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Crisis in the Courts: Proposals for Change

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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 observation of Mr. Justice Holmes that: "[T]he 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."[1]

Lawyers and judges must not be swept away by the broad flow of events, but rather must take such facts as are available and use them to place the current scene in perspective. This is the first approach to any problem, and solutions usually follow. The adoption of a systematic approach is our duty to the republic and to our fellow citizens. In this regard, 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. In a speech in the United States Senate, he once said 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. As an example, Justice Lamar pointed to the successful adjustment by the rulers of England to parliamentary reform. He contrasted this adjustment to the fate of the French royalty who were compelled after their country's revolution 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. I would hope that, with it all, you will be aware of your duty to preserve and improve the system. Those of us in the system are, after all, 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

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1. O. HOLMES, *Use of Law Schools,* in SPEECHES 30 (1913).

caseloads in the trial and appellate courts, is a *fait accompli.*[2] Whatever the cause of the explosion—whether the 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, 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 Benét in *John Brown's Body* are apt: "Say neither, in their way . . . nor 'It is blest,' but only 'It is here.' "[3]

The pressures imposed upon the court system by the law explosion are severe, and the courts may not be equal to the task. Important rights may be lost. Defendants charged with crimes may be free on bail, some to commit other crimes. Defendants already convicted of crimes 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 uncompensated because of delay in the trial and appellate courts. These and other dire predictions can be avoided, but the solutions will not come easily. I would like to talk today about the very real opportunity we have to solve these problems, and I would like to propose some decisive change.

The popular conception of the crisis in the courts focuses upon the condition of the courts and particularly upon the increasing volume of disputes that are presented for resolution. For example, Judge Ruggero J. Aldisert of the Third Circuit, one of the busiest federal circuits, has observed: "The reality is that today there is a mad rush to the Federal courts."[4] The available statistics reflect Judge Aldisert's observation. For instance, according to the most recent report of the Administrative Office of the United States Courts, record numbers of cases have been filed in the circuit and district courts during the past year, and the number of cases pend-

2. According to the *1977 Annual Report of the Director, Administrative Office of the United States Courts* [hereinafter cited as 1977 ANNUAL REPORT], at 2-9, 65-67, 79-80, 133-39, A-28-29, a record number of cases (19,118) were filed in the United States Courts of Appeals. Additionally, a record total of 15,444 cases were pending in the courts of appeals, with each three-judge panel having an average of 478 cases pending on June 30, 1977.

In the United States District Courts, 130,567 civil cases and 41,464 criminal cases were filed, representing a record 432 civil and criminal filings per authorized judgeship. While pending criminal cases (17,109) decreased to their lowest level since 1968, pending civil cases increased to a record 153,606, or 386 civil cases pending for each authorized judgeship. The overall median time required to dispose of civil cases was nine months, but six districts recorded median times of more than 15 months from filing to disposition.

3. S. BENÉT, JOHN BROWN'S BODY 385 (1928).

4. Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload,* 1973 L. & SOC. ORD. 557, 559.

ing in these courts has reached new levels.[5] The result 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. The addition of some judges, a measure that I hope Congress soon will approve and send to the President, is necessary, but the mere addition of new judges will not address the more fundamental problems. We should consider as well the appropriate role of the judiciary in American society, for it is that role more than the condition of the courts that presents the greatest possibility for decisive change in response to the crisis. In taking this approach, however, we must consider many factors—including the pressures of volume—before 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 the United States Department of Justice. As far back as 1790, following the first Judiciary Act of 1789, Congress requested recommendations from the first Attorney General, Edmund Randolph, on court reform.[6] 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 still are maintained between the Department of Justice and the federal judiciary through the service of the United States Marshals and through the exercise of the President's power to nominate federal judges. Moreover, as the Nation's legal department, the Justice Department's interest in the quality of justice dispensed by the federal courts is both essential and inescapable.

