEASE UPON DELIVERY
MONDAY, AUGUST 8, 1977

ADDRESS

BY

THE HONORABLE GRIFFIN B. BELL
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

THE AMERICAN BAR ASSOCIATION
JUDICIAL ADMINISTRATION DIVISION

7:30 P.M.
MONDAY, AUGUST 8, 1977
THE WELLINGTON ROOM
CONTINENTAL PLAZA HOTEL
CHICAGO, ILLINOIS

I began my service as Attorney General with the long held view that our justice system needs certain repairs and general refurbishment if it is to function properly. Although some of the necessary steps could be carried out administratively, it was clear that many reforms would require legislation.

The legislative process can be difficult and time-consuming, but I have found a real desire among many members of Congress to work toward the same goals of an improved judicial system and greater access to the court system for more people.

I felt it would be appropriate here to give you a brief legislative report from Washington on some of the more significant matters in this area.

Among pending legislative proposals is one bill which would significantly expand the authority of magistrates. It passed the Senate last month and the House is expected to begin hearings on it in September.

This measure would reduce the burdens of District judges by shifting to magistrates many of the cases District judges now hear. By allowing full trial at less than District Court level, delays and costs would be reduced, to the benefit of the less-advantaged.

For the first time, magistrates would be allowed to decide civil cases if the court and parties agreed. With court consent, magistrates would hear all petty offenses and could try all misdemeanors if the defendant agreed.

I was pleased that the President took special note of the magistrate proposal last week in his message to Congress on drug abuse. He said that broader jurisdiction for magistrates would reduce the burden on the District judges who must hear major narcotic cases.

Another important measure submitted on behalf of the Administration is the Foreign Intelligence Surveillance Act. It would bring the court system into the process of regulating use of electronic surveillance by the government to obtain foreign intelligence information in this country.

The bill would strike a delicate balance by safeguarding both national security and civil liberties. A government application for a warrant to conduct electronic surveillance would be considered by one of seven District judges appointed by the Chief Justice. Appeals (only by the government) would go to a special three-judge court and then to the Supreme Court.

The measure would help to prevent past abuses by making even secret intelligence operations subject to the judicial process. Congress has already begun consideration of this important bill.

Two other bills will soon be submitted to Congress. Each is part of the Department's program to work with Congress on legislation which will increase citizen's access to courts.

One is a reform measure that would preclude a plaintiff from filing a diversity case in the state where he or she lives.

In 1976, nearly one in four Federal civil cases was a diversity matter, and half of those involved resident plaintiffs. That comes to 15,000 cases. Eliminating those cases from the docket would mean considerable relief for the District Courts, which could then use the additional time for truly Federal issues. This measure will also remove a stigma from state courts.

The other measure now ready for submission to Congress is designed to enhance citizen participation in the justice process by increasing fees and transportation and subsistence allowances for witnesses.

There are several other proposals currently being considered at the Justice Department which are also part of the access to courts program. One of the most important would be legislation to authorize an experiment in some Federal District Courts with compulsory but non-binding arbitration for certain kinds of civil cases.

As each of you well knows, civil litigation costs are rising sharply, and in some courts there are delays of up to three years. Those facts make a compelling argument for developing rational alternatives.

In drafting this bill, the Department studied the results of compulsory arbitration in several states, and we were impressed with the high finality rate of decisions made by the arbitrators. We hope to have a legislative recommendation ready to send Congress in September.

The Department is presently examining the feasibility of requiring judicial impact statements for all proposed legislation relating to the Federal courts. This procedure is needed if all three branches of government are to work effectively in improving court planning and budgets.

We are also studying, at the Justice Department, ways to improve class action procedures and to provide alternatives for handling mass grievances. Toward this end, we will consider new legislation and also work closely with the Advisory Committee on Civil Rules of the Judicial Conference. Even if we determine to go the rule route for changes rather than legislation, these changes would be subject to Congressional disapproval.

I am now reviewing a suggestion for a Federal Justice Council. The Council would propose needed court improvements and coordinate court-related matters throughout the government.

One option calls for the Council to be composed of the Vice President, the Chief Justice, the Attorney General, a judge appointed by the Judicial Conference, and the chairmen and ranking minority members of the Senate and House Judiciary Committees.

The Council could be created by either Executive Order or legislation, and we are presently examining both possibilities.

The Justice Department played an important role in drafting the proposed revision of the Federal criminal code. This complex

measure would improve the effectiveness and fairness of Federal criminal proceedings by simplifying and consolidating the present tangle of criminal statutes and judicial interpretations.

Work on the bill may be completed by the Senate Judiciary Committee before the October recess, and Senate floor action could take place by January.

Finally, there are several bills that were not proposed by the Justice Department but in which we are nevertheless interested.

A measure now before the House of Representatives proposes changes in grand jury procedures, and the American Bar Association is also considering grand jury proposals.

