Department of Justice

REMARKS

BY

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Chief Judge Don Lay, Program Chairman Pasco Bowman, Distinguished Members of the Eighth Circuit Judicial Conference:

I greatly appreciate this opportunity to address you this morning on matters of mutual concern. In the nearly two years since I took office as Attorney General, I have attempted to encourage increased dialogue between the bench and bar and the Department of Justice, to provide an open door so that we may cooperate fully on those issues of concern to us all. This is, I am pleased to note, the sixth occasion upon which I have an opportunity to speak to a Judicial Conference, with more to come.

This gathering, including as it does the 46 members of the Supreme Courts of the seven states within this circuit, offers a unique opportunity to examine federal-state judicial relations, something to which I, as a former governor, am acutely sensitive. And I hope to offer some useful observations this morning on some of the issues we see of importance to improved federal-state relations from the point of view of the Department of Justice.

This year, we have been engaged in our own year long celebration of the two hundredth birthday of the Office of the Attorney General, created by the very same Judiciary Act of 1789 which established our Federal court system. Last September, to inaugurate our celebration, I invited to Washington all the

living former Attorneys General, back to Herbert Brownell, who served President Eisenhower in the 1950s. And I took that occasion to recall the quite different press of duties upon the first Attorney General, Edmund Randolph.

The Attorney General is frequently called "the President's lawyer," and that's really what Randolph was -- George Washington's personal attorney. Or as might be said today, a "crony" of the President. Maybe that's why Congress was so hard on him. They wouldn't pay for his paper or his goose quill pens or even his inkwells. They wouldn't even hire him a law clerk. He was <u>it</u> -- the whole office -- and only on part-time pay at that. Congress, in its wisdom, reasoned that he could make up the difference by continuing his private practice. It is even suggested that President Washington had to jolly Randolph into taking the job by suggesting that as Attorney General he would gain "a decided preference of professional employment"!

The times . . . they are indeed a-changing. From Randolph's part-time office of one, we have grown to become, since 1870, the Department of Justice, today with some 80,000 employees. I am still very much the President's lawyer, but we now have over 6,000 other lawyers, who advise all branches of the Executive, to see that the laws are faithfully executed. And when the laws <u>are</u> violated, we can call upon the FBI, the DEA, the U.S. Marshals, the Immigration and Naturalization Service, and the Bureau of

Prisons, along with other agencies and commissions and components of the Department. That makes us a sizeable presence, both in Washington and throughout our 94 U.S. Attorneys' offices. And as I am sure you can tell, the Attorney General now works full time.

We are, of course, the principal litigators in the Federal Courts, last year handling, by initiation or defense, 26.5% of the civil cases and, of course, all the criminal litigation, as well as appearing as appellant or appellee in 43.6% of all cases before the Courts of Appeals -- all told, a total of 115,000 cases. So our interest in the matters you are considering during this conference is far from academic.

Looking back, this has not been a year without accomplishment. A year ago few could foresee, for example, favorable action on a judicial pay raise. Yet, after intense negotiations, Congress agreed to increase judicial salaries by some 35% -- a cost of living increase this year and an additional 25% increase effective the first of next year. This pay increase was strongly supported by the President and the Department of Justice as part of an ethics package -- the Ethics Reform Act of 1989 -- setting high ethical standards for all public servants -- whether in the judicial, executive or legislative branch. These dictates respecting our conduct are not a burden that we must bear, but are instead a right which the citizens of this nation expect and one that we must secure.

We are consistently seeking to address all components of the criminal justice system evenly, in particular, to ensure that each -- investigators, prosecutors, judges, and correctional officials --has the resources to handle increased workloads. With the continuing flow of new cases into the judicial pipeline, it is evident, in the present circumstances, that the pipeline must be expanded and new means of managing cases must be created.

Some statistics may be useful here. Last year the number of civil filings in the Federal Courts totalled 223,000 while criminal cases rose to nearly 48,000. And the change in the mix is instructive. While criminal filings increased by 7%, civil cases declined by 7%. Here in the Eighth Circuit, the change was even more dramatic, with criminal cases up by 23% at the same time civil filings dropped by 12%. Part of the reason for the decline in civil cases reflects, to be sure, Congressional action raising the minimum alleged damage required from $10,000 to $50,000 in diversity cases. But the overall shift toward the criminal side is evident and, coupled with speedy trial requirements, means that more judicial focus is sure to be placed on criminal cases for the foreseeable future.

With respect to the need for additional judicial resources to help cope with this shift, the Administration's position is clear: we support the Judicial Conference's recent proposal to

add 96 judgeships, including seven within this circuit, to the Federal system and are currently seeking an additional $403 million to ease the impact of drug-related activities on the judiciary in this year's budget negotiations.

In the area of maximizing present judicial resources, I am also pleased to report that the filling of judicial vacancies proceeds apace. Thus far, in this Administration, over 260 prospective judicial nominees have been interviewed, and the President has sent a total of 64 persons to the Senate for confirmation -- 49 of whose nominations have been acted upon favorably. The President, I am pleased to say, regards the selection of men and women of character, integrity and sound judicial temperament as a high priority for this Administration.