Shortly after assuming office, I established a new unit in the Department, the Office for Improvements in the Administration of Justice, to work on a number of court-related problems. In developing a two-year plan to improve the delivery of justice in this country, we have given special attention to the courts. The following organizational goals of the two-year plan underlie our approach:

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5. 1977 ANNUAL REPORT, *supra* note 2. Several recent studies indicate that these pressures will continue to increase. *See, e.g.*, FEDERAL JUDICIAL CENTER, DISTRICT COURT CASELOAD FORECASTING (1975); Goldman, Hooper & Mahaffey, *Caseload Forecasting Models for Federal District Courts*, 5 J. LEGAL STUD. 201 (1976).

6. 1 AMERICAN STATE PAPERS, MISCELLANEOUS 21 (1790).

1. To assure access to effective justice for all citizens;
2. To reduce the impact of crime on citizens and the courts;
3. To reduce impediments to justice unnecessarily resulting from separation of powers and federalism; and
4. To increase and improve research in the administration of justice.[7]

Congress already is considering a number of legislative proposals, the first of the Department's suggested improvements. In addition, we have been working with the Congress on other bills of great importance, several of which I would like to discuss briefly.

In early November, the Senate Judiciary Committee approved a new Federal Criminal Code—the most comprehensive revision of federal criminal law in the Nation's history. This is a singular achievement for the committee members and their staffs and represents praiseworthy and single-minded devotion on their part. I have every reason to be optimistic that the bill[8] will progress on the Senate floor and in the House of Representatives. Subcommittee Chairman James R. Mann and Chairman Peter W. Rodino, Jr., of the House Judiciary Committee share my optimism and have made commitments to do their utmost to meet the Senate record and to enact the Code into law. Amid the publicity that has accompanied more visible Administration bills, the Senate's work on the Criminal Code too easily can be overlooked. It deserves recognition and applause as a vindication of the continued validity of our legislative processes. As many people have recognized in the past several years, if we are to have a fair and effective system of justice, fairness and effectiveness must begin with the laws themselves. The proposed Code has now moved to a point at which final enactment next year is a realistic goal.

The Federal Criminal Code is not the only important legislation making significant progress in Congress. Another major proposal, which already has passed the full Senate, would expand the authority of the United States magistrates.[9] Still another proposed bill would reform diversity jurisdiction by barring plaintiffs from bringing diversity suits in the federal courts of their own state.[10]

The proposals already advanced, and similar proposals nearing

7. Copies of tbe plan are available from the Office for Improvements in the Administration of Justice, U.S. Department of Justice, Washington, D. C. 20530.

8. S. 1437, H.R. 6869, 95th Cong., 1st Sess. (1977) [*ed. note*: S. 1437 passed the Senate on Jan. 30, 1978].

9. S. 1613, H.R. 7493, 95th Cong., 1st Sess. (1977).

10. S. 2094, H.R. 9123, 95th Cong., 1st Sess. (1977).

completion or under study, are set within a distinct philosophical framework: we must ensure that every American citizen with a legitimate claim will be able to find an appropriate forum in which he or she can obtain 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. Our framework also raises the issue of the effectiveness of dispute resolution within the appropriate forum, which must in turn lead to a consideration of the condition of our mechanisms for resolving disputes.

I first would like to discuss some of the considerations involved in choosing a forum. Access to an appropriate forum does not always require a public hearing 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, with less cost and inconvenience to the parties. Consequently, we have developed some proposals for alternative means of dispute resolution. For example, we have proposed legislation authorizing an experiment with compulsory, but nonbinding, arbitration in certain kinds of federal civil cases.[11] Either party could reject the arbitration decision and go to court. If, however, 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. Several states with similar systems have experienced a high finality

11. S. 2253, H.R. 9778, 95th Cong., 1st Sess. (1977).

The bill would add a new chapter to the United States Code setting forth procedures for arbitration. It would allow any district to adopt this arbitration scheme and would require the scheme to be implemented on a test basis in five to eight districts chosen by the Chief Justice after consultation with the Attorney General.

