Department of Justice

REMARKS OF

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Many years ago, de Tocqueville observed that scarcely any governmental problem arises in the United States that is not resolved, sooner or later, by the courts. If de Tocqueville was struck by the judicialization of American society 150 or so years ago, he would be infinitely more impressed today -- particularly if he looked at the courts during the last 10 to 15 years.

While explanations for this phenomenon are doubtless complex, a principal reason seems clear to me: the judiciary is the most respected and probably the most effective branch of our tripartite federal government. The courts have earned this well-deserved respect for a number of reasons.

Judges have not hesitated to make difficult decisions, even when the outcome has been politically unpopular. Throughout American history, many of the advances that have been made in social justice have been spearheaded by the courts. Because of the nature of the judicial process, courts must respond to an issue directly. In general, they cannot "finesse" the central questions, the way the legislative and executive sometimes feel it necessary to do. Moreover, the courts get their work done at far lower cost and in a much shorter time than either the Executive or the Congress. For example, even though the judicial branch is the only one that has formal layers of review, the process of decision-making is more streamlined there than in the other branches. Before any decision of significance can be reached in Cabinet departments, the levels of review are often double or even triple those used in our judicial system.

Yet another reason for the effectiveness of the courts -- perhaps the most important one -- is that the quality and integrity of the men and women of the federal judiciary as a whole are, I think, very high. Despite the often controversial nature of the work, the decisions of judges are respected and obeyed. I am sure you can think of additional reasons for what I believe is the outstanding success story in the history of our federal syatem: the work of the federal judiciary.

The judges of this country are being called upon to decide an increasing number of issues that involve more complex, more sensitive, and more broad-ranging policy decisions than ever before. The actions of judges touch the lives of individual citizens more frequently and more profoundly than they have in the past.

Judicial involvement in controversial issues has resulted in wide recognition of great power wielded by federal judges. This awareness has coincided in recent years with a growing mistrust of all public officials. Not surprisingly, there has been increasing insistence that judges answer to the public in a manner that was not required in the past.

Demands for greater accountability acquire special significance and special constraints when they are addressed to federal judges. It has often been said that the Third Branch lacks both the legislature's pursetring power and the executive's many instruments of authority. The judiciary, more so than other branches of government, relies for its effectiveness primarily on the reputation of its members. If the public is to retain faith in the nation's system

of justice, judges must be -- and must be perceived to be -- persons of fairness, integrity, and ability. Thus, in the context of the judiciary, the appearance of rectitude is as essential to continued public support as is the reality of competence and honesty.

But accountability is not the only value that must be considered. Under the Constitution of the United States, the independence of judges is guaranteed. The freedom of judges to interpret and apply the law with neither the fear of retribution nor the influence of favor is among the highest values of our American system of justice. If our democracy is to function well, judges must be free to make whatever decision they believe to be correct in an individual case. They cannot be bound by outside constraints.

The story is told that when Judge John Biggs was appointed to the Third Circuit in the 1930's, his friend H. L. Mencken said to him, "John, I want you to remember that a judge is a law student who corrects his own papers." Mencken's comment provides the right focus for a consideration of judicial independence. Legal decisions may, of course, be subject to judicial review. But the appellate process should be the only way a judge is made accountable for the substance of a legal decision.

There will always be some tension between the values of judicial independence and judicial accountability. Accountability carried too far -- for example, in the form of partisan elections -- is a clear threat to independence. It could make the law no more

than the political whim of the moment. But lack of accountability, carried too far, threatens a backlash by citizens who no longer have faith in their judges. By contributing to disrespect for the law, lack of accountability also could weaken our legal system.

We must recognize that judges are already called to be accountable in a variety of ways. Some of these ways are clearly inappropriate. Under existing complaint avenues, litigants who object to the substance of a decision, or citizens who find fault with the way a judge has ruled on a particular issue, may attempt to attack the judge in a forum other than an appellate court. The challenge may be focused on the judge's habits and abilities or morals, even though in fact the judge is under attack because of what he or she decided. These attacks may be made by taking a complaint to the press, by attempting to invoke the impeachment process, or by attempting to use collateral legal proceedings.

There is no way to make a judge impervious to inappropriate attacks. Threats to judicial independence exist today, as they have throughout history. I firmly believe that the establishment through legislation of formal procedures by which the judiciary itself can consider and act upon complaints against judges will provide a shield for the many, many unwarranted complaints that are raised against judges and will increase public confidence in the quality of the judiciary.