Now to some of the nuts and bolts of our concerns. With respect to civil dockets, we expressed to Judge Joseph Weis, Jr. and the members of the Federal Court Study Committee and have reiterated since our view that the most evident long-term answer to the problems facing the federal courts is to trim their jurisdiction to that which fits the federal interest. The most obvious example, in our view, would be to abolish or severely limit diversity of citizenship jurisdiction. At a time when criminal dockets are rising rapidly in many districts and citizens are forced to wait in line to bring their <u>federal</u> civil claims before a federal court, we do not believe we can afford

the luxury of having the federal courts continue to consider some 60,000 civil claims founded up on state law each year. However unlikely the prospect, we see no other federal judicial reform that can sufficiently reduce your caseloads so as to avoid the alternative of substantial increases in the size of the judiciary over time.

Unchecked expansion of the judiciary, of course, raises substantial concerns -- concerns quite apart from the obvious impact on budget deficits. Among those most commonly expressed are that, if the judiciary becomes too large, we will lose the consistency, collegiality and constancy of federal law that our citizens deserve.

With respect to criminal dockets, there are obviously no easy answers. Increased efforts are being mounted against white collar crime, hate crimes, environmental profiteers and, most of all, drug offenses. We are committed to an all-out effort against drug trafficking. I will not mince words on this issue: over the next few years you will most likely see more federal drug cases, not fewer, as a result of necessary increases in our force of investigators and prosecutors and increased international cooperation. It is critically important that federal courts remain in the front lines of this effort.

Of late, another significant levy on the courts' dockets has emerged as we have stepped up our effort to deal with white collar crime. These cases, such as those involved with criminal conduct in the collapse of the savings and loan industry, are highly complicated and sophisticated in nature. They are not "one size fits all" investigations and prosecutions. They most often involve careful scrutiny of thousands of documents, hundreds of witnesses, months of grand jury investigation and, inevitably, when they come to trial, an equivalent commitment of court time. Again, it is highly likely that more, not fewer of these "paper trail" cases will be in the federal courts in the foreseeable future.

Now let me mention an area of potential relief, for a change of pace. Before the House of Representatives this week, following action by the Senate on similar legislation, is the President's crime package. Included in that package are proposals designed to curb the seemingly interminable litigation and re-litigation of cases involving state criminal convictions and, more particularly, cases involving the imposition of the death penalty. As a former governor, I am well aware of the virtual nullification of the death penalty now in effect in 37 states which these protracted delaying tactics have produced.

We strongly support the proposals embodied in the recommendations of the committee headed by former Justice Lewis F. Powell, Jr., to deal with the latter problem as part of an overall effort to reduce the over 10,000 Federal habeas corpus cases filed each year -- one-third of which are filed more than ten years after conviction -- on the basis of which relief is rarely granted.

Our proposals would establish a reasonable time limit on habeas corpus applications and would provide deference to "full and fair" state court adjudications in subsequent federal proceedings. We also support those recommendations of the Powell Committee giving the states the option to elect coverage through providing counsel to represent capital defendants in state collateral proceedings which would trigger a requirement that a 180-day time limit be put upon the filing of Federal habeas corpus petitions.

On a more ominous note, it is obvious that we face new challenges ourselves in seeking to ensure court security. The dreadful murder of Eleventh Circuit Judge Robert S. Vance proves to us, once again, how fragile human life can be, indeed how fragile can be our own personal security. We are committed to tracking down the individual or individuals who took Judge Vance's life; likewise, any others who threaten or seek to

intimidate officers of our judicial system must be brought to justice.

An ounce of prevention, of course, is always worth a pound of cure and we are focusing anew, accordingly, on preventive measures. This year, the Director of our Marshals Service, Mike Moore, and the Court Security Committee of the Judicial Conference have been working on all of these security issues. It is, as always, our hope that these endeavors will be both fruitful and uninterrupted by further incidents.

Finally, let me mention an historic opportunity that we who occupy leadership positions within the American legal community have today. This past year I have had the chance to participate in discussions on the rule of law and human rights with our counterparts in the Soviet Union. Beginning with a week long visit in Moscow last fall and continuing to date, we have examined together in great detail those characteristics of our democratic society which distinguish it as an exemplar for those nations which are today throwing off the yoke of totalitarian rule.

Our unique Soviet agenda included subjects such as federalism, our two-party system, the concept of separation of powers, the notion of checks and balances and, most of all, the absolute necessity of an independent judiciary. Soviet Justice

Minister Venamin Yakovlev will be making a return visit next month to the United States, during which he and I hope to attend together the annual meeting of State Chief Justices and Judges in Lake George, New York to further the process of acquaintance and appreciation with our system of governance.

These discussions over the past year have made me well aware that Soviet justice does not yet embody what we know as the rule of law, but they have also convinced me that patience and example, and even some advocacy, might well help support President Gorbachev's stated desire to create what he calls a "law-based state" in the Soviet Union.

Like everybody else's democratic experiment, theirs will have to be attempted and achieved within their own society. Nobody else but their own judges, lawyers, ministers and citizens can evolve the judicial fairness and institute the legal restraint that underpin the rule of law. And it is only inherent respect for the law -- such as we have seen people steadfastly demanding in the open squares and open parliaments and newly open societies -- that will bring to a tolerable end the last vestiges of tyranny in these formerly closed Communist monoliths.

So we must use every opportunity to remind our counterparts just what a "law-based state" means. And they can surely recognize it in these United States. By the human rights the

rule of law protects, by the governmental powers the rule of law limits, by the judicial independence the rule of law preserves. Thus evolves the responsibility to match our opportunity. After more than two hundred years of our own experience and experiment with the rule of law -- who better to aid in its emergence elsewhere?