The bill requires that certain specified cases filed in a district court adopting the scheme be referred to arbitration soon after the pleadings are closed. In addition, any matter to which the parties consent is to be referred to arbitration. The cases that are to be referred mandatorily are actions for money damages only or, in the discretion of the court, actions in part for monetary relief in which no more than $50,000 in relief is sought and that are: (1) Miller Act (in which the United States does not have a monetary interest) or Jones Act federal question cases; (2) cases based on federal question or diversity jurisdiction; or (3) personal injury or property damage cases brought under diversity or maritime jurisdiction. Actions to which the United States is a party are excluded, except when the Attorney General provides for their inclusion by regulation and except for the Miller Act cases in which participation by the United States is in form only. The exception to the money damages limitation is made for cases in which the judge determines that any nonmonetary claims are insubstantial.

In addition to the proposed statute, the Department of Justice is proceeding with the Federal Judicial Center to establish under local district court rule similar arbitration plans on a pilot basis in three federal district courts. This program, which will begin in early 1978, will continue for one year; the program then will be evaluated by the Federal Judicial Center.

rate from such arbitration decisions.[12]

In seeking a national program for the delivery of justice, we have not concentrated all of our efforts on the federal judiciary. As a part of our efforts to assist the states, we are establishing Neighborhood Justice Centers in three cities.[13] These model centers will serve as an alternative to the local courts for settlement of many kinds of disputes—including family, housing, neighborhood, and consumer problems—through mediation and arbitration.[14] We also are working with Congress to develop a program of aid to the states for use in developing appropriate mechanisms for resolution of minor disputes.[15]

The stability of our complex modern society depends in large part upon the effectiveness of its mechanisms for resolving inevitable disputes among citizens. Without such mechanisms, people will turn to improper means of self-help or will become subject to resignation in the face of unfair treatment. In either event, the inevitable result will be agitation and social unrest. In considering alternatives for dispute resolution and the incentives for their use, we must weigh such factors as the effectiveness of the alternative forums and the assurance of appropriate responsiveness to the parties involved. Each of the proposals that we have set forth contemplates the establishment of alternatives that will achieve a final resolution with more speed and at lower cost. For example, expansion of the authority of magistrates provides both a less expensive and a more convenient forum. These improvements will in turn serve as incentives for

12. Five states, California, Michigan, New York, Ohio, and Pennsylvania, have experimented with compulsory arbitration. For commentary on these state plans, see, *e.g.*, AMERICAN BAR ASSOCIATION, REPORT OF POUND CONFERENCE FOLLOW-UP TASK FORCE 12-15 (1976) [hereinafter cited as POUND CONFERENCE FOLLOW-UP]; CALIFORNIA JUDICIAL COUNCIL, A STUDY OF THE ROLE OF ARBITRATION IN THE JUDICIAL PROCESS (1972); STATE OF NEW YORK, APPELLATE DIV., 4TH DEPT., COMPULSORY ARBITRATION PROGRAM, MONROE COUNTY ANNUAL SUMMARY AND COMMENTARY (1971); Miller, *Mediation in Michigan*, 56 JUDICATURE 290 (1973).

13. The Centers will be established in Atlanta, operated in cooperation with the local court administrator; in Kansas City, Missouri, directed by the city manager; and in Los Angeles, managed by a bar association committee of judges, lawyers, and academicians. The three pilot centers will be funded by the National Institute for Law Enforcement and Criminal Justice of the Law Enforcement Assistance Administration. Each center will receive approximately $200,000 to finance its operations for an 18-month period. An additional $350,000 has been allocated for an independent evaluation of the Centers aimed at determining the most successful elements of the program.

14. *See* POUND CONFERENCE FOLLOW-UP, *supra* note 12, at 9-12; Sander, *Varieties of Dispute Processing, reprinted in* 70 F.R.D. 111, 130-33 (1976) (presented to the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice); NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, U.S. DEPARTMENT OF JUSTICE, NEIGHBORHOOD JUSTICE CENTERS (1977).

15. S. 957, amend. no. 1623, 95th Cong., 1st Sess., 123 CONG. REC. S18904-08 (daily ed. Nov. 4, 1977).

use of the alternatives. Our choice of these alternatives does not emerge from any fixed consensus on the best way to resolve conflicts; rather, they are alternatives derived from experience in contemporary circumstances.

