Department of Justice

REMARKS OF

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Reform takes time. Reform in the administration of justice takes a long time. As Chief Justice Vanderbilt of New Jersey said, "Judicial reform is no sport for the short-winded."

The American Law Institute has played a major, continuing role in the improvement of our legal system. Through its development of the Restatements, the ALI has brought greater clarity and consistency to the substantive law. And through its formulation of model acts, the ALI has been the leading force in developing reform legislation that is carefully drafted and rules that operate simply.

Yet producing the Restatements and model acts requires us to find and synthesize the decisions of myriad codes and court decisions; it requires examining the views of numerous commentators; and it requires consideration of successive drafts and broad discussions of a topic before a thorough and legitimate interpretation of existing law can be achieved. Not light or instant work.

Improving the substantive law is a compelling interest of the Department of Justice too. For more than a decade now we have been working with the Congress to produce a new Federal Criminal Code. It will be the most comprehensive

reform and recodification of the federal criminal law in our nation's history. But a decade is a long time.

Achieving reform in the procedural law and practice often is equally difficult. It should not be and need not be, but it is. Unfortunately, careful attention to the manner in which the courts and our system of justice is operating does not occur on a frequent and consistent basis. Court reform tends to happen only as a slow reaction to mounting crisis.

Why? I don't know. Perhaps dozens of other more immediate matters compete better for the attention of national policymakers. Attention is diverted from the quieter and less visible work that must be done in court reform. Perhaps other institutions have proved slower or even more cumbersome than courts. Perhaps courts and those involved in them have been ineffective advocates. But I do know that as a result the condition of courts is once again dangerously unhealthy.

As close observers of the law and the courts, you know what has been happening. In recent years, Congress and the courts have passed statutes and made decisions that have extended all manner of legal rights. I was pleased to note that the Chief Justice last Tuesday in his address to you observed that many of these new statutes have blurred the

distinction between state and federal courts, thus eroding the concept of the Founding Fathers that federal courts are tribunals of special jurisdiction. The result has been that the workload of the federal courts has increased enormously.

Even when we know there are problems, the actual figures are surprising. For example, in the 19 years from 1960 to 1979, case filings in the district courts increased by 118 percent. During the same period, filings in the courts of appeals increased by almost 419 percent. This growth has resulted in overworked judges and court personnel. For litigants, it has meant increased delay before a case reaches a final, binding decision.

Because of these developments, substantial discussion has occurred over the last 20 years with regard to the appropriate role for courts in our society. At the same time, attention also has been focused on means by which our system of justice may be made even more accessible and more effective. A number of ideas were generated at the national conference in St. Paul in 1976, the "Pound Revisited" Conference. Experimental projects to test some of the Conference's proposals have been tried. Some legislation has passed the Congress that will significantly improve the operation of the federal courts.

But we cannot afford to be complacent about these few but substantial accomplishments. The addition of new judges

and the expansion of magistrates' jurisdiction will provide some temporary relief for the courts. But an increase in judicial personnel will not solve long-range problems in the administration of our laws.

Indeed, adding more judges to the system alone will, from an institutional perspective, create more problems than it resolves. It may be possible to expand the district courts almost indefinitely since trial judges act as individuals. But increasing the number of judges increases administration and housekeeping needs and management inefficiencies. Moreover, this solution increases the number of appeals and adds to the current pressures on the appellate level of courts. Unlike trial courts, appellate courts cannot continue to grow larger and larger. Those courts must function as collegial bodies and must be capable of pronouncing uniform national law. At some point, increasing the number of appellate judges will undercut the collegiality of those courts, and the ability of the courts to lend stability and consonance to the development and interpretation of national law will be jeopardized.

The Department of Justice, as the nation's largest litigator, is in a special position to see the problems of our justice system. As a result, it has the responsibility of insuring that court procedures are effective. This is a

responsibility we owe not just to the government as a client but to all consumers of justice. This responsibility derives from the constitutional mandate that the President recommend to Congress such measures as he shall determine are "necessary and expedient" and that he shall "faithfully execute" the laws of the United States.

Since 1964, when an Office of Criminal Justice was established, the Department has had a unit charged with assessing the need for and proposing reforms in the criminal law. As problems in the area of civil justice became more acute, the Office for Improvements in the Administration of Justice was established by Attorney General Bell in 1977. That Office is charged with studying the needs of our entire system -- civil as well as criminal; primarily federal, but state as well. The existence of this Office advances an important and historic relationship between the Department and the federal judicial system. As long ago as 1790, Congress requested recommendations from the first Attorney General, Edmund Randolph, with regard to court reform. And from that time until the creation of the Administrative Office of the United States Courts in 1939, the Department of Justice performed administrative functions for the federal courts.

