

REMARKS OF THE ATTORNEY GENERAL
BEFORE THE ABA LITIGATION SECTION
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Thank you, Mr. Cooper and fellow members of the ABA Litigation Section.

Litigators and judges frequently bear the brunt of criticism for many of the problems facing the nation today. I am not here, however, to burden you with yet another brief about lawyers who, as my colleague Bill Baxter says, "litigate to the eyeballs." The subject of my remarks is not litigation but legislation, not lawyers but lawmakers, in particular many of those in the House of Representatives.

Last month the Washington Post in an editorial titled "The Gutless House," asked: "Why do the members of the House of Representatives think they were elected?"

That is a question much on my mind when it comes to matters involving the administration of justice.

Like the American Bar Association, the Department of Justice has a special responsibility to seek improvements in the justice system. The Department has discharged this duty over the past three years. Working with members in both houses of Congress, and on both sides of the aisle, we have helped develop legislative proposals on a variety of issues including bankruptcy, crime, and immigration. Yet as the Washington Post observed in its editorial, while on most occasions the Senate has acted responsibly, by passing legislation dealing with these justice-related issues, the House has not. To be sure, some members of the House have worked to see needed reforms passed, but not enough have. The fact is that the Senate has passed legislation in these areas, while the House has not.

Consider, for example, bankruptcy, an issue that concerns many litigators. You know the situation. In its Northern Pipeline decision more than a year ago, the Supreme Court held that the bankruptcy courts created by the Bankruptcy Reform Act of 1978 could not constitutionally exercise the broad jurisdiction that law conferred upon them. The Court stayed its judgment until December 24, 1982, to allow Congress time to reconstitute the bankruptcy court system. Although some members urged

their colleagues to respond, Congress failed to act. The courts then adopted an Interim Rule proposed by the Judicial Conference in an attempt to prevent the breakdown of the bankruptcy courts.

That rule expires on March 31, 1984. The Senate has attempted to meet this deadline by passing legislation that would re-establish the Article I bankruptcy courts provided by the 1978 Act. This bill provides the additional district court supervision required by the Supreme Court's decision. Under this approach, the President would appoint 232 bankruptcy court judges, with the consent of the Senate, to 14-year terms. The Senate legislation also includes an omnibus judges provision, which would create 85 new federal judgeships. The House, meanwhile, has failed to pass comparable legislation. None of the three principal bankruptcy bills in the House has even come to the floor for a vote.

Although it has failed to deal with the immediate issue of reconstituting the bankruptcy courts, the House has nonetheless proved quite capable of modifying one of the rules of bankruptcy procedure for the sake of a private interest. In the only piece of bankruptcy legislation it has passed in the current session, the House voted to make sure that a Kansas company providing notices in Chapter 13 cases did not lose any business as a result of a recent rule turning this job over to the Administrative Office of the U.S. Courts.

The House passed this legislation in the final hours before the August recess, and the Senate quickly followed suit. No committee hearings on the bill were held, no legislative history was prepared. Indeed the Department did not learn about the bill until after it had been passed by the House. While written as general legislation, it obviously was no such thing.

Evidently, the House can act quickly on well-lobbied, special interest legislation for those who profit from bankruptcy. But it seems incapable of acting on broader issues that concern the public interest. Cynics and even the credulous among us will be tempted to conclude that some members of Congress think they were elected simply to please special interests. As a member of the executive branch concerned about the administration of justice, I can only conclude that when it comes to bankruptcy reform, tomorrow continues to be the busiest day of the week on Capitol Hill.

There are, however, not very many tomorrows left before the Interim Rule expires. As March 31 approaches, the Department is increasingly concerned that Congress pass some sort of bankruptcy court legislation. Otherwise, the 812,190 pending bankruptcy cases will inundate the federal district courts, and our economic system will be forced to do without a proper forum for resolving bankruptcy cases. President Kennedy once remarked that "there are risks and costs to a program of action. But they are far less than the long-range risks and costs of comfortable inaction." These remarks apply with added force to bankruptcy.

They likewise apply, I should note, to a matter that the Senate also acted on in its bankruptcy bill, but which the House has refused to deal with. I am referring to the need for more federal judges to handle the burgeoning civil and criminal caseload. From 1979 to 1983, just five years, district court filings have increased from 187,000 to 278,000, and appeals to the courts of appeals have increased from 20,000 to 30,000.

This is a matter of professional interest to litigators. It is also a matter in the public interest.

The Department of Justice has launched an unprecedented effort to bind the hands of organized crime and stop the flow of illegal drugs into the nation. Congress has provided us with some of the resources to do this job. We now have more investigators, and more prosecutors. Yet the criminal justice system is only as strong as its weakest link. And if we have too few judges, justice cannot be done swiftly. It may not be done at all.

In testimony to a House subcommittee two weeks ago, Stanley Marcus, the U.S. Attorney for the Southern District of Florida, commented on the substantial volume of criminal cases in his jurisdiction. His district, rife with the activities of organized crime and drug trafficking, has more criminal cases than any other, and the likelihood that federal defendants take their cases to trial is more than twice as great in South Florida as in any other district. Not only can criminal justice be delayed or denied in such circumstances, civil justice can suffer, too. In the Southern District of Florida, according to Mr. Marcus, the federal bench sits essentially as a criminal court.

