Department of Justice

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THE CECIL SIMS MEMORIAL LECTURE
VANDERBILT UNIVERSITY SCHOOL OF LAW

ADDRESS

BY

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I am honored to participate in this lecture series established in the memory of Cecil Sims. Mr. Sims' commitment to legal education and the highest standards for the legal profession reflect the observations of Mr. Justice Holmes that

> ...the business of a law school is not sufficiently described when you merely say that it is to teach law, or to make lawyers. It is to teach law in the grand manner, and to make great lawyers.

It is for lawyers and judges not to be swept away by the broad sweep of events, but to take such facts as are available and use them to place the current scene in perspective, the first approach to any problem. Solutions usually follow. That is our duty to the republic and to our fellow citizens.

In that connection, I give you this beginning thought -- L.Q.C. Lamar, a native Georgian who served as a United States Senator from Mississippi and later as a Justice of the United States Supreme Court was one of the acknowledged leaders in bringing the nation together after the great conflict between the states. He once said in a speech in the United States Senate that institutions lacking

in public support cannot survive, and that the way of wise men is to adjust to such changes and thus remain in positions of influence and leadership. He gave as an example, the adjustment by the rulers of England to parliamentary reform. He contrasted this adjustment to the fate of the French royalty after their country's revolution, who were to spend the balance of their days as dancing masters.

As lawyers, you will present your causes in a professional manner, with style and with a standard of excellence. But, I would hope that with it all, you will be aware of your duty to preserve and improve the system. It is, after all, those of us in the system who are the trustees responsible for maintaining and improving it.

It is appropriate that I have been asked to speak on the "Crisis in the Courts." The law explosion, with the attendant overwhelming caseloads in the trial and appellate courts, is a fait accompli. Whatever the cause of the explosion -- whether Supreme Court decisions refurbishing the Constitution, the statutory expansion of jurisdiction, the natural flow from the technological revolution, the shift from a rural to an urban society, or a manifestation of our litigious society, or a combination of some or all of these factors -- it is here. There is no status quo in our system of justice. The lines of Stephen Vincent Benet in

"John Brown's Body" are apt: "Say not of this time that it is blessed or it is curst, only that it is here."

The pressures on the court systems from the law explosion are severe. The courts may not be equal to the task. Important rights may be lost. Defendants charged with crime may be free on bail, some to commit other crimes. Defendants convicted of crime may be free on bail pending delayed appeals. Business controversies may go unresolved because of the lack of a forum. Hapless plaintiffs with meritorious claims may go unpaid because of the delay in the trial courts and in the appellate courts.

Can these and other dire predictions be avoided? The answer is yes, but it does not come easy.

I would like to talk today about the very real opportunity that we have to address these problems, and I would like to propose some decisive change.

The popular conception of "crisis in the courts" addresses the condition of the courts, particularly the increasing volume of disputes that are presented to the courts for resolution. Judge Aldisert of one of the busiest federal circuits, the Third Circuit, has observed: "The reality is that today there is a mad rush to the Federal courts."

The result for the Federal courts has been large caseloads for judges and substantial delays for litigants. Despite the efforts of overworked Federal judges, the quality of justice dispensed by our Federal court system is beginning to deteriorate and, unless checked, this deterioration will accelerate.

I believe, however, that we must look beyond the condition of the courts and their caseloads. Adding some judges, which I hope Congress will soon approve, is necessary; but additional judges alone does not address more fundamental problems. We should consider as well the appropriate role of the judiciary in American society, for it is the role more than the condition of the courts in which there is the possibility of decisive change in response to the "crisis." In taking this approach, though, we must consider many factors -- including the pressures of volume -- in proposing solutions to the problems that we find.

I would like to think that, as Attorney General, my concern with the problems of the courts continues an important and historical function of my office and of the United States Department of Justice. As far back as 1790, Congress requested the recommendations of the first Attorney General, Edmund Randolph, on court reform following the

First Judiciary Act of 1789. From that time until the creation of the Administrative Office of the United States Courts in 1939, the Department of Justice performed a range of administrative functions for the Federal courts.

Of course, close ties are still maintained by the service of the United States Marshals, and in the exercise of the President's power to nominate Federal judges. And as the nation's law department, the Department's interest in the quality of justice dispensed by our Federal courts is essential and inescapable.

