Department of Justice

STATEMENT

OF

THE HONORABLE BENJAMIN R. CIVILETTI

ATTORNEY GENERAL OF THE UNITED STATES

BEFORE THE

AMERICAN BAR ASSOCIATION
SECTION OF LITIGATION

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RITZ-CARLTON HOTEL
CHICAGO, ILLINOIS

My name is Benjamin R. Civiletti, and I am with a large Washington law firm. The announcement of this meeting indicated that I am a working member of this Section's Council. While I believe I am still working, I am afraid that it is less on the affairs of our Section than was formerly the case. What I have learned in serving on the Council has, however, guided me in the initiatives which I have taken with respect to litigation since becoming Attorney General.

I'd like you to imagine for a moment that you have recently become the chief executive officer of a large conglomerate, which I'll call D.O.J. Industries. Upon taking office, you surveyed the diverse and ramified operations now under your stewardship, and found that you were presiding over an organization comprising many talented and hard-working people, dedicated not only to the internal concerns of D.O.J. Industries, but also to the public which does business with it directly or indirectly. Everything looked promising. But suppose that closer scrutiny made you aware of some other traits which threatened to frustrate the corporation's efforts to serve its many constituencies. More specifically, you identified four significant, though perhaps inconspicuous, danger signals: First, although all operations were carried on and current needs met with efficiency, there was no uniform procedure for projecting

future needs, so as to allow for planning in the areas of personnel, raw materials, and so on. There seemed to be no assurance that D.O.J. could be responsive to market conditions two years hence. Second, demand for all of D.O.J.'s products and services had risen so sharply in a short time, that the manufacturing force was significantly increased while the managerial corps remained stable. Profits were high for the present, but managers had become dangerously removed from those who developed and produced the commodities which kept D.O.J. in business. Third, the increased importance of field offices had resulted in large components of the conglomerate functioning nearly independently of one another. For example, there was no way that the field office in New Orleans could learn quickly of a novel technique which had been used successfully by the Pittsburgh office. Finally, you discovered that although work projects which had the potential to produce major and beneficial breakthroughs were being pursued diligently , some of them had been pursued diligently since 1924.

You would worry.

I <u>have</u>, because the picture I have just sketched, in both its bright and hazy parts, matches what our efforts have turned up at the real D.O.J., for which I have been given responsibility. Concern is particularly appropriate in the case of one large block of that conglomerate - whose

products affect so many Americans -- the litigating divisions and the United States Attorneys' Offices. And I believe that similar concern is called for throughout the legal profession.

To you, more than to any other audience I could have, the source of these problems should be obvious. During the last ten years, litigation has been used increasingly not only for dispute resolution, but also to address wide issues affecting the very economic and social structure of our nation. But ironically, the volume and the complexity of the litigation are themselves creating economic and social problems.

Of course, the litigiousness of our society has resulted in significant fees for trial lawyers, and many of us have been beneficiaries of that phenomenon. Yet that benefit is sure to prove ephemeral. For one thing, attorneys cannot ignore the best long-range interests of their clients and expect the public estimation of the profession to be maintained. But most important, the increase in the types and complexity of litigation has created knotty problems for lawyers in the very course of their work. Much of the "litigation explosion" has occurred in such new branches of the law as environmental protection, personal privacy, and biochemical hazards. Cases must be tried in areas where the legal experts are not specially trained as advocates. It is increasingly common for a lawyer

to know what information should be produced, but not to know how to choose witnesses, how to develop information from them, or more important, how to cross-examine witnesses for the opponent. A skilled trial lawyer, on the other hand, may not be sufficiently versed in the esoteric substance of the law to use his techniques with maximum effectiveness. Washington, D.C. was called by President Kennedy a city of "Southern efficiency and Northern charm." Although at least part of that analogy is not accurate for 1980, I wonder if many trials have not similarly achieved the worst of all possible worlds by combining the trial techniques of the non-litigating lawyer with the specialized legal knowledge of the trial lawyer.

The results of this trend are all too familiar: Litigation today has become too lengthy, too costly, too complicated, and too ineffective. For the general population, this has meant delays in justice and "pass-alongs" of the inordinate costs. For the Justice Department, which includes among its many operations the largest law firm in the nation, it has brought all the problems confronted by the executive of the mythical D.O.J. Industries. We have had to use our limited resources to engage many more litigating attorneys at the expense of sound managerial control of their activities. The necessary expansion of United States Attorneys' offices has created problems of decentralization and isolation. Uncertainty concerning future trends has made Departmental planning difficult. And

finally, long and complex cases drain much of our very talented manpower.