The establishment of alternative means of dispute resolution suggests that the availability of a federal forum should depend upon the existence of circumstances that identify a federal court, usually a trial court, as the most appropriate forum for resolution of the particular dispute. In this regard, federal jurisdiction should be examined in light of contemporary realities and needs, rather than in light of historical theory or assumed problems that may in fact no longer exist, if they ever existed.

In examining the proper scope of federal jurisdiction, we can posit extremes, 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 history of our country's judicial system reveals the range of jurisdiction that can be established. For example, general original and removal jurisdiction of federal question cases was not conferred upon the federal trial courts until 1875.[16] In fact, such countries as the Federal Republic of Germany and, with rare exceptions, Australia, have no federal trial courts. 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. Of course, one of the justifications for our unique federal court system is the vindication of rights accorded to every citizen under the Constitution and federal statutes.

In a recent book entitled *Federal Jurisdiction: A General View*, Judge Henry Friendly suggested some of the attributes that should be considered in granting federal jurisdiction:

> [T]he 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.[17]

By using Judge Friendly's criteria for federal court jurisdiction, we may be better able to evaluate those circumstances in which federal court resolution of disputes is warranted. We may wish to consider such factors as the need to ensure uniformity in applying a federal statute or a constitutional provision. A need also may exist, based

16. Act of March 3, 1875, ch. 137, 18 Stat. 470.
17. H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 13-14 (1973).

upon experience, to ensure a federal fact-finding forum in certain instances.

While these are only suggested considerations, they are based upon the underlying assumption that claims for federal court adjudication should be tested 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 vindication of federally granted rights, historical and traditional factors must be accorded due weight in determining whether to provide a federal forum. In addition, these criteria must be measured against the unique capabilities of the federal courts to resolve certain disputes that involve constitutional issues or the application of federal statutes. Finally, because these needs are dynamic, we must be sensitive to the necessity of change over the course of time.

I would like to discuss some current areas of concern in which we are testing some assumptions regarding the scope of federal jurisdiction. For example, our proposal to reform diversity jurisdiction, which I mentioned earlier,[18] is grounded in part upon the improved quality of the state judiciary. The widespread adoption of discipline and removal commissions, the merit selection of judges, and the creation of the National Center for State Courts and the College of the State Judiciary all are important contributions. A recent resolution of the Conference of Chief Justices formally articulated the willingness and ability of the state courts to absorb many of the diversity cases now heard in the federal courts.[19]

Earlier this year, the Department of Justice proposed that the statute governing diversity jurisdiction[20] be amended to preclude a plaintiff from initiating a suit in a federal court located in the state of his or her citizenship.[21] We estimated that this change would eliminate about 15,000 cases annually from the federal district courts, or approximately eleven percent of the district court caseload in fiscal year 1976.[22] According to a Senate Judiciary Commit-

18. S. 2094, H.R. 9123, 95th Cong., 1st Sess. (1977).

19. On August 3, 1977, the Conference of Chief Justices adopted the following resolution: "Our state court systems are able and willing to provide needed relief to the federal court system in such areas as: . . . (c) The assumption of all or part of the diversity jurisdiction presently exercised by the federal courts." *See also* Statement of Chief Justice Robert J. Sheran of the Supreme Court of Minnesota before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, *reprinted in* 123 CONG. REC. S13346-49 (daily ed. Aug. 2, 1977).

20. 28 U.S.C. § 1332 (1970).

21. S. 2094, H.R. 9123, 95th Cong., 1st Sess. (1977).

22. Statement of Assistant Attorney General Daniel J. Meador before the Subcomm.

tee study, if resident plaintiffs are barred from bringing suits in the federal courts located in their own states, the civil caseload of the state courts would increase no more than one and one-half percent in any state.[23] More recently, a House Judiciary subcommittee chaired by Congressman Robert Kastenmeier reported a bill that, among other provisions, would abolish all diversity of citizenship jurisdiction with the exception of statutory interpleader and suits by foreign states or their citizens.[24] Assistant Attorney General Daniel J. Meador has testified that the Department of Justice does not object to this change.[25]