Shortly after assuming office, I established a new unit in the Department, called the Office for Improvements in the Administration of Justice, to work on a number of court-related problems. We have worked together to develop a two-year plan of goals and programs to improve the delivery of justice in this country, with special attention given to the courts.

Already Congress is considering a number of the Department's legislative proposals, which represent the first of our proposed improvements.

On Wednesday afternoon, the Senate Judiciary Committee voted in favor of a new Federal Criminal Code -- the most comprehensive revision of our Federal Criminal law in the nation's history. This is a singular achievement for the

committee members and their staffs and represents praiseworthy and singleminded devotion on their part.

Senator McClellan, despite current poor health, never ceased in his efforts to get through the committee a bill that represented a real consensus between sometimes differing philosophies of law enforcement -- a consensus that would be accepted by the vast majority of the Senate members. Senator Edward Kennedy performed unprecedented service in shepherding the 400-page bill through the elaborate but necessary processes of the Senate, allowing at all times full and considered debate on the dozens of amendments offered by other members and on the important changes that the new code makes in existing law.

Other members -- Senators Bayh, Biden, Byrd, Abourezk, DeConcini, Culver, Metzenbaum, Mathias, Allen, Thurmond, Laxalt, Hatch, Scott, and Wallop -- took hours of their busy schedules day after day to deliberate on these far-reaching reforms that will critically affect the fates of so many people and the integrity of our criminal justice system. Senator James Eastland led the committee to its final conclusions.

The work of all these people on such a complex undertaking truly shows the Senate at its best.

It illustrates in my opinion that the sometimes frustrating and elaborate processes of the Senate can and often do produce a better product in the end than the purist notions of zealots of any persuasion; that compromises such as occurred here that are entered into in a spirit of tolerance and determination to come together in the end are not only necessary but beneficial to the final product.

I sincerely believe that the history of the code in this session is one that says that our democratic processes are alive and well and can cope with difficult, complex and important subjects. That is a very important message to scholars, students, and citizens throughout the land.

I have every reason to be optimistic that the same will occur when the bill goes to the Senate floor and in the House of Representatives next session. Subcommittee Chairman Mann and Chairman Rodino of the House Judiciary Committee share my optimism. They have made commitments to do their utmost to meet the Senate record and to enact the code into law this session.

In the barrage of publicity that has accompanied more visible Administration bills, the Senate's work on the Criminal

Code can too easily be overlooked. It deserves recognition and applause as a vindication of the continued validity of our constitutional processes. As many people have recognized over the past several years, if we are to have a fair and effective system of justice, the fairness and effectiveness must begin with the laws themselves. The proposed new code has now moved to a point where final enactment next year is a realistic goal.

Another major proposal, and it has already passed the full Senate, would expand the authority of the United States magistrates; still another proposed bill would reform diversity jurisdiction by barring plaintiffs from bringing diversity suits in the Federal courts of their own state.

The proposals already advanced, and similar proposals nearing completion or under study, are set within a philosophical framework: We must ensure that for every legitimate dispute which an American citizen has, there will be an appropriate forum in which he or she can get effective redress. This philosophy raises issues of the availability and choice of a forum -- questions that are posed by my earlier question concerning the role of the courts. Also raised is the issue of the effectiveness of dispute resolution within the appropriate forum, which must in turn consider the condition of our mechanisms for resolving disputes.

I would like to discuss first some considerations involved in choosing the forum for resolving disputes. Access to an appropriate forum for dispute resolution does not always require a public hearing of matters in dispute before a life-tenured judge operating under formal rules of evidence and procedure. Rather, many disputes are readily susceptible to resolution by more informal means, and at less cost and inconvenience to the parties.

We have developed some proposals for alternative means of dispute resolution. For example, we have proposed legislation to authorize an experiment with compulsory but non-binding arbitration in certain types of Federal civil cases. Either party could reject the arbitration decision and go to court. But if the party demanding a trial de novo in the district court failed to obtain a judgment more favorable than the arbitration award, he or she would be assessed the costs

of the arbitration proceedings, plus a penalty amounting to interest on the amount of the arbitration award from the time it was filed. The experience of several states with similar systems indicates that we can expect a high finality rate from arbitration decisions.