The broad mandate of the Office for Improvements in the Administration of Justice represents an unprecedented commitment by the Executive Branch to devote its resources to the continuous and systematic support of the entire justice system. The Office's work in the field of civil justice has been particularly significant.

Building on the ideas of the "Pound Revisited" Conference, and formulating new proposals of its own, OIAJ has established experimental projects, conducted research, and recommended a variety of administrative and legislative measures that would improve our legal system. The object of this effort has been to ensure that every American citizen with a valid claim has access to a forum in which effective, fair redress can be obtained inexpensively and expeditiously.

With this broad goal in mind, the court reform work of the Office has focused on three general areas: assuring that the justice system provides readily available forums that are appropriate to resolve all types of legitimate complaints; assuring that the justice system, as an institution, operates effectively and efficiently; and conducting sound empirical research that can provide the basis for policy reform. A truly effective system of justice will exist only if there

is progress in all three of these areas. But even though these three strands of the work are intertwined and interdependent, it is useful to consider them separately. Each is important in its own right.

The justice system will be effective only if an appropriate forum is available to resolve all types of legitimate complaints. In recent years, our society has become increasingly "judicialized." As other institutions have diminished in authority or action, a growing number of the complaints that arise in our society have been assigned to the courts for resolution. But not all types of disputes are truly best served by the adjudicative process; indeed, certain controversies may actually be hindered by procedures that are overly formalized. The classic example, I suppose, is that of the family or neighborhood dispute.

In situations such as this, our legal system must provide access to justice, but the genuinely appropriate forum may not always be a court. Indeed, a public hearing before a life-tenured judge, operating under formal rules of evidence and procedure, may actually be inimical to "access to justice." What is needed, instead, is a flexible and diverse panoply of dispute resolution processes, with different types of cases being assigned to different processes.

Defining which cases should go to courts and which should go elsewhere is not an easy matter. It is, however, one of the subjects being explored by the Council on the Role of Courts. This is an advisory group for which OIAJ is providing research and staff support. The Council, which is composed of outstanding lawyers, judges, and academics, is conducting an in-depth study of the nature of the business of state and federal courts. At the end of two years, it will publish research papers on the functioning of courts in contemporary American society. It also will make recommendations for legislators and judges concerning the kinds of matters that appear appropriate to route to courts or to non-judicial processes.

Whether we are concerned with "courts" as they are familiarly known, or with some less formal structure, it is necessary to determine what are the essential attributes of an effective civil justice forum. I am not sure that we know enough now to propose definitive answers to this question, but I would offer the following observations.

-- There must be access to a legal forum whenever a substantive entitlement is involved. Often, original consideration by a social or administrative agency, with

some court review of appropriate cases, is all that is required. Nevertheless, in the popular mind, the courts are the most important instrument for the delivery of justice to the individual. Access to courts therefore can be curtailed only when there are acceptable alternatives. Courts must remain available for the resolution of concrete disputes where the law is unclear and for the protection of individual and societal rights.

-- In circumstances where an individual legal entitlement may be less certain, it may still be functional for society to provide a forum outside the adjudicative process for dispute resolution. A family or neighborhood dispute is an example; in those cases, if the system offers no forum, more serious disagreements may arise that will require government intervention before they are resolved.

-- In either situation, the forum that is available must be relatively inexpensive. The sad truth is that today indigents and people of moderate resources often cannot afford to take their complaints to court. Ways need to be found to reduce the cost of legal services. In addition, the system needs to provide less formal, and hence less costly, mechanisms through which to resolve disputes that appropriately

may be settled outside the courts.

-- Whatever forum is provided, it must produce an outcome that can be objectively viewed as "correct." It must arrive at this result through a just process. And the forum must provide the appearance as well as the reality of justice.

With this framework in mind, OIAJ has developed several proposals for alternative ways of resolving disputes outside of full-scale court proceedings. For example, the Office has proposed legislation authorizing the experimental use of mandatory arbitration in federal district courts. This process could be used to resolve certain types of civil cases involving money damages only. Although the bill provides for compulsory arbitration, it does not make the arbitrators' decisions binding; either party, if dissatisfied, retains the right to go to court.

In addition to the proposed statute, OIAJ developed related arbitration plans and assisted in their implementation pursuant to local rule in three federal district courts. The purpose of these projects is to test the effectiveness of compulsory arbitration as a means of reducing cost and delay.

The Office also has encouraged the development of innovative means of non-judicial resolution of minor civil disputes. In collaboration with LEAA, it has established

Neighborhood Justice Centers in three cities. These model centers serve as an alternative to local courts for settlement of many types of disputes through mediation.

