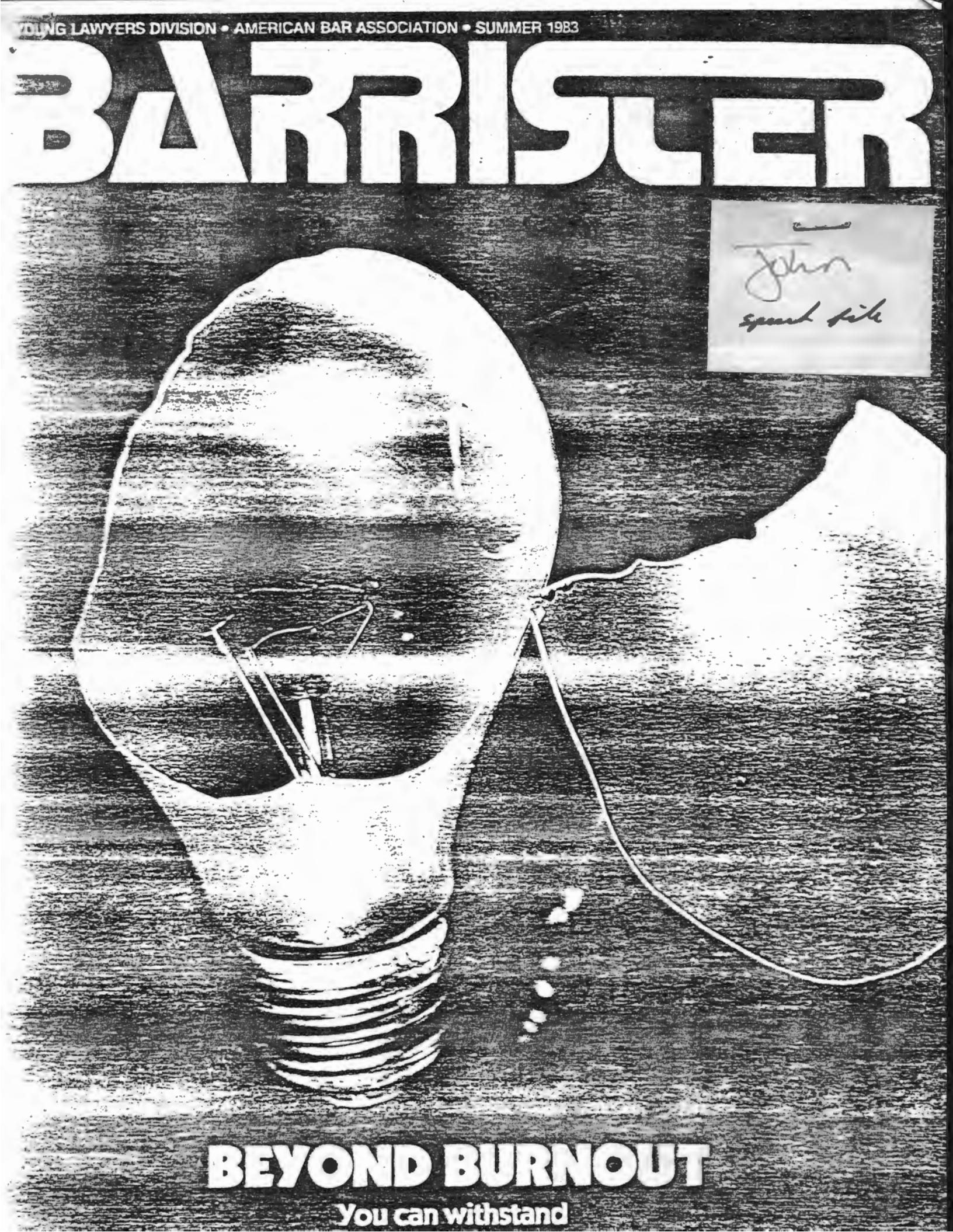
YOUNG LAWYERS DIVISION • AMERICAN BAR ASSOCIATION • SUMMER 1983

BARRISTER



BEYOND BURNOUT

You can withstand

Barrister Interview

Fred F. Fielding

by Shawn D. Lewis
Associate Editor, Barrister

What it's Like to be the President's Lawyer

Presidential Counsel Fred F. Fielding has been in his current position since January 1981. Prior to this White House appointment, he was a partner with the firm of Morgan, Lewis & Bockius in Washington, D.C., where he was engaged in the general practice of law with emphasis on international and corporate law and civil trial practice. During the Nixon administration, from April 1972 to January 1974, he was deputy counsel to the President, and from October 1970 to April 1972, he was assistant counsel to the President. Except for a military leave of absence, he practiced with Morgan, Lewis from 1964 to 1970, with emphasis on communications, international, libel and corporate law and federal court (non-personal injury) practice.

Fielding is a member of the President's Commission on White House Fellowships, the American Arbitration Association, the Judicial Conference of the District of Columbia and several bar associations. He was also a member of the White House transition team and conflict of interest counsel during the Reagan-Bush transition. He earned his bachelor's degree from Gettysburg College in Gettysburg, Pennsylvania, and his LL.B. from the University of Virginia School of Law. While in law school, he was a member of the national moot court team and the law school advisory council.

The following interview was conducted at the 1983 ABA Annual Meeting in Atlanta.

In a recent Washington Dossier *cover story, you were quoted as saying that you were a pawn in the Watergate episode, and that the experience has made your present job easier. What did you learn from Watergate and how has it made your job easier?*

It made my job easier because people are now more aware of the restrictions and responsibilities that go along with public office. It's one thing to tell people not to do something, or to follow a certain course of action, but people sometimes get caught up with themselves when they get into public service. The Watergate experience, in that regard, has sensitized people in government, in departments and agencies and on the White House staff.

When President Reagan asked you to become presidential counsel, you were working part-time on his transition team while continuing your private practice. Why did you accept President Reagan's offer?

I really didn't intend to go into the government. As a matter of fact, the reason I did as much as I did do during the transition was because I felt it was a way of paying my dues. I did not want, at that point in my career, to go back to public service. I did it basically because the President asked me to. One often thinks of leaving legacies to their children and they usually think in monetary terms, but there are certainly other terms. I felt that if the President had the confidence in me to ask me, and if I could be of assistance, then I would take the job. And I accepted it right on the spot because I didn't want to go home and think about it.

Your other White House positions were as deputy counsel to the President and assistant counsel during the Nixon administration. Why did you decide to leave a successful law practice to assume this position considering the personal and financial costs associated with public service?

I received a call when I was in Philadelphia late one night asking me if I was a registered Republican and I said I was. The person thanked me and hung up. I called him right back and asked him the same question and he asked why I asked that. I replied, "For the same reason you're asking me." But what happened was that the White House had let it be known that they were looking for a lawyer in John Dean's office, and somebody that I knew in Washington had recommended me in Philadelphia. At the time, I was not aware that all of this was going on and subsequently, I was asked if I would be interested in going down to interview for the job and I did.

Even though I enjoyed private practice very much, at that time, the position was interesting to me because it was something new. I had never been involved in public service other than being in the military. It was an opportunity I felt would be challenging professionally.

You remained in that position until January 1974 when you returned to private practice in the Washington office of your former firm, Morgan, Lewis & Bockius. Was this a difficult transition and how did the clients and partners respond?

If you mean was there any negative reaction to Watergate, I think there was much more curiosity than anything else. I was never aware of any antagonism because of Watergate. There were those in the firm who were pleased or perhaps relieved that I had been able to conduct myself the way I did and survive. I was spared when an awful lot of people had their careers destroyed. It's not an experience I would recommend to anyone, but if you do have the training and do have the professional background and go through something like that, your instincts should be right. And it really does give you an opportunity to hone your judgment.

Getting back into private practice wasn't that difficult a transition for me except that I had not been in the firm's Washington office before. Although I knew a lot of people, it still meant going into a different environment. The transition was probably not as dramatic as one might think because I was very anxious to get back to private practice. The year or so before I left was obviously a very tumultuous period of time.

Do you believe the young lawyer's attitude regarding public service has been jaded as a result of Watergate?

I don't think it should be. People make mistakes in any profession and I certainly don't think they should be jaded by it. If young lawyers are a little more cynical, I don't think that would ever be a bad thing. Many people in public service get so caught up in it and so imbued with their own supposed self-importance that they come to love the job too much. I don't think anyone should ever be in government service who doesn't have a place to go to when he is finished.

Having seen both sides of the fence, would you say you preferred private practice to government service?

Yes, and I would still say that today.

In discussing the Ethics in Government Act, you have said that it created a negative effect on recruiting people for government service. How do you think the issue should be resolved and are there any proposed amendments to the current Act?

There are some proposed amendments to the current Act, but the problem that we are dealing with is a problem of accumulative impact with so many barriers and impediments. The Ethics in Government Act is one set of regulations which should be reviewed. We should just take a look to see if there is a way to learn from our experience. In specifics, I don't have the answers and there may be no right or wrong answer. I am not calling for a change—I just think it is time that we should recognize that we made it just a little more difficult than it was before to go into government. We can take a look to see if the public's need for confidence in their public servants can be filled in another way.

Describe your responsibilities as President Reagan's in-house counsel.

Basically, I am in a sense like in-house counsel in a corporation except that the responsibilities are not easily defined because they really are formulated in large measure by circumstances and events. There are some fixed responsibilities such as the handling of conflicts of interest, reviews for the executive branch or handling clemency requests. But the scope of the office is such that you are involved one moment working to develop a policy that's legally related, and at other times you are merely reviewing or writing a speech that the President is going to give. The judicial selection process takes an enormous amount of my time.

A typical day might begin at 7:30 am and end at 8:00 pm. Every morning I have a senior staff meeting at 8:00 am. Then, every morning after that I meet with my executive assistant. At a minimum of twice a week, I also meet with my entire staff. Every week I've got a scheduled meeting on judicial selection with the Attorney General, but other than that, my day is structured by events. I always take a briefcase full of papers home because I just cannot get to the paperwork during the day. I can't get that much of it done because of meetings and things of that nature.