Of the 85 new federal judgeships created by the omnibus judges provision in the Senate bankruptcy bill,

three would sit in the Southern District of Florida. It is time for the House to act to establish the additional judgeships the federal court system so badly needs -- past time.

The same can be said about immigration reform. Three decades have passed since Congress last enacted a comprehensive reform of our immigration laws. Increasingly in recent years it has become apparent that the United States has a serious problem. It is, simply put, that we have lost control of our borders.

The vehicle -- the only vehicle -- for improving our immigration laws and their enforcement is the Simpson-Mazzoli bill. Among other things, the bill seeks to deter future illegal immigration by banning employers from knowingly hiring illegal aliens and thereby diminishing the economic incentive for illegal migration. Employer sanctions are the only remaining credible enforcement tool left that shows any promise of restoring control of our borders. The bill also would deal realistically and humanely with illegal aliens already in this country by establishing a mechanism for many of them to obtain legal status.

During the last Congress the Senate passed a version of this bill by the overwhelming bi-partisan vote of 80 to 19. But the legislation died in the House. In this Congress the Senate again has passed Simpson-Mazzoli, by 76 to 18. But now the nation has been told by the House leadership that immigration reform will not be scheduled for floor action this year. That position is based on partisan politics, and represents the first time politics has been injected into this issue in the five-year effort to deal with this difficult problem. Many believe that immigration reform may not be attempted again for years.

The problem that Simpson-Mazzoli addresses will not go away; in fact, it can only become worse. In fiscal year 1983 the Immigration and Naturalization Service reported an almost 40 percent increase in apprehensions along our Southern border. That figure is a strong indication of worsening migratory pressures. We need expanded legal authority to reduce the magnet effect of the attractive U.S. job market.

One of the President's first acts in office was the creation of the Task Force on Immigration Law Reform, of which I was chairman. Following months of hard and concentrated work and building on the work of President

Carter's Bipartisan Select Commission on Immigration Policy, on which my predecessor, Ben Civiletti, served with distinction, the administration proposed a legislative package to Congress. This legislation evolved into the Simpson-Mazzoli Bill. It is a careful, conscientious, and balanced response to a very difficult problem. It has had the strong support of Americans of diverse views, including Father Theodore Hesburgh, Lane Kirkland, Barbara Jordan, Robert McNamara, Cyrus Vance, Governor Lamm of Colorado, former Presidents Carter and Ford -- and many others. In addition, it has won the editorial support of almost all of the nation's principal newspapers, and it has the support of large majorities in every poll and survey on the issue.

All of this effort should not go to waste. All of this support should not be in vain. The choices involving immigration are difficult, compromise is necessary, and political risks are associated with any course of positive action. The Senate has accepted the existence of our immigration problem, and dealt with it. The House, however, has refused to do so. Why were the members of the House of Representatives elected? To make hard choices, and to devise fair and practical solutions to important public problems. Immigration reform is in the long-term public interest. But it cuts across a host of short-term special interests. Unfortunately, the latter have prevailed so far in the House of Representatives. The refusal to permit a floor vote prevents the House from performing its responsibilities to the American people. I have said before and I say it now again: "The House should be allowed to vote." It is were, my prediction is that Simpson-Mazzoli would pass by a wide margin.

Crime is another issue where the House balks. In the 97th Congress the Senate by a vote of 95 to 1 passed a major crime bill that included bail reform, determinate sentencing, abolition of parole, stronger forfeiture provisions, and many other reforms. The House refused to act on this measure. In the 98th Congress, the Senate Judiciary Committee has reported favorably the Comprehensive Crime Control Act of 1983, which is similar to the bill the Senate passed last year. We expect that the full Senate will act on this bill, which should receive the same overwhelming support. Once again, this session, there has been almost no action in the House.

Last fall, in the waning hours of the 97th Congress, the House did pass what some of its members labeled a crime bill. But that legislation was by no

means a significant anti-crime measure. Where the bill now pending in the Senate has 42 provisions, the House bill had only four, and these were inadequate. It was vetoed because it contained an unnecessary and impractical reorganization provision.

Something much more comprehensive is needed if we are finally to strike a better balance in our criminal justice system that in recent years has been tilted in favor of wrongdoers. Such a balance is especially needed if the federal government is to wage an effective battle against the nation's principal crime problem: organized crime and drug trafficking. As politically divergent a group as Senators Kennedy, Biden, Thurmond, and Laxalt understand this. And so do many Democrats and Republicans in the House. Apparently some important members of the House do not.

The status quo in many areas of the federal criminal law cannot continue. Neither can it continue in regard to bankruptcy and immigration. Yet it will not be changed and the American people will not be served until the House of Representatives quits standing on the sidelines and decides to join the action on the field.

The members of the House of Representatives were not elected to stand like stone in the way of significant reforms in the administration of justice. Surely they were not elected to become evidence to support Samuel Johnson's remark that "to do nothing is in every man's power."

No one can persuasively argue that today there is no need for action -- certainly not with a day of judgment coming due for bankruptcy, with control of our borders lost, and with the scales of criminal justice tilting more and more out of balance. Neither can it be said that these reforms lack bipartisan support. It is overwhelming -- as witness the 95 to 1 vote in the Senate on criminal law reform.

Winston Churchill once remarked:

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

We must hope that very soon Congress will do what is required to avoid that explosion.