Our support for experimental arbitration programs and Neighborhood Justice Centers does not mean that we view these mechanisms as the best way to resolve certain types of conflicts; rather, they are promising avenues that need to be explored. More evaluation of comparative systems is necessary before we will know what really works best for given types of cases. The point is that the courts have more business than they can handle and, for some disputes, adjudication is not the most effective way to resolve conflicts. Different forums should be available, and OIAJ is attempting to further our knowledge in this area.

In addition, for those cases that do belong in court, the Office is examining the costs of litigating modest claims. In today's world, it is not at all uncommon for a lawsuit to cost more than the amount that is recovered. Several possible strategies for remedial action have been identified. One concern is that it may not be economical to use the litigation system where small sums of money are involved. In these cases, society may be better off paying the claim directly

if it can devise a system that will prevent fraud rather than to attempt to determine the validity of the claim through litigation. Another option would be to experiment with fee-setting practices like those in Germany and Japan or the fee-shifting practices of the British courts. The goal in either case is to reduce the amount of time a lawyer must devote to resolving disputes over modest amounts of money, or to find ways in which those disputes can be resolved at less cost to individuals and society as a whole.

But even if appropriate forums are available, at a price that is affordable, citizens will not have access to effective redress of their grievances unless the justice system is operating well. Several OIAJ projects have been concerned with jurisdictional and structural anomalies of the court system, particularly at the federal level.

As I have said, different forums are appropriate for different types of disputes. A related matter is that even when a dispute deserves to be in court, it may not be necessary for it to be in federal court. In this regard, the Department has advocated legislation to limit the diversity of citizenship jurisdiction of the federal courts. The ALI, among others, has made the suggestion that diversity jurisdiction

be substantially transferred to state courts. This measure would return to state courts the responsibility for interpreting state law and allow the federal courts to reassume their traditional role as courts of special and limited jurisdiction. I favor the elimination of diversity jurisdiction for resident plaintiffs. This limitation would significantly reduce the workload of the federal courts, but it would preserve the option in diversity cases for the nonresident plaintiff. I definitely think it is time to resolve this issue and turn our energies to other essential reforms.

Creative attention must be devoted to the needs of our federal appellate system. The litigation eruption of recent years has fallen disproportionately on those courts. Although decisions of the Supreme Court are binding, that Court can review only a limited number of cases. Yet there are areas of the law in which the intermediate appellate courts reach inconsistent decisions on the same issue. Sometimes also the law may be applied unevenly from case to case even though the substantive law may be reasonably clear. Disparate treatment of similar issues appears to be particularly severe in patent litigation.

OIAJ has proposed the creation of a Court of Appeals for the Federal Circuit to increase the capacity of the

appellate system to render decisions that have nationwide precedential value. This new intermediate appellate court would be established through the merger of the Court of Claims and the Court of Customs and Patent Appeals into a single appellate court with expanded jurisdiction. The court would function like the existing circuit courts of appeals, but its jurisdiction would be defined by subject matter rather than geography. The court would inherit all the appellate jurisdiction of the two existing courts plus appeals in patent cases from the federal district courts. The substantial trial function which is now performed by the Court of Claims would be assigned to an independent Article I court resembling the Tax Court of the United States.

Creation of the Court of Appeals for the Federal Circuit would enhance the nationwide uniformity of the patent law. It would also provide more efficient federal court administration by reducing some overlapping functions of the two courts that would be merged in the process. Most importantly, the Court of Appeals for the Federal Circuit would be a tribunal capable of exercising appellate jurisdiction nationwide in areas of the law where there is a special need for uniformity. Its specific jurisdiction would be fixed by Congress and could be varied from time to time. The court

would thus supply the appellate system with greater flexibility in responding to changing needs in the national law.

One final aspect of the work of OIAJ deserves special emphasis: the Office is one of the few existing institutions that conducts empirical research on the courts. Such research is essential if we are to have a sound basis for policy reform. Although we may have many instinctive suggestions, we do not have the data and the empirical research to support them -- but we do know, from the few careful studies that have been done, that our intuitive assumptions about the functioning of courts often are not supported by reality. Given the range of subjects on which we do not have hard information, this is not surprising. For example:

-- We know very little about why some individuals take their complaints to court or to some other agency while other people remain silent.

-- We have very little meaningful data comparing the relative costs and the time involved of different dispute resolution processes.

-- We do not even know for sure how much litigation costs for either individuals or society.

In their classic history of federal court administration, Frankfurter and Landis say of one critical period, "the need

for judicial reorganization was recognized by all parties and its fulfillment was indefinitely postponed." Change takes time. The challenge in improving the administration of justice in this country is to compress the time it takes to achieve change into the optimum smallest period, so that reform does not take undue time. Above all, change cannot be "indefinitely postponed."