To seek a national program for the delivery of justice, all of our efforts are not concentrated on the Federal courts. In our efforts to assist the states, we are establishing Neighborhood Justice Centers in three cities. These model centers will be an alternative to the local courts for settlement of many types of disputes -- including family, housing, neighborhood, and consumer problems -- through mediation and arbitration. We are, as well, working with Congress to provide a program of aid to the states for use in developing appropriate mechanisms for minor dispute resolution.

Each of these proposals contemplates the establishment of alternatives available to the parties to a dispute, with sufficient incentives for their use that will cause many disputes to be resolved with more speed and lower cost. The choice of these alternatives does not emerge from any fixed consensus as to the "best way" to resolve conflicts; rather, they are alternatives derived from experience in contemporary circumstances.

The stability of our complex modern society depends in large part on the effectiveness of the mechanisms for resolving inevitable disputes among citizens. Without such resolution mechanisms, people will turn to improper means of self-help or will become subject to resignation in the face of unfair treatment. The inevitable result would be agitation and social unrest.

In considering these alternatives and the incentives for their use, we must weigh such factors as the effectiveness of the alternative forum and the assurance of appropriate responsiveness to persons involved in disputes. For example, expansion of the authority of magistrates provides both a less expensive and a more convenient forum.

Alternative means of dispute resolution suggests that the availability of a Federal forum should depend upon those circumstances that would identify a Federal court, usually a trial court, as the most appropriate forum for resolution of a particular type of dispute. In this context,

Federal jurisdiction should be examined in light of contemporary realities and needs -- not in light of historical theory or assumed problems which may in fact no longer exist, if they ever existed.

Of course, we can posit extremes of Federal jurisdiction, ranging from the most limited powers (excluding general Federal question and diversity jurisdiction) to a much broader grant of Federal judicial power than we have today. The range of jurisdiction can be found in the history of our country. For example, general original and removal jurisdiction of Federal question cases was not conferred on the Federal trial courts until 1875. Looking at other countries, there are no Federal trial courts in the Federal Republic of Germany. The same, with rare exceptions, is true in Australia. The courts of first instance in both countries are provided by the states, and cases flow into a Federal forum only at the appellate level.

In a recent book entitled Federal Jurisdiction: A General View, Judge Henry Friendly suggested some of the attributes to be considered in grants of Federal jurisdiction:

> . . . the general Federal courts can best serve the country if their jurisdiction is limited to tasks which are appropriate to courts, which are best handled by courts of general rather than specialized jurisdiction, and where the knowledge, tenure, and other qualities of Federal judges can make a distinctive contribution.

Using Judge Friendly's criteria for Federal court jurisdiction, we may be able better to evaluate those circumstances in which Federal court resolution of disputes is

indicated. We may wish to consider such factors as the need to ensure uniformity in applying a Federal statute or a constitutional provision. There may be a need, based upon experience, to ensure a Federal fact-finding forum in certain instances.

While these are suggested factors, the underlying assumption is the need to test claims for adjudication by Federal courts in the context of contemporary needs and the most effective allocation of scarce judicial resources. I should note, however, that in some areas, such as the general availability of a Federal forum to vindicate federally granted rights, historical and traditional factors must be accorded due weight.

I would like to give you some examples of current items of concern in which we are testing some assumptions as to the scope of Federal jurisdiction.

Our proposal to reform diversity jurisdiction, which I mentioned earlier, is grounded in part on the improved quality of the state judiciary. The widespread adoption of discipline and removal commissions, merit selection of judges, and creation of the National Center for State Courts and the College of the State Judiciary all are important contributing factors. A recent resolution of the Conference of Chief Justices formally articulated the willigness and the ability of the state courts to absorb many of the diversity cases now heard in the Federal courts.

Shifting of some diversity cases to the state courts, as our proposed legislation would do, has led us to examine the continued need for a jurisdictional floor -- currently $10,000 -- for Federal question cases. We believe that Federal question cases should not be barred by a dollar limitation, and we recently so testified in Congress.

In another area, the Department of Justice is working with Congress to consider the proper allocation of power between the Federal courts and state, county, and municipal authorities as to the nature and extent of private civil actions brought under 42 U.S.C. § 1983 to enforce Fourteenth Amendment guarantees.