According to the National Journal, *you don't report directly to the President, but to Chief of Staff James Baker, who is one of the four White House staff members with direct access to him. How often do you actually sit down face to face with the President?*

So much for the *National Journal*. I am in a reporting structure. I report to the Chief of Staff as do all people, all the assistants to the President who are not exclusively involved in the office of policy development or exclusively involved in national security. My job is probably different from any other in the White House staff in that my responsibilities go all the way across the board and I deal with the policy development people as well as the function of staffs. As far as my relationship with the President, how often I sit down face to face varies from day to day, issue to issue.

There are some days when I'll spend two-and-a-half hours with him, and then maybe three days that I won't see him at all, and I am not talking about ceremonial things. I am talking about business. I do see the President at least about every other day. If everyone is embroiled in the tax bill, by that time I will have done my bit. I have no basis to talk to the President about that, but during that same day, I may have to go in and talk with him about another problem. Or, if somebody has kidnapped people and they are holding them for ransom, and one of their ransom demands is that the President do something, then I would have to counsel him. On an average it would probably come out to at least every other day, but it really varies.

How do you handle stress in such a high-powered position?

I have to maintain a sense of humor and I try to take a little time to myself during the day. I don't have time to try to get a golf game back. A tennis game is almost nonexistent. I find it very difficult to have time to do anything of that nature. By the same token, I take whatever occasion I can to try and take my wife out to dinner or go to the

Kennedy Center. On the weekends I try very hard to spend at least half of one day, if not the whole day, with my children. Sometimes I'll take them into the White House with me on Saturdays if I have to work. I have tried for the last two years to take my family away for two weeks and both times I have had to come back within the two weeks to the office.

It is a stressful job, as most jobs in the White House are. I don't thrive on the stress. The term "thrive" seems to indicate that you get some deep enjoyment out of it and that would make me a masochist. I enjoy the challenge of the job very much.

What are the advantages and disadvantages of your position?

It's a great job—a very challenging job for a lawyer if he enjoys being a lawyer. It would be frustrating for somebody to work on my staff, however, if they wanted to be able to be intimately involved in the formulation of a comestic policy from start to finish because I handle the policy side of my job. But the young lawyers who work for me were told from the day they went in there that this was a law firm. We are operating a law office. There are plenty of other places they could go if they wanted to do the other kinds of things that people do in the White House. We all understood each other from the beginning and we have set up what I would consider to be one of the best small law firms in the country.

The disadvantages of my position are personal things like time and financial sacrifices. I've got two small children who are six and seven now, which means they were three and four when I started the job. It has been quite a few years. If I had to point out the one disadvantage, I would have to say it is the personal sacrifices.

You have been quoted as saying that the President of the United States is your client, but that you are not Ronald Reagan's personal attorney. How do you differentiate between the two?

I mean that I don't do Ronald Reagan's personal tax returns and that sort of thing. I don't do personal things that would ordinarily be performed by a lawyer. His own lawyer fills out his financial disclosure forms and other duties. The presidential counsel has a complete set of responsibilities aside from those of his personal lawyer.

How does the lawyer confidentiality issue affect you when your client is the President?

I say my client is the President because I am counsel to the President and that is my job, but I am ultimately accountable to the people, as is my client. But, the President has got to have somebody that he can have a confidential relationship with, as does any person. That's part of the genius of our profession—you want your client to be totally candid with you because it is the only way you can give him totally accurate advice. The President of the United States, like anybody else, is entitled to that and should have the luxury of knowing that he can say something to me and know that it will be a privileged communication. Both of us are ultimately responsible to the people. There are many, many issues of executive privilege, of course, that come up in this administration, and you must be aware of that. But my relationship with him would not only be subject to executive privilege, but certainly would also be subject to the privilege of attorney/client confidentiality.

(Please turn to page 47)

Fred Fielding (Continued from page 11)

Is your position more political or legal oriented, and which takes precedence?

It is much more a legal than a political job. Politics are an element that you have to be aware of in making decisions. There is no question as to which takes precedence.

What is the legal profession's perception of the presidential counsel position?

Every White House counsel role is different. It depends on the individual—it depends on the scope of responsibilities that he is given. It is a much different position than John Dean had as counsel to former President Richard Nixon. The scope of responsibilities is much broader, the staff is twice as large, the access to the President is entirely different. I can think of only two occasions in the first two years of the Nixon administration in which John Dean even saw the President. One was when they went in to meet some visiting school children and another was when he went in to witness the President signing his will. My job is much different. For instance, I think this is the first administration where judicial selection is handled by committee. I chair a committee that meets on judicial selection which, to the best of my knowledge, was never in the White House before. It is just an entirely different job. Ted Sorenson had the title of presidential counsel, but he really served as a speech writer. Lloyd Cutler, when he was with President Carter, was much more of a counselor and was heavily involved in the Iranian negotiations. I feel very comfortable with the job the way it is now. Quite frankly, it is the most exciting job that a lawyer could ever have.

What are some of the current legal issues on your agenda?

I have just concluded negotiations with the Alboста subcommittee regarding the Carter-Reagan debate issue. You have to tune in every day to figure out what your agenda is unfortunately, or fortunately. The job is interesting but it also changes a lot. We're involved in trying to make some decisions on the recommended inter-circuit tribunal. We're reviewing the impact of the *Chadha* case involving legislative veto. And if I really have to talk about the job, one of the reasons it is so exciting to me is because of the variety of assignments that I am fortunate enough to be involved in.

How do you think the Carter-Reagan debate issue should be handled?

I think the President is handling it just right. We want to get to the bottom of it. We want to get the facts and want to get them out as quickly as possible. The President will then have the opportunity to review the results of the investigation. I think as a result of this, we may all have a better understanding. It would have been wrong to have an investigation of the entire campaign unless the investigation were just that, and if it weren't only an investigation of one of the contestants. But if there is ever an investigation, I don't mean this to in any way denigrate the jurisdiction of the Congress, but if there is a criminal investigation or an investigation to allegations of potential criminal activity, I don't think it should ever be conducted in an atmosphere where you could have a fair or unfair charge that was political in nature.

What should be done to the person or persons involved?

I've got my own set of morals and my own sense of what is right and wrong; my own standards of ethics that I impose upon myself. I don't necessarily demand that others have the same set unless I find that their actions are totally offensive to my own standards. But, one of the things that my own set of ethics requires of me is that it would be unfair to judge others and their actions until I know what the facts are. So I think we really have to wait and see what happens.

The Reagan administration's alleged plan to de-emphasize affirmative action in the selection of judges was explored in a recent Washington Post *article where you were quoted as saying, "We are not going to make the decision based exclusively on factors other than competence." How many women and minority judges have been selected under the Reagan administration? Is there a de-emphasi-*

on affirmative action in the judicial selection process?

I wouldn't say there is a de-emphasis on affirmative action per se. What we're trying to do is, in our traditional selection, get people who are philosophically consistent with the President in their outlook. There is no litmus test. There is no checklist of people, and we don't want clones, either. But we don't want people who philosophically feel that the court should be activist because it is the President's conviction that that is not the role of the judiciary. With the selection process, it is difficult for us to identify candidates from around the country. We are relying upon other people to identify them. What I am about to say in no way denigrates any of our judicial selections that have already been made. I am very proud of the caliber of people that we have, but we also go through a period where we have a political party in power for the first time in a few years, and therefore, there are an awful lot of people who are making recommendations. In the first wave of vacancies, the names you hear most are names people have been planning or hoping for the opportunity to recommend for several years.

Let me make a comment about the selection of women judges. I have talked with a large number of women's groups and told them what we were looking for and told them I needed their help in identifying qualified candidates. I don't want them to send me names of people that they know are not going to make it, but I want them to send me names of people with a good chance of being selected. Of all the groups that I have asked for help in supplying me with names, only two have ever complied. So if there is anybody out there who knows of potential choices, we are really seeking qualified candidates. Let me say something else that is interesting about women in judicial selection. I think that in 10 to 12 years it will not be an issue at all because the universe of candidates will be so much greater.

We have the same identification problem with minority candidates. I personally want the record to be improved and I know the President wants the same thing. He is pleased with the judges we have but statistically, he is not happy with those figures. We just have to work harder to identify more qualified candidates. The President has appointed one female Supreme Court Justice and six district court judges who are women. He has also appointed one black circuit court judge and three Hispanic district court judges.

What is your impression of the young lawyers with whom you come into contact?

I don't think many young lawyers have the luxury of being properly trained. If you start out right, what seems second nature to you later in your profession is because you were trained right. Too often, I see younger lawyers who are not disciplined in their work habits, are not disciplined in the ethics of our profession and are not disciplined in the comity that should exist between people who are basically combatants with each other. The result is not complimentary either to them, to their profession or to their clients. So I think that the most important thing, and I know we are all eager to burn up the world when we start out practicing law, but the time that is spent in your first couple of years training are the most critical. Understand what I am saying. I see this in not so young lawyers too. But the way it is corrected is by dealing with the young lawyers right out of law school and training them properly. I think each year the young lawyers who come out of law school seem to be brighter than the year before.

I think that young lawyers have to understand that they are going out into a world, however, and certain things are expected of them. I remember interviewing in law schools and I certainly don't understand how somebody interviewing and trying to make a good impression will come in unshaven in a tee shirt and a pair of jeans. Now, I personally don't care, but I would not put anyone with that little judgment together with any of my clients.

My observation about young lawyers is that they are—in Washington now—more aggressive than my peers were when they were young lawyers. But I would attribute a little of that to the job market more than any individual traits or growing trends. There are no atheists in foxholes and there are people willing to do the jobs and who are very enthusiastic about jobs in a bad job market.

Describe your career as a young lawyer with the Morgan, Lewis & Bockius firm.

Morgan, Lewis is probably the second largest firm in the country. Before I went into the Nixon administration, I was a civil litigator. I was in charge of the litigation for the firm right before I went back to this the second time. But what I ended up doing primarily was litigation, international contract negotiations and similar things.

What were your primary goals as a law student at the University of Virginia School of Law?

Beyond Burnout (Continued from page 6)

As the object of such an intense socialization process, it is easy for the law student to come to view that all beliefs are equally wrong, and that "truth" and "justice" are relative terms—essentially empty concepts.