The proposals for transferring some or all diversity cases to the state courts has led us to examine the continued need for a jurisdictional floor—currently 10,000 dollars—for federal question cases.[26] The legislation recently reported by Congressman Kastenmeier's subcommittee would remove the 10,000 dollar amount-in-controversy provision of 28 U.S.C. § 1331, with the exception of certain suits maintained under the Consumer Product Safety Act.[27] We support this change, which appropriately would place in the federal courts all cases that arise under the Constitution or laws of the United States.[28]

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 gnarantees.[29] For example, we believe that present law should be changed to impose liability on state and local governmental units for violations of section 1983. By permitting suits to be brought against state and local governments, Congress would encourage these authorities to take preventive steps to ensure that their employees do not violate the constitutional rights of their citizens. Also, the Department believes that federal injunctions should not be issued against pending state crimi-

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on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, at 3-4 (Sept. 28, 1977) (copy on file with *Vanderbilt Law Review*).

23. *Id.*

24. H.R. 9622, 95th Cong., 1st Sess. (1977).

25. Testimony of Assistant Attorney General Daniel J. Meador [hereinafter cited as Meador Testimony] and Deputy Assistant Attorney General Paul Nejelski before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of tbe House Comm. on the Judiciary (Oct. 19, 1977); letter from Attorney General Griffin B. Bell to Congressman Robert W. Kastenmeier (Oct. 21, 1977) (on file with the *Vanderbilt Law Review*).

26. 28 U.S.C. § 1331 (1970).

27. H.R. 9622, 95th Cong., 1st Sess. (1977).

28. Meador Testimony, *supra* note 25.

29. S. 35, H.R. 4514, 95th Cong., 1st Sess. (1977).

nal proceedings except, as was decided in *Younger v. Harris*,[30] in cases in which exceptional circumstances are present. While these are only a few of the issues raised by this complex legislation, we look forward to action by Congress in this important area.

Closely related is our work with Congress on legislation that would empower the Attorney General to institute civil actions in federal courts for redress of deprivations of constitutional rights and to intervene in litigation in which institutionalized persons allegedly have been deprived of such rights.[31] This legislation would codify what has been the practice of the United States since 1971 of either intervening in or litigating *amicus curiae* a large number of cases concerning the constitutional rights of confined persons.[32] This legislation also would permit the Attorney General, upon certification that he has performed certain pre-suit negotiations, to file suits when he believes that a pattern or practice of deprivations of constitutional rights has developed in institutions. 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 of such institutions would be certified if they met the standards. A federal court could grant a continuance for up to ninety days in a case filed by a prisoner under section 1983 to allow any certified administrative procedures to operate to resolve the complaint.[33] These minimum administrative standards would preserve access to a federal judicial forum 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 about the condition of the courts, which usually center on caseload volume, have led many to consider means of restricting the flow of cases into 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

30. 401 U.S. 37 (1971); *cf.* Dombrowski v. Pfister, 380 U.S. 479 (1965) (permitted injunction against the institution of a state court proceeding that was not yet pending at the time of the federal action).

31. S. 1393, H.R. 9400, 95th Cong., 1st Sess. (1977).

32. *See* Statement of Assistant Attorney General Drew S. Days, III, before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary (April 29, 1977) (copy on file with *Vanderbilt Law Review*); statement of Assistant Attorney General Drew S. Days, III, before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary (June 17, 1977) (copy on file with *Vanderbilt Law Review*).

33. *See* H.R. 9400, 95tb Cong., 1st Sess. (1977).

those matters that currently are not, but should be, heard in the courts; those matters that currently receive and should continue to receive judicial resolution; and those matters that currently are heard in the courts, but should be resolved instead in alternative forums. 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. Recent federal court decisions have raised concerns that meritorious lawsuits involving important federal questions will be excluded from the federal courts unnecessarily on the ground that the plaintiff lacks standing to sue.[34] As the President has requested, I have directed the Department to assist Congress in developing legislation governing federal standing requirements.[35] This legislation will provide 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 also are considering improvements in such related areas as class actions. We are interested principally in class actions brought under rule 23(b)(3),[36] especially in those cases in which the alleged unlawful conduct affects many persons, such as claims for defective goods or fraudulent transactions. These cases often involve small individual claims for only a few dollars in damages, but when viewed in the aggregate, they can amount to millions of dollars.