I have approached this matter as I approach all legislative proposals, with the assumption that Congress should pass no law unless the need for it is clear. I wish I could say that the

current system provides adequate mechanisms through which complaints against judges may be resolved, but I do not believe that it does.

Our federal judiciary has a long and honorable history that is probably unmatched by other elements in public and corporate life. But when the rare instance of an unfit judge does occur, there are gaps in the present system that prevent adequate action from being taken.

The impeachment process is cumbersome and is applicable only to the most egregious cases. Informal efforts by other judges to help a colleague overcome a barrier to effective judicial service may not always produce results.

As you know, all of the circuit councils recently have adopted procedural rules to govern the receipt and handling of complaints against judges. These rules fill some of the gaps that existed previously, but they do not fully answer the public's need for a responsive system.

There is such disparity among the procedural rules that, in the Justice Department's view, they are likely to produce unexplained inconsistencies in the way different circuits treat similar types of complaints. A more substantive weakness of the circuit rules is that not a single set of them establishes a mechanism that is basically satisfactory. Many of the rules, for example, are either vague or completely silent with regard to the definition of a standard by which to determine whether a judge is unfit, the measures that may be imposed by a council, or whether a decision or action by a council is reviewable. A major purpose of a mechanism for handling complaints

against judges is to enhance the prestige and efficacy of the judiciary as a whole by assuring the public that judges are persons of integrity and ability. Procedures that are incompletely defined and that treat judges inconsistently cannot be expected to enhance public confidence in the judicial system and may even diminish it.

An additional weakness of the circuit rules is that, under current law, the specific powers of the councils to deal with instances of judicial unfitness are ill-defined. In discussing the authority of circuit councils under the relevant statute, the Supreme Court in Chandler v. Judicial Council wrote that "[l]egislative clarification of enforcement provisions of this statute . . . [is] called for." Congress now has the opportunity to provide this clarification.

Because the present system lacks appropriate avenues through which citizens may express their legitimate dissatisfaction, attempts to rectify the situation have led to sometimes extreme proposals. Even friends of the courts occasionally consider new arrangements that could have a negative effect on judges. For example, within recent years the Senate Judiciary Committee considered a constitutional amendment that would have defined the tenure of federal judges by means of a term of years rather than by the "good behavior" standard that now applies. I understand that approval of this amendment was defeated by a very narrow margin. Such a change would have been a genuine threat to judicial independence.

In my judgment it would be a dangerous mistake for Congress to assign to itself or to any other non-judicial authority the

responsibility for hearing complaints against federal judges. The judges themselves are aware of the need for a system that appears more responsive to public dissatisfaction. In testimony before a Senate Subcommittee last year, a representative of the Judicial Conference of the United States, in explaining why it is necessary to establish a procedure supplementary to impeachment, said that "[e]ven if we assume that only a small percentage of our judges 'misbehave,' with the total number of federal judges escalating almost geometrically . . . there is no question that some process is needed." The Conference has supported the establishment of uniform rules through congressional action that will keep the complaint mechanism within the judiciary.

Obviously, any legislative proposals in this area must be carefully formulated to insure that judges retain total freedom in their decision-making. Great progress has been made in recent months toward a consensus that will foster the complementary values that are so important to both the public and the judges -- independence and accountability. As you know, last October the Senate passed S. 1873, the Judicial Tenure and Disability Act. In the House, the Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice, chaired by Congressman Kastenmeier, has unanimously approved and reported a bill that is expected to receive the attention of the full Judiciary Committee and possibly the whole House before the end of the 96th Congress.

The Department of Justice has testified that it could support S. 1873 if certain modifications were made; we essentially support

the draft bill in the House. These proposals offer a more limited approach than that offered by bills the Department has supported in previous Congresses, but they overcome various objections to those bills. I would like to offer some suggestions concerning ways the current proposals can be reconciled with each other and improved to provide truly effective legislation.

Under both bills the proposed mechanism for dealing with allegations of unfitness against judges is located in the judicial branch, and complaints are adjudicated first by the members of the circuit councils. The bills also establish explicit sanctions that may be imposed on unfit judges. While the bills in these ways are similar to earlier legislative proposals, certain significant features are markedly different.

Both bills rely on the circuit councils to conduct the basic investigation of a serious complaint; they do not create a national commission to perform this function. The proposed mechanism therefore is less ponderous than that created in earlier bills. Quite significantly, the bills also have eliminated the power to remove judges. Once the removal sanction is no longer a point of controversy, the gulf between a process that the public would find effective and a process the judiciary could find acceptable is substantially narrowed.