Progressively, the human beings who are involved become less important, perceived as they are in a context of a shared attitude of strictly factual analysis that reduces anxiety through inhibitions on caring. (Earlier studies suggest that the highest drop-out rates among first-year law students occurred among "those who were concerned with people, who valued human contacts, and who were friendly, sympathetic, and loyal.")

One might speculate that this tradition of legal education has expressly developed as an attempted *protection* against the stresses of legal practice. That in fact, one way to armor the lawyer against the intrinsic stress of the legal life is to teach him to *care less* about the fellow lawyer, or client, who may get shocked in spite of the lawyer's best efforts. Beyond a veneer of seeming antihumanism, such an educational approach would be a strategy

I had tremendous, challenging law professors, some of whom I still have contact with. I really admired people like Daniel Meador, a legal scholar with whom I had the privilege of being a student assistant while I was there. I decided at the end of my first year that if I didn't make Law Review, I was not going to stay in law school and I really looked forward to practicing law. The actual practice, of course, I really did not enjoy studying law and my only hope was that when I got out, practice would be exciting. It was and it is. I *love* practicing law. I don't know if I was thinking of any particular specialization through law school more than just a kind of general feeling that I wanted to be involved in trials and litigation. That is really what I wanted to do and that is what I spent over 50 percent of my professional time doing. I loved the challenge of it, I loved the excitment and I especially loved the diversity.

What advice can you offer to a young lawyer seeking a government service position?

Figure out what you want to do. If you want to come into the government, make the decision on whether you want a job in which you are a lawyer or whether you will be doing what an awful lot of lawyers do—seeking government service as a change in their practice. If you decide you will continue to be a lawyer, decide on an area in which you want to perform. Be realistic in the level that you are seeking and sometimes you can learn more and have a much more exciting experience doing what others may consider to be a slightly lower ranked job. Apply all the professionalism that you should be bringing to your practice anyway and you will not have to worry about promotions. They will come as appropriately and consistently with how you apply yourself.

My personal advice is: don't take the job if you are really trying to later get rich from what you were doing. First, it is not the right motive and second, you may be very disappointed. If you get a job, remember that your responsibilities are not only as a public servant, but as a lawyer. You do have those obligations and you may be called upon. The only way you can fulfill your obligation is to do that. To be professional. And nobody should go into government, as I said before, who doesn't have something else to do. The most dangerous thing in the world is to have somebody in government whose entire life revolves around that job. That was part of the problem of Watergate.

If President Reagan is reelected, will you remain as counsel? If not, what are your other options?

When the President offered me this job, I told him that he deserved someone who would commit to him for four years—a full term. I was very flattered that he asked me, but I couldn't make that commitment because I had not planned to work in government. I had not done things that I would have otherwise done. I didn't feel like I could make the commitment and so he said we'll worry about that later. He's not worrying about it, though. I went into this with my eyes wide open. I'm not complaining about government salaries or anything like that. I knew exactly what I was getting into, but I have no intention of staying for a second term. I am proud and honored to have the opportunity to do some more government service. I hope I am making a contribution. Somewhere down the road, if called upon, I may be willing to make another contribution, but I don't anticipate now being in the government in any capacity.

It would be natural for me to return to Morgan, Lewis. I returned to them before when I had left to go to the service. I feel very comfortable with the firm and I like the people very much. I like their professionalism. But I haven't even had time to think about it and I'm a little reluctant to think about it while I am still in this job. But I do intend to return to the practice of law.

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resting on totally laudable motives. Unfortunately, as a method intended to arm the young attorney for later practice, it doesn't seem to work very well. Perhaps the problem is that it is difficult to teach human beings to *not care enough* to protect themselves.

In any case, as stressful as all law students find law school to be, their real difficulties are not to be encoun-

Speeches file

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

October 19, 1983

MEMORANDUM FOR ADMINISTRATION SPOKESMEN

FROM: MIKE BARODY
DEPUTY ASSISTANT TO THE PRESIDENT
AND DIRECTOR OF PUBLIC AFFAIRS

SUBJECT: ATTACHED REAGAN ADMINISTRATION RECORD

The attached are materials which may be of use in preparing speeches, and other surrogate activities. Included herein is the President's Saturday Radio Address on the "Quality of Life," some recent polls showing recent rise in approval for the President, and some talking points on the 1000th Day of the Reagan Administration.

WHITE HOUSE TALKING POINTS

October 18, 1983

A NEW BEGINNING: THE FIRST 1000 DAYS

- In his inaugural, President Reagan said many of America's ills "have come upon us over several decades. They will not go away in days, weeks, or months," he added, "but they will go away."

- The President's optimism was countered by sceptics who thought many problems were simply out of control.

- By the end of the 1970s, serious problems like inflation, energy dependence, Social Security's solvency, economic growth, looked like they were years away from solution, at best.

- Some said inflation would take a decade to tame, and as for economic growth, there were those who suggested we'd do better learning to live without it.

- But 1000 days into the Reagan Administration prospects on these and other fronts are much brighter than they were:

  -- Inflation, at 2.6% the last 12 months is lower than it been in 15 years;
  -- Energy dependence is down with oil imports half what they were in 1977; reliance on Mexico, Canada is up, on OPEC its down. Gasoline prices are still below pre-decontrol levels.
  -- Social Security's retirement fund has been saved from bankruptcy through Presidential leadership while benefits have risen (up over $100 a month for average retired couple.)
  -- Economic growth came virtually to a halt at the start of 1979 in the wake of high inflation, taxes and federal spending. By the start of 1983, 15 months after the Reagan recovery program began, GNP growth resumed and -- at almost 10% in the 2nd quarter and about 7% in the 3rd -- exceeded expectations of economists in and outside of government.

- Jobs: A growing economy means jobs, and 1000 days into the Reagan presidency:

  -- 101.9 million had civilian jobs, the most ever;
  -- the economy was creating over 300,000 jobs a month;
  -- employment was rising faster than in any recovery of last 30 years.

The President's program

- Less than a month after taking office, President Reagan announced his program for economic recovery. Congressional resistance prevented its full implementation, but, in 1000 days:

  -- tax rates have been cut 25 percent. In contrast, taxes doubled in the previous five years;
  -- federal spending growth has been slowed, from over 17% in 1980 to less than 2/3s that rate now;
  -- the regulatory burden has been reduced -- billions of dollars, and 300 million manhours a year have been saved;
  -- the Administration, true to its promise, has encouraged the Federal Reserve to maintain stable growth in the money supply.

The result: a recovery that can last -- with low inflation

- This was President Reagan's goal -- and a growing consensus among economists says its in reach.

- Growth of over 8% the last 6 months and inflation at under 3% the last 12 months sets the stage.

- Interest rates are also down (the prime, at 11%, is about half the pre-inaugural record of 21.5%).

- Factories are back to pre-recession levels of activity (78.1% in September); business investment's up;

- Housing starts, at 1.9 million rate in August, and auto sales, up substantially from last year, are a positive response to lower interest rates.

- Disposable personal income -- what workers have after taxes -- is up at an 8% annual rate. Coupled with rising confidence, this has contributed to a healthy 5% rise in real consumer spending.

U.S. defenses, world leadership role also being restored

- The declining U.S. commitment to adequate defense spending has been reversed under President Reagan and funding for needed defense systems such as B-1 and MX is being secured.

- The U.S. has adopted a firm, realistic posture toward the Soviet Union at the same time we have put forward a comprehensive set of proposals for mutual and verifiable arms reductions.

- Our alliances have been strengthened and, in numerous forums such as at Williamsburg for the economic summit, and at the UN after the Korean airline massacre, U.S. leadership has been demonstrated to the world -- and it has been welcomed.

THE TYPICAL FAMILY
(How's it Doing?)

Background

- Lower inflation has made a typical family's income of $29,300 worth about $2500 mroe than if inflation were still at the 1980 rate. ($29,300 is 1983 median income for family of four).

- Lower tax rates mean that family will pay $700 less in federal income taxes for 1983 than if 1980 tax rates were still in effect. (Despite a typical income increase of $3052 for such a family, it actually will pay $44 less for 1983 than for 1981.)

- Together, lower taxes and inflation mean the family has about $3200 more in purchasing power than it would have had.

- The same holds true at other income levels -- much higher purchasing power due to much lower inflation and lower tax rates.

Home-ownership more affordable for more famlies.

- The monthly payment on a $50,000 mortgage has dropped over $200 in the last 20 months or so as interest rates have fallen.

- An $80,000 30-year mortgage now costs over $350 a month less.

- Statisticians say the lower rates -- down about 6 points the last year and a half -- have put home-ownership in reach for about 10 million families who couldn't afford it 2 years ago.

THEN AND NOW: TWO YEARS OF PROGRESS
(1980 vs. the present)

Inflation

Then -- 12.4% for the year 1980; was 13.3% in 1979.
Now -- 2.6% over 12 months ending in September, 1983 -- lowest since the late 1960s.

Interest Rates

Then -- The prime hit 21.5% at the end of 1980.
Now -- The prime is at 11%, cut in half in two years.

Mortgage Rates

Then -- They were climbing; FHA on the way to 17-18% range.
Now -- They're falling; at present 12% of the monthly cost of a $50,000 mortgage is over $200 less than at peak rates of last year.

Housing Starts

Then -- In 3 year slump, starts down and falling further.
Now -- Start rate up, running at solid 1.7 million annual rate for first 9 months of 1983.

Federal Spending Growth

Then -- Growth rate was over 17% by 1980.
Now -- Spending will grow by less than two-thirds that rate -- about 11% -- this fiscal year (FY83) and by about 5 percent in fiscal 1984.

Federal Income Tax (family of four, median income of $29,300)

Then -- Under old tax law, typical family would pay $3766.
Now -- Lower tax rates cut tax to $3049 -- $717 less.

Energy Security

Then -- Net U.S. energy imports were the equivalent of almost 6 million barrels per day.
Now -- Net imports are down to just over 3 million.

Gasoline Prices

Then -- Decontrol critics predicted $2.00 a gallon gas once controls were lifted.
Now -- Price fell about 10 cents a gallon in 1982; first drop in ten years, steepest ever. Real price lower now than just before decontrol.