I believe the grand jury offers the best approach to bringing criminal charges while at the same time protecting individuals from unfounded accusations. I also feel that grand jury procedures can be improved, and I agree with many of the proposals for change.

I am, however, opposed to some of the suggestions -- especially to the idea of permitting counsel in the grand jury room.

This change could amount, in effect, to holding two trials -- one in the grand jury room and, if an indictment were subsequently returned, to a second trial in the courtroom. It would lead to appointing counsel for witnesses in many instances.

New legislation might thus create more difficulties than it would serve.

Another measure being considered in Congress would establish machinery short of impeachment for removal of Federal judges who

suffer from disabilities or who have engaged in improper conduct.

Another, which we also generally support, would increase the number of Federal District and Appeals judgeships.

There are, of course, many other matters on the legislative agenda.

I do wish to speak briefly on one last matter which is of great concern to a large number of Federal employees, to the Department of Justice, and to me personally. It is an issue which should be of concern to everyone. This issue is the current crisis of confidence among Federal law enforcement and intelligence personnel caused by the explosion of civil damage actions against them.

There are several reasons for the recent increase in such suits. Congressional investigations have resulted in many allegations of past misdeeds by the FBI, the CIA, and other law enforcement and intelligence agencies. Freedom of Information and Privacy Act suits have revealed other instances which may give rise to tort claims. Court decisions have created rights of action for constitutional violations where none existed previously. The immunity defense for government employees has eroded to the point that many allegations that once would have been blocked by an employee's immunity now require trial.

Every one of these suits, regardless of how lacking in merit, carries a potential of monetary loss. The spectre of such suits and the possibility, be it ever so slight, of having to pay damages are not lost on law enforcement personnel. They know, as you and I

know, that most suits alleging wrongdoing by law enforcement officials tend to be long, complicated, and expensive. An official who gets caught up in such a case is in for the agony of prolonged uncertainty about whether he might lose his life's savings or his home. He, and his family, must endure that agony even if he ultimately is exonerated.

The danger of a jury verdict sometimes is only part of the problem faced by a law enforcement officer who is named in a civil suit. In an increasing number of these suits, Federal officers cannot be certain that the Department of Justice will represent them.

In providing representation, the first situation in which the Department faces a problem is that in which there are material conflicts or inconsistencies between the defenses of two or more employees. In these circumstances, the Justice Department would face the same ethical conflict in representing all defendants as would a private attorney. Thus far, the Department has been able to meet this difficulty by hiring as many outside counsel as there are different positions among the defendants.

But it is by no means clear that the Department will be able to continue to hire outside counsel indefinitely, for purely budgetary reasons. Despite the willingness of many private counsel to represent law enforcement and intelligence personnel at far below their normal rates, the Department in the last two fiscal years has spent more than $1 million on outside counsel. Congress has indicated its displeasure by cutting our most recent request for additional funds by almost two-thirds. Given the number of lawsuits

requiring outside counsel, and the unwillingness of Congress to fund the payment of those counsel, the day may come when the Department will be forced to discontinue retaining counsel for Federal employees who are sued.

The Department also faces a problem in providing representation when an agent is sued civilly on allegations which, if true, may constitute violation of Federal criminal law. Under the Department's statutory authority, its attorneys can appear only in suits in which the Federal government "is interested." 28 U.S.C. 516. When it appears that a defendant employee committed criminal acts, a serious question arises as to whether any legitimate interest of the United States would be furthered by providing him with Departmental representation.

In addition, it seems wrong that the Federal government lacks statutory authority to pay damage awards levied against most law enforcement and intelligence personnel for actions taken in performance of duty. I am informed that only Internal Revenue Service agents and some Defense Department personnel now can be indemnified for adverse monetary judgments.

The situation confronting our law enforcement and intelligence personnel should be compared to that confronting the drug companies that manufactured swine flu vaccine. Congress passed a law substituting the United States as sole defendant in any suit brought against those companues. Does not the country have at least as much interest in the morale and effectiveness of its Federal law enforcement and intelligence agents? I believe it does, and I have

directed the Department to prepare amendments to the Federal Tort Claims Act to substitute the United States as sole defendant in suits brought against such agents for actions performed within the scope of their employment.

Over a century ago (in 1857), Attorney General Jeremiah Black gave the following rationale for government defense of civil lawsuits brought against its agents:

> When an officer of the United States is sued for doing what he was required to do by law, or by the special orders of the Government, he ought to be defended by the Government. This is required by the plain principles of justice as well as by sound policy. No man of common prudence would render him liable to be plagued to death with lawsuits, which he must carry at his own expense.

My view as to such issues is that we should substitute the Government as the party defendant and reserve any right of an action over against the employee or other disposition for consideration after the lawsuit has terminated.

These are some of our aspirations and some of our problems.

We may not always agree on specific proposals. But we share at all times a quest for a common destination. As the Task Force Report on the Pound Conference put it:

"The ultimate goal, it is worth reiterating, is the fullest measure of justice for all."