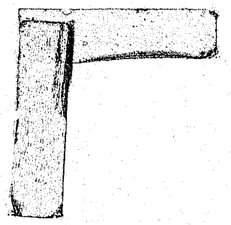

Department of Justice

REMARKS

OF

THE HONORABLE WILLIAM FRENCH SMITH
ATTORNEY GENERAL OF THE UNITED STATES

TO

THE OPENING SESSION OF THE 28TH ANNUAL SPRING MEETING

OF THE

AMERICAN COLLEGE OF TRIAL LAWYERS

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BOCA RATON HOTEL
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In addressing this distinguished College of Trial Lawyers, I would like to discuss a problem that has been evident though unsolved for some years -- the explosive and continuing growth of litigation within the federal judicial system.

To quote Judge Learned Hand, "I must say that, as a litigant, I should dread a lawsuit beyond almost anything else short of sickness and death." As the amount of litigation has grown, so too has the sense of dread. The growth of litigation in the federal courts has made litigation an increasingly time-consuming and disillusioning experience for attorneys and litigants alike. The resulting burdens on the courts are gradually effecting a dramatic change in the character not only of our federal judicial system, but also of our profession and of society.

According to an old story, the great Chief Justice John Marshall once had some difficulty attempting to dislodge one particular law book from the high and tightly packed shelf where it rested. Trying to get that one book loose he succeeded instead in dislodging the entire row, which struck him on the head and knocked him to the floor. A librarian instantly ran to his rescue, but the venerable old Chief Justice was unhurt and answered the offer of assistance by saying:

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

Few federal judges today could make the same response. The dramatic increase in litigation in the federal courts has nearly laid low the federal judicial system itself.

A real acceleration in the incidence of litigation began in the 1960s. In the two-decade period between 1960 and 1981, the number of cases filed in the Supreme Court doubled. Even more dramatic and important, however, has been the growth of cases in the lower courts, which cannot control the size of their dockets. Annual civil filings in the federal district courts tripled between 1960 and 1981 -- from approximately 60,000 to over 180,000. During the same time, appeals increased more than six-fold -- from less than 4,000 annually to over 26,000. Between 1960 and 1981, the number of civil filings increased eight times faster than the population, and the number of appeals twenty-two times faster.

Most significantly, the number of cases per judge has increased dramatically. Despite the Omnibus Judges Bill of 1978, which added 152 judges to the federal bench, the growth of the federal judiciary has not kept pace with the litigation boom. At the district court level, judges today must process fifty percent more new filings each year than in 1960. Judges at the appeals level must hear almost four times as many cases today as in 1960. In addition, litigation is more complex and time-consuming than ever before. In 1960, for example, only thirty-five federal trials took more than one month. In 1981 there were five times that number.

It is unsurprising that expeditious resolutions of civil suits seldom occur. A recent survey found over 15,000 cases in our federal district courts that have been pending for more than three years.

What do all these statistics portend for our federal judicial system? Moreover, what are the effects of this mounting burden on the process of deciding cases and on the quality of justice available from our federal courts?

The probable effects were most clearly and forcefully articulated at the 1976 Pound Conference, which was a gathering of the most distinguished scholars of the judicial process to consider the present and future problems of the federal judiciary. As Robert Bork, former Solicitor General and now the newest member of the D.C. Circuit noted there:

> "The proliferation of social policies through statute and regulation creates a workload that is even now changing the very nature of courts, threatening to convert them from deliberative institutions to processing institutions, from a judicial model to a bureaucratic model."

As Judge Bork stressed:

> "[W]e are thrusting a workload on the courts that forces them to an assembly line model. Assembly line justice cannot sustain those virtues for which we have always prized federal courts: scholarship, a generalist

view of the law, wisdom, mature and dispassionate reflection, and -- especially important for the perceived legitimacy of judicial authority -- careful and reasoned explanation of their decisions."

I need not remind this audience that, as the workload has increased, the attention which each case receives from the court has declined. The incidence of decisions without written opinions increases. The availability of oral argument declines. Judges must rely increasingly on the work of an expanding cadre of law clerks, magistrates, and other court personnel.

Judge McGowan, a veteran of 19 years on the D.C. Circuit, noted recently that his participation in the decisional process has "changed markedly" since his early years on the bench. He added that it "is much less intellectually satisfying than formerly because there is too much paper shuffling and too little time for personal involvement in research and reflection." It is easy in these circumstances for lawyers, litigants, and the general public to despair of the legal process itself.