Regulatory Relief

Then -- Paperwork took estimated 1.5 billion in manhours.
Now -- Regulatory relief cuts burden by over 300 million.

Then -- The Federal Register averaged 7251 pages a month.
Now -- It's down a third, to under 4875 pages a month.*

Military Re-enlistment Rates

Then -- Rate was 55%, and the military was losing a valuable pool of experienced manpower.
Now -- Re-enlistment rate, at 68%, is the highest since 1964 and is evidence of overall improvement in morale.

Nuclear Arms Reductions

Then -- Senate was rejecting flawed SALT II treaty.
Now -- Serious talks with Soviets on mutual cuts, not just limits.

The Times Poll

L.A. TIMES: 9-26-83

Prosperity, Risk of War Key Issues of 'Gender Gap'

By ROBERT SHOGAN, *Times Political Writer*

President Reagan's problems with female voters do not have much to do with so-called women's issues, according to a new Los Angeles Times national opinion poll but instead reflect the concerns held by a good many women that his policies jeopardize the prospects for prosperity and increase the risk of war.

Responses to the survey offer the President no clear, short-term solution to the "gender gap"—which shows up in polls as a lower level of support for him among women as compared to men—outside of a drastic shift in his fundamental policies. And not only would such a change be out of character for Reagan, it would probably cost him support among men.

Indeed, the survey profiles a nation in which there are conspicuous differences between men and women on today's most important public policy questions: achieving prosperity at home and peace abroad.

This is a phenomenon that did not show up in polls until the onset of the Reagan presidency. And, although it appears to be linked to changes in the thrust of government initiated by Reagan, it may also reflect a rising level of consciousness among women as the result of the growing strength of feminism in recent years.

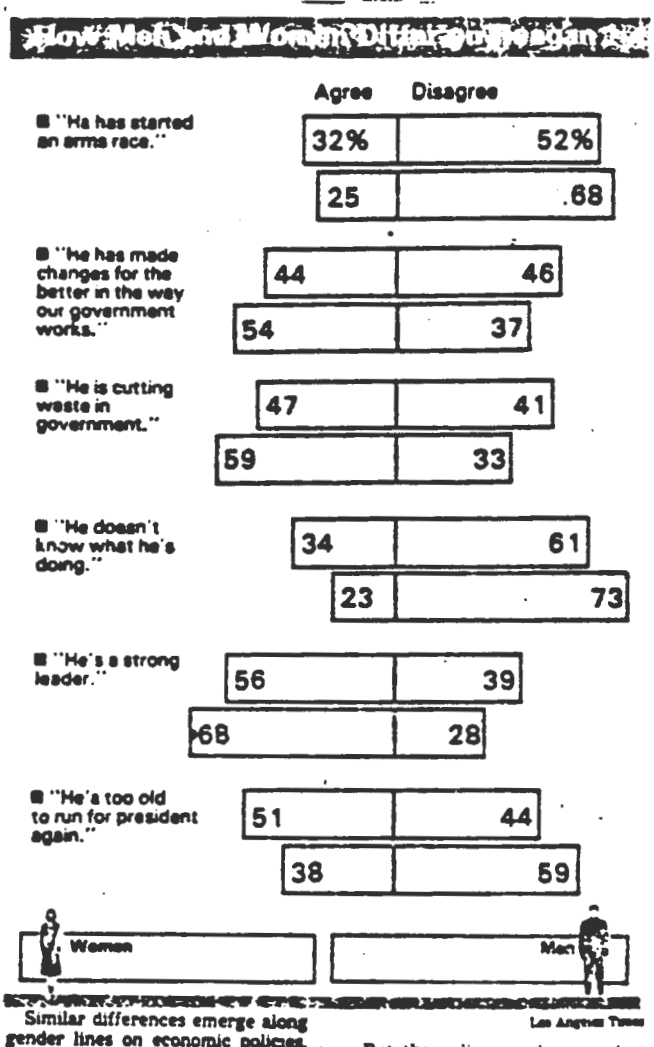
The Times poll shows that 63% of men approve of Reagan's job performance, but he gets the approval of 55% of women. This leaves the President in the seemingly enviable position of having the approval of 59% of the citizenry of both sexes—a sharp rise of seven percentage points above the last Times poll rating in June.

But Reagan's political vulnerability as a result of the gender gap is demonstrated when he is pitted against former Vice President Walter F. Mondale and Ohio Sen. John Glenn, the two leading contenders for the 1984 Democratic presidential nomination, in simulated general election contests. Among registered voters, the President loses to Glenn by 47% to 41%, with women favoring the former astronaut by a margin of 50% to 39%. Reagan edges out Mondale by a margin of 46% to 43% of all registered voters, but women make the race uncomfortably close for Reagan by supporting Mondale by a margin of 47% to 41%.

Conceivably, Reagan could ultimately ease women's anxieties by establishing a firm foundation for enduring prosperity and peace. But, in the meantime, the President will have to reckon with the fact that a politically significant number of women take a dim view of some of his policies that touch close to their lives.

Reagan's handling of foreign affairs is approved by only 40% of women, compared with 54% of men; 30% of women see Reagan's policies increasing the risk of nuclear war, a view held by only 22% of men, and 55% of women, compared with 40% of men, believe that the United States should work [illegible]

If it is any comfort to the President, there is nothing personal about the women's misgivings. Eighty percent of women surveyed said they like the President personally, the same figure as for men. But only 43% of women said they like his policies, compared with 53% for men.



Similar differences emerge along gender lines on economic policies. Only 47% of women approve of the way the President is handling the economy, compared with 58% approval from men; 32% of women see the nation's economic condition as bad, compared with only 27% for men, and 33% believe that Reagan's economic policies are making economic conditions worse, a view held by only 22% of men.

Among the questions regarding the economy asked in the survey, the largest difference between men and women was on whether Reagan is cutting waste in government. Only 47% of women said yes to that, compared with 59% of men. And 25% of women blame the President for the severe recession that began in 1981, compared with 19% of men.

As might be expected, negative reaction to the President's economic polices was strongest among women in relatively less-secure social and economic brackets. His disapproval rating among women 18 to 29 years old was 45%, higher than for any other age bracket, and disapproval among unmarried women was 44% compared to 37% disapproval among married women. Among women who described themselves as economically vulnerable, 49% disapprove of the President's job performance, in contrast to a 34%

But the policy gender gap does not appear to stem mainly from what are generally considered to be areas of special female concern, such as the right to have an abortion and the equal rights amendment, because support for these issues is stronger among men than among women.

When asked whether they favor allowing women to have an abortion, 51% of the men said yes, the answer given by only 47% of the women interviewed, and 70% of men favor the equal rights amendment to the Constitution, compared with only 60% of women. Reagan supports a constitutional amendment banning abortion and opposes the equal rights amendment.

The poll indicates also that courting of feminist organizations would not help the President close the gender gap. Only 28% of women polled said they thought groups such as the National Organization for Women and the National Women's Political Caucus speak for a majority of American women, and 56% said these groups represent a "small minority."

In general, women are less supportive than men of efforts to change and strengthen women's status in society. Sixty-six percent of men favored such efforts, but only 55% of women did. Only 31% of the women interviewed felt discriminated against in American society, just four percentage points more than the number of men who felt any discrimination, and only 24% of the women believe that Reagan is prejudiced against women.

The Los Angeles Times Poll, which was directed by I.A. Lewis, was conducted Sept. 17-22 among 1,653 adults nationwide. Percentages dealing with the entire sample are accurate to within four percentage points in either direction.

Exclusive Survey

How Congress Rates Reagan

What are the President's strengths and weaknesses? Is his effectiveness slipping? From senators and House members comes a candid assessment of the Chief Executive.

Ronald Reagan is heading into a period of confrontation with Congress with one distinct advantage: The perception on the part of most lawmakers that he is a strong President, able to get his way on Capitol Hill when the chips are down.

A *U.S.News & World Report* survey of members of Congress, appraising Reagan's performance, finds that the President's ability to dominate the House and Senate on crucial issues is conceded even by many Democrats, who began 1983 with hopes of blocking his initiatives after heavy Republican losses in last fall's election.

Already this fall, the President has emerged victorious on a string of issues from building the MX missile to keeping Marines in Lebanon. His reputation as a forceful Chief Executive raises the odds that he will win on other key issues in coming months involving aid to Central America, spending and taxes.

Many survey respondents, Republicans as well as Democrats, find serious flaws in the President's handling of specific problems at home and abroad. Some note slippage in his strength since his early days in office. Nevertheless, the prevailing view is that Reagan's skill as a power broker remains largely intact, reminiscent to some lawmakers of three of this century's strongest Presidents—Franklin Roosevelt, Harry Truman and Lyndon Johnson.

All told, 240 representatives and senators answered the magazine's questionnaire—about 45 percent of the membership. Responses came from 132 Democrats and 108 Republicans, roughly proportionate to their parties' numbers in Congress. Many elaborated on their answers with handwritten comments.

Reagan's strongest attributes, as perceived from Capitol Hill, include his ability to marshal support for administration programs, his prowess as a political leader and his skill at inspiring confidence in the Presidency.

He also gets credit for dealing effectively with Congress, slowing the rate of inflation and building up the nation's defense.

"Whether one agrees with Mr. Reagan's policies or not, it is clear that he has been a forceful and effective leader," says a Democrat from Florida.

Even though Reagan gets high marks for fighting inflation, he scores low on coping with the economy generally, managing the federal bureaucracy and dealing with foreign governments.

Most disappointing to lawmakers has been the impact of the President's economic program and what some of them view as his "insensitivity" to the poor. "His neglect of unemployment is tragic," comments Representative Nick Rahall (D-W.Va.).

Following are questions asked, a tabulation of replies and a sampling of comments.

Appraising the President

Q How would you rate Ronald Reagan as President?

	Dem.	Rep.	Total
1. Strong	32.1%	91.3%	58.3%
2. Average	28.2%	8.6%	19.6%
3. Below average	39.7%	0%	22.1%

Not surprisingly, Reagan gets his best rating from fellow Republicans, none of whom regard him as below average. Yet nearly a third of the Democrats responding to the poll also give the President high marks.