In addressing the problems posed by these cases, we are considering all points of view: plaintiffs, defendants, and courts. Plaintiffs frequently are concerned about adequate representation, adequate notice, and financing of the action. Defendants, on the other hand, are often concerned about suits based upon unmeritorious claims designed only to exact a settlement, claims that are based upon ill-defined issues, and abusive use of discovery. Finally, because the administration of a class action may exceed the traditional capabilities of the courts, the judiciary is concerned primarily with issues of manageability.

The Department has been at work on these issues for several months, and during that time we have consulted a number of interested groups. As a result of this process, we expect to forward a

34. *See, e.g.*, Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975).

35. *See* President's Message to the Congress Recommending Measures to Increase Consumer Participation in Government, 13 WEEKLY COMP. OF PRES. DOC. 495, 497 (April 6, 1977).

36. AMERICAN BAR ASSOCIATION, SECTION OF LITIGATION, REPORT OF THE SPECIAL COMMITTEE FOR THE STUDY OF DISCOVERY ABUSE (1977).

proposal to Congress in January that we hope will ameliorate problems for the parties and the courts, simplify proceedings, and make the resolution of alleged mass wrongs more inexpensive and fairer.

We are examining pretrial procedures as well. The American Bar Association's Section of Litigation recently has announced a number of proposals to limit the scope of discovery.[36] I am particularly pleased with a proposed change to rule 26 of the Federal Rules of Civil Procedure that would narrow the scope of discovery to the "issues raised." I have asked the Office for Improvements in the Administration of Justice to study contemporary abuses in discovery. The Section of Litigation's proposals and the views of many other interested groups will be part of this careful review.

Our approach must reflect a sophisticated appreciation of the capabilities of the courts. We must look beyond the simple statistics that reveal increased case filings in order to develop better means of measuring judicial workloads and the effects of alternative dispute resolution mechanisms. One promising technique is the use of justice system impact statements.[37] The Department recently completed an impact statement on the effects of proposed changes in the procedure for reviewing certain Veterans Administration determinations.[38] This study, which was requested by the Senate Committee on Veterans' Affairs, demonstrates 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 a part of government under law. In one sense, the courts sit to resolve disputes arising 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

37. *See* Burger, *The State of the Federal Judiciary—1972,* 58 A.B.A.J. 1049, 1050 (1972). The National Science Foundation recently has funded a two-year Panel on Legislation Impact on Courts to be directed by the Committee on Research on Law Enforcement and Criminal Justice, Assembly of Behavioral and Social Sciences, National Research Council, National Academy of Sciences.

38. Statement of Deputy Assistant Attorney General Paul Nejelski before the Senate Comm. on Veterans' Affairs (Aug. 31, 1977) (copy on file with *Vanderbilt Law Review*). This impact study applied the average rate of challenges to final administrative determinations in disability cases under the Social Security Act to analogous determinations by the Veterans Administration, which under current law cannot be appealed to the federal courts. The resulting impact, or workload, that would be generated by legislation providing for judicial review of Veterans Administration disability determinations was estimated at 4,600 new civil filings annually in federal district courts. This increase in cases would require eight to ten additional judgeships, 20 additional government attorneys, and additional supporting personnel.

equitable. The courts, however, are only one part of government under law—the three branches of the federal government represent the totality of the democratic process. I would suggest, therefore, that the "crisis in the courts" means more than impending change in the courts themselves. What we must face, and what we have begun to address, are the steps that should be taken to preserve the democratic ideal of government under law by striving for more perfect justice. Equal justice under law contemplates the availability of lawyers for those who need their services and speedy and inexpensive dispute resolution.

I would like to close with the words used by Dean Roscoe Pound to conclude his famous speech delivered over seventy years ago: "[W]e 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."[39]

39. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice, reprinted in* 35 F.R.D. 273, 291 (1964).