The first step in responding to these problems must be more judicial resources. In 1978, the Omnibus Judges Bill authorized the President to appoint 152 new federal judges. That act, however, represented the first increase in the size of the federal judiciary in eight years -- and only the second in the past two decades. Already there is an obvious immediate need for more federal judges to handle the burgeoning caseload.

The Administrative Office of the United States Courts recently transmitted to Congress a bill providing for 11 new permanent and 3 temporary circuit court judges along with 24 permanent and 6 temporary district court judges, for a total of 44 new federal judges. The bill is based on a careful assessment of need by the Judicial Conference. I believe that it is time to recognize that the creation of judgeships should be regularized and based upon such an assessment of need, not politics. There should therefore be bipartisan support for this bill.

The problem facing the federal courts, however, is not simply one of too few judges to handle the work. Too great an expansion of the federal judiciary would create its own set of problems. Constant dramatic expansion tends over time to dilute the prestige and reduce the collegiality of the federal bench, making it harder to attract the best candidates. Increasing the number of decision-makers issuing opinions would threaten uniformity, evenhandedness, and stability in the application of the law. There were already 25,000 decisions issued by the courts of appeal last year and over 200,000 decisions at the district court level. Doctrinal confusion even within a single jurisdiction has become increasingly difficult to avoid. As former Assistant Attorney General Daniel Meador has noted, we risk creation of a "judicial Tower of Babel." Moreover, the utility of the en banc procedure to establish a clear law of the circuit is considerably reduced in courts this large. Professor

Meador noted, for example, that the en banc opinions produced by the twenty-six judges of the Fifth Circuit prior to its division:

> "suggest that it ceased to be the kind of appellate tribunal to which the Anglo-American legal system has become accustomed. Opinions were issued by clumps of judges as though they were members of a convention or a legislature."

By creating too large a number of additional judges in response to the litigation surge, we risk creating more doctrinal confusion which, in turn, would generate still more litigation.

Although the creation of still more judges must unavoidably be part of our answer to the growth of litigation, we must also address the basic underlying cause of this growth and attempt, in Judge Friendly's phrase, to "avert the flood by lessening the flow." The basic cause of the continued growth of filings is the progressive accumulation of new litigable rights and entitlements created by the Congress and by courts themselves.

For many years now, we have attempted, as a society, to regulate by law and judicial processes more and more aspects of society. As Chief Justice Burger stated in his 1982 Annual Report on the State of the Judiciary:

> "One reason our courts have become overburdened is that Americans are increasingly turning to the courts for relief from a range

> of personal distresses and anxieties. Remedies for personal wrongs that were once considered the responsibility of institutions other than the courts are now boldly asserted as legal 'entitlements.' The courts have been expected to fill the void created by the decline of church, family, and neighborhood unity...."

It is the supreme irony that our use of courts to enforce so many newly created rights may actually erode their usefulness in protecting the most essential rights of our citizens. Forcing federal courts to do too big a job has jeopardized the effectiveness of the job they have historically performed.

The problem of federal judicial overload is, of course, in large measure caused by the Congress. Each Congress enacts more legislation that gives rise to new litigation. Though Chief Justice Burger has, since 1972, called on Congress to require a judicial impact statement for each piece of legislation affecting the courts, Congress has seldom given adequate attention to the judicial burdens imposed by new legislation. It is difficult to recall any statute in recent years that has eliminated any significant category of litigation. As the burden of government regulation has accumulated, the opportunities and incentives for litigation seem to have expanded geometrically.

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 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.

Moreover, there are currently pending before the Congress some proposals that could provide very significant relief for the federal courts. One proposal would eliminate practically all of the mandatory appellate jurisdiction of the Supreme Court. Under the current system of mandatory appellate review, the Court must decide many cases presenting no question of general importance or interest. This is the source of a great deal of uncertainty in the law. The court is required to review hundreds of such appeals on the merits, disposing of many in a summary fashion which often generates confusion because the

relative weight to be attached to such decisions is unclear. Chief Justice Burger has argued that "all mandatory jurisdiction of the Supreme Court that can be, should be eliminated by statute." It is time that the Supreme Court were given full discretionary control of its appellate docket.