Typical is this appraisal from Representative Don Edwards, a liberal Democrat from California: "He is the strongest President since LBJ." Adds Representative William Goodling (R-Pa.): "He is the first to provide leadership to the Congress since Lyndon Johnson and, before that, FDR."

A number of lawmakers responding to the survey made it clear that "strong" and "good" are not necessarily synonymous. "He's living in an ideological dream world," says Representative Matthew Martinez (D-Calif.). Comments another Democrat: "He's probably the worst President since Warren Harding."

Others believe Reagan has done exceptionally well under difficult circumstances. "With a partisan, hostile House and a Senate where the votes of liberals often are essential, President Reagan has done a superb job," says Representative Henry Hyde (R-Ill.).

Comments Representative Harold Sawyer (R-Mich.): "While at times I disagree with the President, I never have the uncomfortable feeling that there is no hand on the tiller."

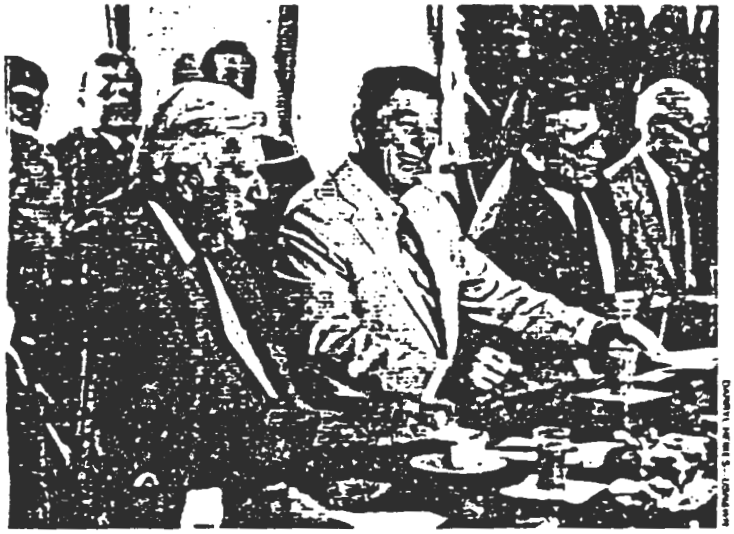
Reagan's Strongest Cards

Q In what area does the President's greatest ability lie?

	Dem.	Rep.	Total
1. Winning support for his program	64.3%	41.6%	52.1%
2. Inspiring confidence	13.8%	21.1%	17.8%
3. Exerting political leadership	15.7%	18.6%	17.3%
4. Coping with economic problems	1.4%	6.8%	4.3%
5. Working with Congress	2.9%	5.0%	4.0%
6. Dealing with foreign governments	1.4%	5.0%	3.3%
7. Managing the bureaucracy	0.7%	1.9%	1.3%

While the thrust of Reagan's policies is a subject of broad disagreement, lawmakers clearly acknowledge his expertise at lining up support for his tax and spending programs, both in Congress and the nation as a whole.

"The President has been able to bring diverse groups within the country together and use those coalitions to



Reagan, a "good arm-twister," with congressional leaders.

move a comprehensive program forward," says Representative Robert Walker (R-Pa.).

Repeatedly singled out in explaining Reagan's success are his skills as a communicator. Asserts Representative Mickey Leland (D-Tex.): "When he uses the media to explain the actions of his administration, he's not always successful. But when he is, he's exceptionally so."

In noting the President's communicating skills, not everyone is complimentary. Some refer to Reagan's talent as "public imagery" and shallow "public relations." One Democrat describes the President's skill as "convincing people that nonsense is logical."

For others, Reagan's greatest assets are in exerting political leadership and inspiring new confidence in the office of the Presidency, an achievement that Senator Ted Stevens (R-Alaska) describes as "restoring American pride."

Where He Falls Short

Q Where, in your judgment, is the President weakest?

	Dem.	Rep.	Total
1. Coping with economic problems	43.4%	17.0%	34.2%
2. Managing the bureaucracy	8.4%	53.4%	24.0%
3. Dealing with foreign governments	25.9%	11.4%	20.9%
4. Working with Congress	11.4%	9.1%	10.6%
5. Exerting political leadership	5.4%	4.5%	5.1%
6. Inspiring confidence	5.4%	2.3%	4.3%
7. Winning support for his program	0%	2.3%	0.8%

Party differences grow sharper when it comes to singling out Reagan's weaknesses.

Among Democrats, a large plurality believe that he has failed to cope with the nation's economic problems and the federal deficit.

Asserts one Democrat: "History will reflect his as the worst economic-policy failure in our history."

Republicans point to the President's difficulty in dealing with government employes and federal agencies—areas in which, Senator Stevens observes, Reagan has "less direct involvement."

A handful of GOP lawmakers criticize Reagan's performance on women's issues, civil rights and "projecting concern for minorities and the less fortunate."

Reagan also is faulted for surrounding himself with, as a Republican senator puts it, "poor advisers." House member Sawyer comments: "He tends to overly credit the opinion and advice of some of his high-level advisers who in some cases are not sound in their judgment and do not understand congressional procedures."

On the World Stage

Q How do you regard the President as a world leader?

	Dem.	Rep.	Total
1. Very effective	9.8%	75.0%	39.2%
2. Average	43.9%	24.1%	35.0%
3. Below average	46.2%	0.9%	25.8%

On his standing in the world community, Reagan gets mixed reviews.

Fellow Republicans laud him for his "firm stand" on foreign-policy issues, while some Democrats find his rhetoric at least partly to blame for heightened world tensions.

"The Williamsburg conference and the handling of the Korean Air Lines situation have made Reagan an effective, respected leader in the world today," says Representative Dan Schaefer (R-Colo.). Adds Representative Michael Oxley (R-Ohio): "The U.S. stands for something again."

Democrats clearly view foreign affairs as Reagan's weak suit. Representative Edwards of California describes the President's international record as "a disaster—not a single accomplishment. Even Jimmy Carter had the Camp David agreement and the Panama Canal Treaty." Representative Rahall declares that Reagan has "too many decisions on hold. He lacks a steady course in the Middle East, thus harming U.S. credibility."

One Democrat sees an element of danger in Reagan's conduct of foreign policy. "With the exception of his correct stand on the Korean Air Lines tragedy, he has used international rhetoric to increase world tension alarmingly."

Dealings With Capitol Hill

Q How effective is Reagan in dealing with Congress?

	Dem.	Rep.	Total
1. Very effective	37.4%	65.4%	49.8%
2. Average	44.3%	32.7%	39.1%
3. Below average	18.3%	1.9%	11.1%

In terms of getting what he wants from Congress, Reagan has racked up an impressive record, as lawmakers see it. But when it comes to building a smooth working relationship with the Democratic-controlled House and Republican-controlled Senate, the President still has much room for improvement.

"Mr. Reagan is a good muscleman and arm-twister," asserts one Democrat. Says another: "He doesn't understand working with a truly bipartisan Congress."

According to one Southern Democrat, Reagan's rating "would have been much higher last year, but in some cases, ideology is getting in the way of his dealings with Congress."

GOP Representative Ron Packard of California sees another reason for the slippage: "It's not because of the President's lack of effectiveness—but Congress is unworkable."

Some lawmakers contend that the best measure of Reagan's effectiveness is his success in getting Congress to stick with the thrust of his tax and spending programs, despite the increasing tempo of the 1984 presidential campaign. A

Republican comments, "The philosophical differences of the majority of Congress in opposition to Reagan's policies have made his victories even more impressive."

Others laud the work of Reagan's staff in dealing with Congress. "He has the most competent and effective congressional-liaison office that the White House has had in many years," contends Representative Oxley.

Sour Views From Congress

Q Since 1981, have Reagan's relations with Congress—

	Dem.	Rep.	Total
1. Improved?	7.0%	23.3%	14.3%
2. Remained about the same?	29.7%	56.3%	41.8%
3. Deteriorated?	63.3%	20.4%	44.1%

Despite Reagan's early successes on Capitol Hill, relations with Congress are clearly on a downswing.

Some lawmakers attribute the change to a shift in the political landscape after the 1982 elections, which saw Democrats pick up 26 House seats and break a Republican and conservative-Democrat hammerlock on Congress that resulted from a GOP sweep in 1980. "Politics today are different," observes Representative Packard.

The approach of the 1984 elections also is a factor. "Reagan's ability to have his way with Congress has diminished as House and Senate members become more and more concerned with several of his policy initiatives and their ultimate impact on elections," says a Southern Democrat.

From another Democrat: "Too many members of his party have been led out on a limb to hold his coalition together in the face of big deficits, sexism and other issues."

Republicans say that at least some of the blame should go to top Democrats who are "injecting more partisanship" into congressional affairs. "The Democratic leadership has done all possible to discredit the Reagan programs," argues one GOP lawmaker.

Nonetheless, contends another Republican, "the President is still strong enough to get most of what he wants."

Which Direction Now?

Q How would you expect Reagan to fare with Congress between now and the 1984 elections?

	Dem.	Rep.	Total
1. Won't do as well as previously	49.7%	55.7%	52.2%
2. Will have to compromise more	46.1%	23.5%	36.5%
3. Will win most major battles	4.2%	20.8%	11.2%

Reagan's rocky relationship with Congress will get even bumpier as the 1984 election approaches.

Already, lawmakers note, Reagan's weaker position in polls has emboldened Democratic leaders to oppose his policies more vehemently and more often. Asserts Senator Malcolm Wallop (R-Wyo.): "Democratic policies will not permit as many program successes or legislative successes as in the past, regardless of national need." Adds Representative Philip Crane (R-Ill.): "Presidential politics and congressional posturing will not serve the public well over the next year."

In the view of many members, both Congress and Reagan will have to do more compromising in the year ahead if a legislative stalemate is to be avoided.

Most Notable Achievement

Q What is Reagan's most notable achievement so far?

	Dem.	Rep.	Total
1. Slowing inflation rate	27.7%	39.6%	41.4%
2. Building up U.S. defense	26.1%	18.3%	26.1%
3. Cutting spending and taxes	13.1%	16.6%	18.1%
4. Creating mood of confidence	5.4%	16.6%	14.0%
5. Standing up to Soviets	3.8%	8.3%	7.6%
6. No notable achievement	23.8%	0.6%	12.8%

While members of Congress give Reagan relatively low marks on his overall handling of the economy, many feel that his success in controlling inflation is the capstone of his Presidency.