Closely related is our work with Congress on legislation that would grant the Attorney General authority to institute civil actions in Federal courts to redress deprivations of constitutional rights and to intervene in litigation where it has been alleged that institutionalized persons are being deprived of such rights. This legislation would codify the practice of the United States since 1971 to be involved as intervenor or litigating amicus curiae in a large number of cases concerning the constitutional rights of confined persons.

In addition, the Attorney General would be allowed to file suits where he believes that there is a pattern or practice of deprivations of constitutional rights in institutions, and where he certifies that he has performed

certain pre-suit negotiations. The legislation, as drafted, provides that the Attorney General shall promulgate minimum acceptable standards for administrative grievance procedures in adult penal institutions. The actual procedures in such institutions then may be certified as meeting the standards. A Federal court could grant a continuance for up to 90 days in a case filed by a prisoner under 42 U.S.C. § 1983 to allow any certified administrative procedures to operate to resolve the complaint.

Access to a Federal judicial forum may be preserved without requiring a Federal court to hear all cases in the first instance. Again, the circumstances must be tested to identify disputes that have matured or originated as matters appropriate for resolution in a Federal court.

Finally, concerns as to the condition of the courts, which usually center on caseload volume, have led many to consider means of restricting the inflow of cases to these courts. This focus on limitation is inappropriate.

Rather, the reasoning process that I am suggesting focuses on a more positive side of the crisis: We must identify those matters which should be allowed into court, matters which are not presently allowed in, or those which are allowed in and should be continued. We must be sensitive to all the interests of society -- majority and minority -- and to the wide range of disputes that require resolution.

Our reasoning has led us to reconsider, for example, various doctrines of standing to sue. Some recent Federal court decisions have raised concerns that meritorious lawsuits raising important Federal questions may be unnecessarily kept out of the Federal courts on grounds that the plaintiff lacks standing to sue. I have directed the Department to assist Congress in developing legislation governing the rules of standing to address these concerns. This legislation will permit access for valid claims without diminishing the traditional authority of the courts to recognize cases that are inappropriate for trial in a Federal forum.

We are also considering improvements in related areas. For example, numerous difficulties in contemporary class actions -- such as problems of manageability, notice, and adequacy of representation -- are receiving detailed attention.

We must find ways to simplify complex litigation, such as that arising out of a major airplane crash involving multiple plaintiffs located in many districts.

We are examining pre-trial procedures as well. The American Bar Association's Section on Litigation recently has made a number of proposals to limit the scope of discovery. We are considering these reforms and others in this area.

Our approach must reflect a sophisticated appreciation of the capabilities of the courts. We must look beyond simple statistics showing increased case filings, in order to

develop better measurements of judicial workloads and the effects of alternative dispute resolution mechanisms. One promising technique is the use of justice system impact statements. The Department recently completed an impact statement on the effects of proposed changes in reviewing certain Veteran's Administration determinations. This impact study, which was requested by the Senate Committee on Veteran's Affairs, shows the value of an impact statement as a means of considering the demands that new legislation could place upon the justice system.

In conclusion, I would like to touch on the role of the courts as part of government under law. In one sense, the courts sit to resolve disputes under existing law -- they are the dispute resolvers of last resort.

I hope that some of the ideas and proposals that I have discussed will make dispute resolution -- both within the courts and in alternative forums -- more convenient, timely, and equitable.

Yet, the courts are only one part of government under law. The three branches -- judicial, executive, and legislative -- represent the totality of the democratic process. I would suggest that the "crisis of the courts" therefore means more than impending change in the courts themselves. What we must face, and what we have begun to address, are the steps that we should take to preserve the

democratic ideal of government under law by striving for more perfect justice. Equal justice under law contemplates lawyers for those who need lawyers and speedy and inexpensive dispute resolution.

I would like to close with the words that Dean Roscoe Pound used to conclude his famous speech delivered over 70 years ago:

> . . . we may look forward to a near future when our courts will be swift and certain agents of justice, whose decisions will be acquiesced in and respected by all.

I once knew a lawyer in North Georgia who always, as a first question on cross-examination, said to a witness: "So that is your swear, is it?" What I have said here today is my swear.

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