In another reform effort, the Department of Justice has recently proposed a major revision of the habeas corpus laws. The federal courts currently receive almost 8,000 filings annually from state prisoners seeking habeas corpus relief. The purpose of these petitions is, in general, to relitigate claims that have been unsuccessfully pursued through an entire state system and even the U.S. Supreme Court. Under our proposals, issues that have been "fully and fairly" litigated in the state courts could not be litigated again in federal court through petitions for habeas corpus.

A still more important initiative for reducing the federal overload is the proposal currently pending before Congress to eliminate diversity jurisdiction. The elimination of diversity jurisdiction would substantially relieve the current congestion of the federal dockets. Over twenty percent of all district court filings and ten percent of all appeals are diversity matters. Nevertheless, elimination of federal diversity jurisdiction would not impose a significant burden on the state court systems. It was recently estimated that states would experience an average increase in civil filings of only one percent if diversity were abolished. A resolution adopted by the Conference of Chief Justices in August 1977 noted that the state

courts "are able and willing ... [to assume] all or part of the diversity jurisdiction presently exercised by the federal courts."

Diversity jurisdiction is based upon the belief that an out-of-state litigant would be treated more fairly by a federal than a state court. This rationale arose in a time when the nation was not so bound together by communication and transportation ties and when regional biases were stronger. Today, it cannot justify the continuation of diversity jurisdiction. Moreover, to require federal courts to spend their limited resources in applying state law in diversity cases diverts federal courts from their primary task of enforcing federal law. It also generates uncertainty in the state courts, which are unable to review and correct errors made by federal courts applying state law.

The elimination of diversity jurisdiction is, of course, a matter that has been debated in Congress for a number of years. We have now developed, however, a greater appreciation for the values of federalism and for the limitations in the capacity of the federal government. Perhaps, the elimination of diversity is a proposal whose time has finally arrived.

Past Congresses have failed to act in part because of resistance by elements of the litigating bar. Other things being equal, litigators would, obviously, prefer to have the added option of bringing a diversity matter to federal court. Each day, however, it should become more apparent to the litigating bar that it is in its clear interest to support strong measures to reduce the overload on the federal judiciary and enable the courts to handle their workload in a more considered and deliberate

fashion. It is in our interest as attorneys to take whatever measures are necessary to protect the integrity and character of the judicial system.

Another suggestion that also merits serious consideration is the creation of special tribunals to decide certain types of disputes that do not by their nature require an Article III court. Federal regulatory and welfare programs, which have grown so dramatically, generate repetitious factual disputes of no interest to anyone other than the parties. They must now be presented to a federal court. These disputes -- which arise under laws such as the Social Security, Federal Employers Liability, Consumer Products Safety, and Truth-in-Lending Acts -- could be resolved just as fairly in an Article I tribunal. And they could then be resolved much more quickly and at a lower cost to the litigants.

Arguably, the review or resolution of the narrow type of factual questions that inevitably arise from a regulatory regime should not compete with the general criminal and civil jurisdiction for the attention of the federal courts. If a substantial question of constitutional or statutory interpretation arose, it could be referred to an Article III court. This suggestion is not new. It was made some five years ago by a Justice Department Committee headed by Judge Bork. Since then, however, growth both in the regulatory regime and the burden on federal courts make its serious consideration even more appropriate.

All of the ideas I have briefly discussed today are worthy of your fuller consideration. Judicial self-restraint, regulatory and statutory reform, changes in federal habeas corpus, the elimination of diversity, and the creation of Article I tribunals could improve the effectiveness of the federal judicial system.

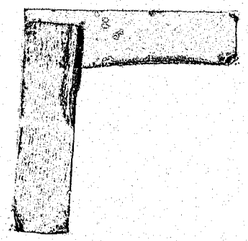
In a book published just last year, one legal commentator wrote:

> "According to one widely quoted estimate, if the rate of lawsuits filed in federal courts alone during the decade 1965-1975 continues to increase as it has, by early in the next century federal appellate courts will hear more than 1 million cases annually -- and the appellate branch typically gets only a tiny fraction of the cases decided by the trial courts each year."

Such increases are unthinkable if the federal judicial system is to play the important role confided to it. Reform is not only important, it is essential. As Winston Churchill once wrote:

> "Things do not get better by being left alone. Unless they are adjusted, they explode with a shattering detonation."

The fuse is lit. It is up to all of us to avert the threatened explosion.



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