Some critics argue that he merely traded inflation for high unemployment, while others contend that inflation slowed as a result of Federal Reserve Board actions and "despite the President's loose fiscal policy." Comments Representative Patricia Schroeder (D-Colo.): "He was there when it happened; he didn't bring it about."

Other lawmakers hail the President for building up the national defense, cutting taxes and reducing the growth of domestic spending. "He has restored confidence in the traditional American system," says Representative Carl Pursell (R-Mich.).

Where He Has Fallen Down

Q What, if anything, has disappointed you about the President's performance to date?

	Dem.	Rep.	Total
1. Insensitivity to the poor	31.9%	10.8%	26.9%
2. Impact of economic program	30.0%	7.7%	24.7%
3. Inflexibility, excessive zeal	20.0%	15.4%	18.9%
4. Hard-line foreign policy	16.2%	3.1%	13.1%
5. Not conservative enough	0.5%	15.4%	4.0%
6. Nothing at all	1.4%	47.7%	12.4%

More than anything else, lawmakers express disappointment with the impact of Reagan's economic program, and what they view as his apparent insensitivity toward the poor.

Democrats, in large numbers, tend to discredit Reagan's spending policies—which reduced funding of some programs for low-income people—as hurting the poor while helping the rich. Republicans complain that Reagan has not come to grips with what many view as a public-relations problem. "He has paid inadequate attention to the 'insensitivity' charge, which is without foundation," says one Republican. GOP House member Pursell thinks Reagan should invoke a "fairness doctrine" with "more across-the-board spending cuts." Others list a variety of disappointments, from Reagan's refusal to fire cabinet members seen as political liabilities to his failure to control federal deficits.

"Something happened about six or eight months into the President's term, and he became more of a politician than the hard-nosed leader we had elected," says conservative Representative Thomas Hartnett (R-S.C.). But not all conservatives agree. Notes Representative Hyde: "The perfect is the enemy of the good—he's not perfect, but he's damn good." □

By JEFFERY L. SHELER

TIME/JULY 18, 1983

Sunny Mood at Midsummer

Americans take a brighter view of Reagan, the economy and the country

As the vacation season ripens to its fullest, Americans are heading to the beaches, tennis courts and backyard barbecue pits in their sunniest mood in nearly two years. The nation's problems, they think, look much less menacing, in particular, better than they did last winter and spring, largely because the recovery in the economy now seems to be genuine. Moreover, as the public's outlook on life in general brightens, so does its opinion of President Reagan, whose ratings are finally beginning to climb.

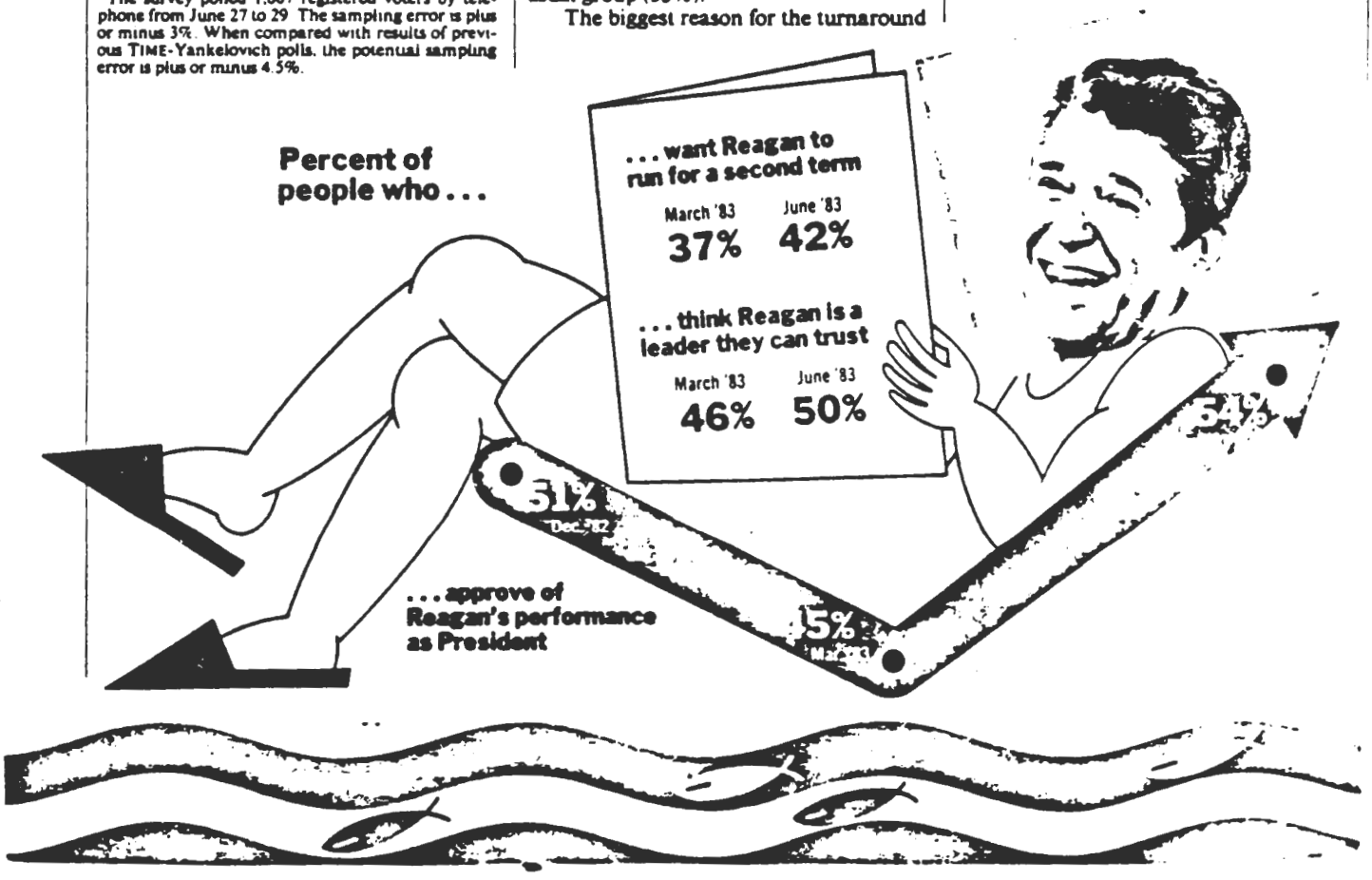
Those are the chief findings of a start-of-summer survey of American attitudes taken for TIME by Yankelovich, Skelly and White Inc.* There are puzzling cross-currents, of the type that occur in every poll, but the upswing in optimism is unmistakable. In response to the broadest question, "How do you feel things are going in the country these days?" a solid majority of 57% answered either "very well" or "fairly well," *vs.* only 41% who replied "pretty badly" or "very badly." That marks a striking reversal from the last two polls: in March those who judged the nation to be heading downhill held the lead 54% to 45%, and last December the pessimists' edge was lopsided, 65% to 35%. Indeed, the current poll shows the first majority since September 1981 for those taking the upbeat view.

The state of the nation, of course, can improve markedly and still leave much to be desired. In fact, 58% of those questioned still rated it "not good," a response hard to reconcile with the general air of optimism. But that was the lowest proportion since November 1977, when it was 55% (for whatever reason, possibly simply high standards, "not good" has always held a majority in the TIME-Yankelovich polls). More significant perhaps, 48% now believe the country's problems to be "no worse than at other times," while 46% think that the U.S. "is in deep and serious trouble," the narrowest division in six years. Only six months earlier, in the December 1982 poll, the deep-trouble worriers were almost twice as numerous (62% of those polled) as the no-worse-than-usual group (33%).

The biggest reason for the turnaround in sentiment seems obvious. It is hardly surprising that public gloom was so widespread late last year; in the judgment of many economists, that was when the most painful recession since World War II hit bottom. Though many indexes of the economy began rising with the new year, their message at first was unclear. As recently as March, those polled by the Yankelovich firm split evenly, 49% to 49%, on whether a recovery had or had not begun. Now the doubt has been resolved. In the current poll, 59% said the economy really has started to improve, while only 38% believed the U.S. is still in "the throes of recession."

The June unemployment figures released last week provided further evidence that the recovery is real; at the same time, they made it clear that the recovery has a long way to go before true prosperity is restored. The civilian jobless rate dropped a tenth of a point, to an even 10%, continuing a creeping but steady decline from last December's postwar record of 10.8%. The June rate was the low-

*The survey polled 1,007 registered voters by telephone from June 27 to 29. The sampling error is plus or minus 3%. When compared with results of previous TIME-Yankelovich polls, the potential sampling error is plus or minus 4.5%.



est since last August, but still higher than at any previous time since 1941. Such a slow decline in unemployment is characteristic of the early stages of recoveries; it reflects in part a return to active job seeking by people who had given up looking for work when the recession was at its worst. Some 1.1 million new jobs have been created since last December, but the number of people competing for them has grown only a bit less rapidly.

In any case, the recovery is visible enough for the poll results to give Ronald Reagan happy summer reading. The most surprising finding of the March survey was that, though the public was already beginning to turn more cheerful, the President's approval ratings were still dropping sharply. Possibly this was because many people were not yet convinced that the recovery was genuine. Now, as measurements of the economy have turned visibly more favorable, so have voter opinions about Reagan.

To be sure, 48% of those questioned have not changed their minds about the President. But 26% now think more highly of him, while 25% take a dimmer view than before. Statistically, that amounts to an even split, which in itself is a major change from March. Then, 35% had a worse impression of Reagan, while only 15% said his standing had improved in their minds. Asked to gauge the President's performance on the familiar scale of 1 to 10 (1 standing for "very poor," 10 for "excellent"), 54% of the voters this time gave him ratings from 6 to 10, while 44% chose scores from 1 to 5. That is almost exactly the opposite of the March results: 55% of those polled then accorded Reagan low ratings, while only 45% judged him favorably.