There are, of course, some discrepancies between the two proposals. The primary differences concern where an appeal may be taken, and the extent to which the complainant retains standing to press a complaint throughout the process. It seems to me that these

differences can be reconciled through relatively modest changes in the bills.

Under the Senate bill, a circuit council's action may be appealed to a new Court on Judicial Conduct and Disability composed of five federal judges. Under the House proposals, on the other hand, review of a circuit council's action would be in the Judicial Conference.

If the House bill is interpreted to require review by the full 25-member Judicial Conference, appeal from a circuit council will be cumbersome and expensive. The recent en banc experience of the Fifth Circuit has demonstrated that a tribunal of that size is wholly unsatisfactory in practice. We would recommend the inclusion in the legislation of a provision specifically authorizing the Conference to act on complaints through a special committee of the Conference.

Either a special court or a committee of the Judicial Conference would provide a practical and accessible means of review for appropriate cases. We would hope that enactment of judicial unfitness legislation would not be deterred because of differences between the bills on this matter.

Another point on which the bills differ is whether a grievance can be pressed beyond the council level, an eventuality that is permitted in the Senate bill. Clearly, if a procedure for dealing with complaints against judges is to win the faith of the public, it must assure due consideration by a process that is wholly fair in appearance as well as in fact. This does not require converting the proceedings into adversary contests or allowing complainants to appeal every losing decision. The judges need protection from appeals that are frivolous and merely designed to harass.

A way to secure both credibility for the process and justice for the judges would be to allow request for further review to be made by an individual who could be trusted by all parties, for example, a senior judge from another circuit. This person could act throughout the proceeding to aid the investigation of the facts and, in an appropriate case and under an appropriate standard, could intimate the need for an appeal to the reviewing body. A procedure such as this would go a long way toward assuring a process that did not appear one-sided. I am informed that, at the markup of the House bill on July 31, it was said that the report accompanying the bill will suggest that in appropriate cases, the Judicial Council may appoint a senior judge for the purpose I have urged. I prefer writing that idea into the statute.

I am not suggesting -- and I want this point to be very clear -- the creation of an investigator who is, in any sense, the stereotypical "special prosecutor." The role of the investigator would not be to act as a relentless advocate in an adversarial dispute. Rather, it would be simply to safeguard the integrity of the system by assuring a balanced presentation of the case.

There is one other modification in the bills before Congress that would, I believe, vastly improve the effectiveness and fairness of any legislation. Neither the bill that has passed the Senate nor the one that is being considered by the House defines clearly and comprehensively the circumstances that constitute judicial unfitness. Both bills define misconduct as action prejudicial to the effective and expeditious administration of the business of the courts.

This formulation of a standard for unfitness is misleading. It suggests that the central concern of the process is solely to assure more productive court management and is indifferent to conduct -- however despotic or even dishonest -- that does not affect the filing and movement of cases or other aspects of the business of the courts. At the same time, though, the language is so amorphous it could be stretched to apply to conditions that ought not be censurable, as when a judge's docket falls into arrears because he is handling an unusually complex or difficult case.

The standard for unfitness should apply clearly to those types of problems that "fall through the cracks" of current processes -- conduct such as actions that are criminal but not impeachable, ethical lapses, and disabilities such as chronic illness, alcoholism, and senility. A number of formulations of a standard of unfitness would more clearly cover these problems. For example, one acceptable definition of unfitness would be conduct that is inconsistent with the effective and expeditious administration of the business of the courts, or conduct that violates the Code of Judicial Conduct or the laws of any state or of the United States, or mental or physical disability that renders a judge unable to discharge all the duties of office. We believe that a definition along these lines should be adopted by the Congress.

On a question as complex as the one I have discussed today, everyone has particular tastes and emphases. I will not extend my remarks by mentioning all of the provisions that might ideally be

incorporated in legislation such as this. I simply want to emphasize that the Department of Justice strongly supports the enactment of effective legislation to deal with judicial unfitness. A procedure assuring that legitimate complaints against judges will be addressed and authentic problems resolved, and that at the same time clears the name of a judge who has been unjustly attacked, will enhance the judiciary's standing with the public by showing that the judges who have the law in their charge are themselves subject to the law and not above or beyond it when their fitness is in question.

All sides have come a long way in recent months toward crafting legislation that takes duly into account the values of judicial independence and judicial accountability. The disagreement now is basically over the specific procedures that will prove more effective. With a continuing spirit of cooperation a solution to that problem will not long elude us.