I am therefore determined that the Department take the lead in efforts to eliminate these difficulties by improving the litigating skills and techniques of American lawyers. As a first step, I have appointed a senior lawyer in my office whose responsibilities relate solely to litigation. Edward R. Slaughter, Jr., one of your members who generally parades under the alias of "Ned", is now my Special Assistant for Litigation. Ned has for the past fifteen years headed the litigation department in the Charlottesville, Virginia office of McGuire, Woods, and Battle; he is immediate past president of the Virginia Bar Association and a fellow both of the American College of Trial Lawyers and the American Bar Foundation.

Ned's specific duties are designed to deal with our specific problems. Reporting through Acting Associate Attorney General John Shenefield, he will be coordinating the development of comprehensive and compatible case management and information systems. This program should produce a dual effect. First and foremost, it will provide the much-needed link between managers and litigators and allow for evaluation of and improvement of the effectiveness of procedures followed in the litigating offices. Second, it will greatly enhance our ability to chart trends and plan for the future. Although, as in private practice, even our dedicated and selfless lawyers must be paid, we

cannot simply add up the time spent on services and send a bill to the Congress. (I sometimes think such a bill might exceed the national debt.) Rather, we must demonstrate accurately to the Office of Management and Budget and to the Congress exactly what we are doing and what our projected legitimate needs will be a year and a half in advance. In developing these record-keeping systems, the Department will not only present the public with an accurate bill for services rendered, but will also improve its ability to respond to future conditions in its "market".

We will cope with the complexity of litigation by increasing our capability for precision in two ways. I have charged Ned with coordinating the development of systems, using automatic data processing where feasible, to obtain better litigation support in large cases. In addition, we are in the process of instituting a Scholar-in-Residence program in the litigating divisions to bring academic experts into the Department for short periods. We are working toward developing a track for career advancement within the Department to a supergrade level for senior trial attorneys who will be free of administrative responsibilities. It might also be possible for us to establish an arrangement for the sharing of litigation specialists between large and small U.S. Attorneys' offices in proximity to each other. All of these initiatives will have a salutary effect

on the working relationships among U.S. Attorneys' offices in different regions and the Divisions in Washington.

Of greatest concern to me, however, are the problems of the length and costliness of trials. Some progress in breaking court logjams has been made through the additional judgeships authorized by the Omnibus Judgeship Act of 1978. As of today, the Justice Department has made recommendations and completed processing on all but five of those one hundred fifty-two judgeships. But much more must be done within the Department. In September, I asked the heads of each of the litigating divisions to review aged and stale matters with an eye toward closing such cases or expediting their resolution through settlement or court action. The Assistant Attorneys General took this assignment very seriously, and I am pleased that I can already report progress. The Land and Natural Resources Division has recently closed 100 of the 300 cases in their General Litigation Section which were over five years old. The Pollution Control Section of that Division also managed to close 300 cases during the month of September alone. In the Civil Rights Division, 100 out of 500 desegregation cases have been concluded since April, and more closings are expected. In general, all the divisions are committed to reducing delays and the resultant high costs by emphasizing pre-trial preparation and increased efforts in negotiating settlements.

Incidentally, one of the Assistant Attorneys General reported that a matter in his division had in fact been open since 1924. He did point out, though, that there has been constant activity on it, and that while it was aged, it was definitely not stale. In any event, my request helped to bring it to light and I am now wondering with some bemusement how many Attorneys General will become both aged and stale before the matter is laid to its final rest.

It will, of course, require action by the entire profession to deal adequately with the hazards which face us. I am therefore happy to note that the current president of the American Bar Association, Leonard S. Janofsky, has established the ABA Action Commission to Reduce Court Costs and Delay, already vigorously at work under the chairmanship of Seth Hufstedler, a past president of the state bar of California. I am especially pleased that the staff director for the commission is Paul Nejelski, formerly Deputy to Daniel J. Meador in the Justice Department's Office for Improvements in the Administration of Justice.

I hope that we can work together closely on these issues. Both Ned and I are most eager to hear any ideas which you may have. He is with me this weekend, and I urge you to accept this invitation to talk to him here or to call him at the Department.

I think we can all be excited by the challenge before us -- not just winning cases but trying them in the most effective way and in a manner which will not bankrupt and demoralize our clients. If we can do that, then the right to litigate will remain a social benefit of a civilized society and not become a frustrating barrier to social progress.

Thank you.