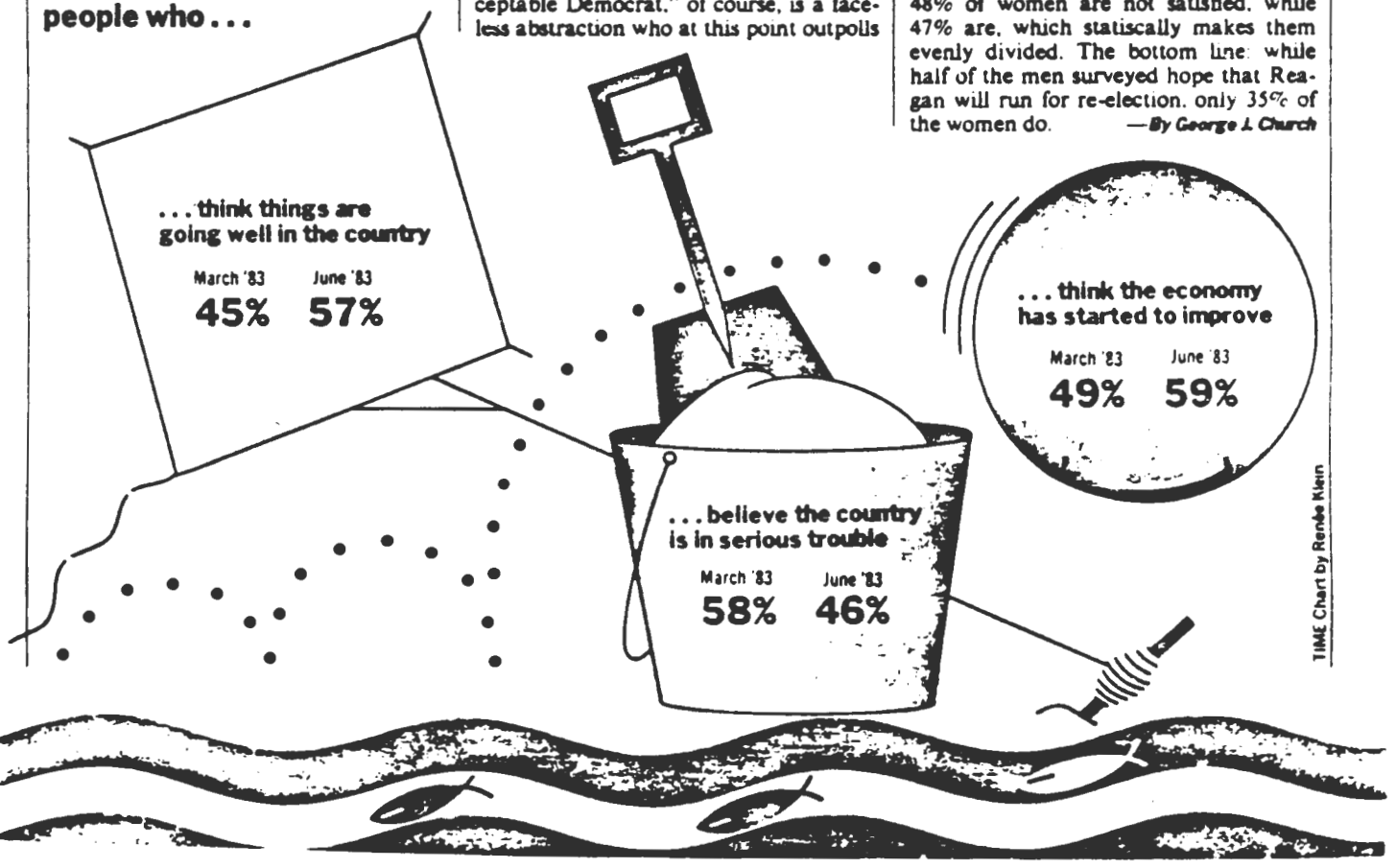
Again, the reason for the change is not hard to find. Among the majority who believe that the economy is recovering, 43% say Reagan is most responsible for the improvement. Runner-up is a feeling that "the economy goes up and down; it [the recovery] would have happened anyway" at a distant 25%. The Federal Reserve Board scored 13% and Congress 8% (behind the 11% for "not sure").

Also, the President seems to be winning converts to his view that the recession was the bitter price the nation had to pay to bring inflation under control. Some 54% of those questioned thought that the Reagan Administration has "made sufficient progress in solving inflation," while only 42% said it has not. That is a response of the highest importance to political calculations. Asked which of 15 issues would have "a lot of influence" on their choice of who should be elected President in 1984, 80% selected "policies on inflation," more than those who specified any other issue. Second place, at 75%, somewhat surprisingly went to "policies on improving education," an issue that is rising fast in public consciousness, in part because Reagan has highlighted it repeatedly in recent weeks.

Like the economy, though, the President still has a great deal of lost ground to make up. Some 54% of those polled said they would vote for "an acceptable Democrat" against Reagan next year, the same percentage as in March. The proportion choosing Reagan rose only from 27% to 30%. "An acceptable Democrat," of course, is a faceless abstraction who at this point outpolls all the flesh-and-blood Democrats competing for the White House. On a question designed as a direct measure of Reagan's appeal, those who hope the President will not run for a second term outnumber those who hope he will, as they have in each of the last six surveys. The hope-he-won't group, however, now prevails only 46% to 42%; three months earlier the split was 51% *vs.* 37%.

While giving Reagan high marks for containing inflation, the public continues to be dismayed by the slowness of the decline in unemployment. Almost exactly two-thirds of those questioned think the Administration has not made sufficient progress in reducing the jobless rate; only 29% say it has. And though they put inflation at the top of the list of 1984 election issues, many voters are more worried right now by unemployment. Asked which they were "personally more concerned" about, joblessness or rising prices, 49% of those surveyed replied "unemployment," *vs.* 35% for inflation.

In addition, Reagan continues to be viewed less favorably by female than by male voters on just about every question that the pollsters raise. Contrary to popular belief, the gender gap yawns wider on economic than on foreign policy issues. For example, large majorities of both sexes—71% of men, 64% of women—express at least some confidence that the President is dealing effectively with the Soviets on arms control. But only 53% of the women believe that the economy is improving, *vs.* 65% of the men. On Reagan's strongest issue, inflation, the division is even more striking. Men are satisfied with Reagan's progress in bringing price rises under control, 61% to 35%; but 48% of women are not satisfied, while 47% are, which statiscally makes them evenly divided. The bottom line: while half of the men surveyed hope that Reagan will run for re-election, only 35% of the women do. —*By George J. Church*



THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release October 15, 1983

RADIO ADDRESS BY
THE PRESIDENT
TO THE NATION

Camp David

12:06 P.M. EDT

THE PRESIDENT: My fellow Americans, I know I court trouble when I dispute experts who specialize in spotting storm clouds and preaching doom and gloom. But at the risk of being the skunk that invades their garden party, I must warn them -- some very good news is sneaking up on you. The quality of American life is improving again. "Quality of life," that's a term often used, but seldom defined. Certainly, our standard of living is part of it. And one good measure of that is purchasing power.

Just a few years ago, double-digit inflation was bleeding our purchasing power. Record price increases, interest rates, and taxation punished the thrifty, impoverished the needy, and discouraged entrepreneurs. When an economy goes haywire, confidence is destroyed. Well, today, the tables have been turned. Double-digit inflation is gone. And confidence is coming back. In 1980, the U.S. ranked only 10th among 20 industrial nations in per capita income. By the end of 1982, we'd climbed all the up to third place. Our stronger dollar has increased purchasing power. Real wages are up. And inflation is down to 2.6 percent. Sometimes when we shop, we don't realize how much inflation has dropped because prices are still going up. But they're going up much more slowly than before. If food prices had kept rising as fast the last two years as the two years before we took office, a loaf of bread would cost seven cents more than it does today, a half gallon of milk 18 cents more, a pound of hamburger 60 cents more, and a gallon of gas 97 cents more.

The prime interest rate has been cut nearly in half so costs of business, mortgage, education, and car loans have dropped. The federal income tax on a typical working family is $700 less than if our tax program had not been passed. With parents, students, entrepreneurs, workers, and consumers feeling more secure, opportunities for jobs are expanding. Our work force, in September, rose by nearly 400,000 to 101.9 million -- the highest level in American history. And the trend will continue.

Quality of life is not just more jobs. It's, also, better jobs. And we're seeing better opportunities opening up for all Americans. Women, for example, filled more than half of all the new jobs in managerial, professional, and technical fields between 1980 and 1982. The number of women-owned businesses is growing five times faster than men's. The future looks brighter. To get a peak at what tomorrow's jobs and products may be, look at the venture capital industry. This is where high-powered capital is invested, and much of the techn logical revolution is taking place.

During the first nine months of 1983, the venture industry raised about $2.5 billion -- nearly three times more than in all of 1980. The General Accounting Office has already estimated that previous venture investments of some $209 million in the sample of 72 companies directly generated 130,000 jobs during the decade of the '70s. Well, if $209 million of venture capital generated 130,000 jobs in 10 years, imagine how many jobs $2.5 billion will create during the next year. And like interest that compounds, growth and opportunities create more growth and more opportunities. Capital spending by business, a key source of higher productivity and new jobs help propel the economy

MORE

forward in the third quarter.

Much of the increase in spending went for products of high technology like computers and word processors.

We're witnessing an industrial renaissance and this is only act one. It's being nourished by incentives from lower tax rates, starting with the 1978 capital gains tax reduction, passed, incidentally, over the objections of the last administration, and followed by our own more sweeping tax cut program in 1981.

Our program to create opportunity and bring big government under control, the subsequent decline in inflation and interest rates and prospects for robust growth have all led to another basic change: America's confidence in their institutions is turning up after nearly two decades of decline. A 1982 survey by the University of Michigan found people more likely to say they trusted the government to do what is right.

Looking beyond the economy, we see more evidence that the quality of life is improving. Life expectancy reached a record high last year, climbing to 74.5 years. Infant mortality declined to an all-time low with only 11.2 deaths per 1,000 live births. And the number of divorces dropped for the first time since 1962. Serious crime dropped 3 percent, the first measurable decline since 1977. Quality education, an American tradition, but one neglected for years, will be restored, thanks to leadership in Washington and vigorous action by your families at the grass roots.

Good things are happening in America. Confidence is returning. Our quality of life is improving because your voices, voices of common sense, are finally getting through. Believe me, it wasn't Washington experts who said government is too big, taxes are too high, criminals are coddled, education's basics are neglected and values of family and faith are being undermined. That was your message. You made reforms possible.

With your help, we'll make even more progress because I'll be the first to admit much more progress needs to be made. We're on a new road for America, a far better road, filled with hope and opportunities. Our critics may never be satisfied with anything we do; but I can only say, those who created the worst economic mess in post-war history should be the last people crying wolf, 1,000 days into this administration, when so many trends that were headed the wrong way are headed back in the right direction.

Thanks for listening and God bless you.

END 12:11 P.M. EDT

speech file

Lawrence Harrison Post 12/20/76

More Malaphors

Since "Searching for Malaphors" was published in The Post on August 6, I have received some 20 letters from people who were collecting malaphors long before the word was coined (malaproprism plus metaphor). Indeed, several were delighted to discover a word for what they were collecting. (One had been calling them "fingers of speech.")

What I conclude from this admittedly narrow data base is that, while the malaphor flourishes in bureaucratic compost, it will grow just about anywhere. The following malaphors are my pick of the letters. They were uttered in the home, on the farm, in the street, as well as in the office.

"He said that with his tongue in his mouth."

"His 90-year-old grandmother still had all her facilities."

"I don't hold much water to that idea." (A nice mate for the earlier "He was uncertain about their views and was feeling the water.")

"We have matters well under hand." (Note the link to the earlier "A study is under foot.")

"I'd like to have been an eardropper on the wall."

"I'm not going to put my neck out on a limb."

"He died interstate."

"That guy's out to butter his own nest."

"He's cutting off his nose in spite of his face."

"We are diabolically opposed."

"He threw a wet towel on the meeting."

"He's between a rock and the deep blue sea."

From a speech to the AP Sports Editors Association in June of this year by a Vietnam veteran: "But lately, I have felt that I am back in the rice patties."

While it may not really be a malaphor, I like the following, from The Washington Post of Aug. 11: "Steinmetz said the gas would be fatal only if one remained in its presence until dead."

Notwithstanding the fact that, since the first article was completed, people are more careful about what they say near me, my family and friends, I have accumulated the following:

"It's like pulling blood."

Spoken by a foreign aid official: "The technocrats [of another country] were hand over hand above the technocrats in this country."

"It may be so, but my guttural reaction is that it won't work."

A reaction to an amateur theatrical production: "People were ranting and raving about it."

"He doesn't stand a Chinaman's chance in hell."

A comment about a threatened strike of government engineers in a Latin American country: "They are rising in righteous indignity."

"What I've been saying in bits and drabs. . . ."

"He went through it with a fine-tuned comb."

"I'm raising a straw horse. Feel free to burn it down." (This was uttered by one of my best malaphor sources. It was he who said, "Maybe we ought to include part of their suggestion—you know, throw them a fop." Recently, he came within an ace of saying "prima feces.")

"Rome wasn't burned in a day."

"It's a tenant of our policy."

With reference to lower-level officials of another country: "They shouldn't upstream the ministers."

"All those guys do is sit around at meetings and postulate."

"It fell between the tracks."

"He really speaks his mind; he doesn't crouch his terms."

"Perhaps I'm looking at it from our own colloquial point of view."

Even the most malaphor-sensitive families are not immune. My 13-year-old daughter recently said of her 15-year-old-sister: "The boys are falling all over Beth's feet."

It is clear that bureaucrats have it legs down when it comes to malaphors. But anyone can play.

The writer recently spent two years in AID's Latin American bureau in Washington.

Lawrence Harrison

Searching for 'Malaphors'

Aug 6, 1976 Post

As the endless meeting in the State Department wore on, one of the participants announced: "It's time to fish and cut bait." A few days later, a colleague, in talking his way through a difficult bureaucratic problem, said: "Maybe we ought to include part of their suggestion—you know, throw them a fop."

That was about two years ago. I've kept my ears open since, with great reward, as have several colleagues. Bureaucratic language, whatever else its failings, is a treasure trove of figures of speech, filled with worms in cans, wax balls, oranges, apples, chicken, and eggs. And each metaphor carries the seeds of its own destruction.

Mr. Harrison recently spent two years in AID's Latin American Bureau in Washington.

Most of our laughs have come from incorrect or mixed metaphors. Malapropisms, too, have contributed. I've coined the word "malaphor" to cover the range of bureaucratic fluffs.

In looking over two years of malaphors—and all of them, I want to assure you, are authentic—I find that the human body is the most popular theme:

"It warms the coggles of my heart" (appeared in a memo).

"He threw a cold shoulder on that idea."

"Now we've got to flush out the skeleton."

"He deals out of both ends of his mouth."

"Let's do it and listen to how the shoe pinches."

"He's trying to get his foot in the tent."

"A study is under foot."

"He said it off the top of his cuff."

"When he heard that, he furrowed his eyebrows."

"The project is going to pot in a hand basket."

"I'm not going to knuckle in to that politician."

"Going for the juggler again, eh, Art?" (a written note).

"We're breaking pre-virgin territory."

"He got off on a sour foot."

"They treated him as if he had Blue Bonnet plague."

Science and technology are also a common source for easily mutilated figurative language:

"That project will be coming on steam soon."

"Let's wait and see if there is any follow out from the incident."

"We ought to hone in on that problem" (heard almost every day).

"He's flying against the current."

"The issue is on the back burner in a holding pattern."

"Maybe we should take a different tact."

"The proposal is out of focus with the budget cycle."

One of the better malaphors with science and technology roots appeared on January 28, 1975, in a Washington Post article headlined: "Nixon Didn't Like Advice From Science Aides." The article quotes Edward E. David Jr., Nixon's last science adviser:

"The White House advisers to Mr. Nixon thought that the scientists were using science as a sledgehammer to grind their political axes."

Four items on the list have animal themes:

"Don't flag dead horses."

"It was a case of the tail biting the dog."

Said of an idealist: "He's a Don Coyote."

"He's feathering his own bed."

Some miscellaneous malaphors:

"It was a Fiat accompli."

"He was uncertain about their views and was feeling the water."

"I'm not going to bail out his chestnuts."

"We can shoot potholes in that argument."

"They were raking him over the ropes."

"The problem started small, but it was baseballing."

"He has worked in several places. He just put in a stench at HEW."

"The whole show is his. He covers the watershed."

"It all becomes a mute question."

"Since we can't handle it now, let's leave it to prosperity."

I place the final group of malaphors under the heading of "Freudian Slips."

"The project was moving ahead rickety-split."

Said of an autocratic president of a foreign country: "He accepted the cabinet resignations with unanimity."

"Don't rock the trough" (spoken by a veteran bureaucrat).

"We'll have to be backing and shoveling with these press people" (spoken by a public affairs officer).

It may be unfair to saddle bureaucrats with the sole blame for malaphors. Chances are that similar goofs occur in the private sector and that a Madison Avenue or Detroit type should be making a collection like this one. After all, the apt figure of speech impresses people, and in big organizations where it's hard to know how competent someone really is, promotions are sometimes made on style as much as anything else.

It may also be that the repetitiveness of circumstances and problems in large organizations encourages the evolution of a kind of figurative shorthand that is a convenience as well as a conceit. Whatever the explanation, as soon as a metaphor is well established, a malaphor cannot be far behind.

Speech file

Steinberg - 633 2245

Abraham Lincoln once said: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, expenses, and waste of time." Americans, however, have failed to heed Lincoln's advice. They are filing more lawsuits than ever before, and are bringing into court virtually every conceivable type of dispute. As Chief Justice Burger has observed, "courts have been expected to fill the void created by the decline of church, family, and neighborhood unity."

The staggering increase in litigation has strained the capacity of our courts and has threatened their ability to settle disputes. Much of the blame for this litigation explosion, however, must rest with the courts who have failed to exercise appropriate restraint. As never before, courts have been voiding legislative enactments and have been discovering new rights, protections and entitlements.

While we are taking steps to restore the courts to their proper role, we must, at the same time, respond to the crisis the courts now face. One measure that can provide some immediate relief to our overburdened courts in the District of Columbia is to add talented, new judges to handle the expanding caseload. Thus, I am naming ....

speeches file

Embargoed until:
2 p.m. Central Standard Time
Sunday, January 24, 1982

As Prepared for Delivery

ANNUAL REPORT ON THE STATE OF THE JUDICIARY

WARREN E. BURGER
Chief Justice of the United States

at the Midyear Meeting
American Bar Association
Chicago, Illinois
January 24, 1982

ISN'T THERE A BETTER WAY?

The obligation of our profession is, or has long been thought to be, to serve as healers of human conflicts. To fulfill our traditional obligation means that we should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense and with a minimum of stress on the participants. That is what justice is all about.

The law is a tool, not an end in itself. Like any tool, particular judicial mechanisms, procedures, or rules can become obsolete. Just as the carpenter's handsaw was replaced by the power saw and his hammer was replaced by the stapler, we should be alert to the need for better tools to serve our purposes.

Many thoughtful people, within and outside our profession, question whether that is being done today. They ask whether our profession is fulfilling its historical and traditional obligation of being healers of human conflicts. Although it may

be too much to say that we lawyers are becoming part of the problem instead of the means to a solution, I confess there is more to support our critics than I would have thought 15 or 20 years ago.

Litigation and the Adversary Tradition

Today, I address the administration of justice in civil matters, which shares with criminal justice both delay and lack of finality. Even when an acceptable result is finally achieved in a civil case, that result is often drained of much of its value because of the time-lapse, the expense and the emotional stress inescapable in the litigation process.

Abraham Lincoln once said: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, expenses, and waste of time." In the same vein, Judge Learned Hand commented: "I must say that, as a litigant, I should dread a lawsuit beyond almost anything else short of sickness and of death."

I was trained, as many of you were, with that generation of lawyers taught that the best service a lawyer could render a client was to keep away from the courts. Obviously that generalization needs qualifying, for often the courts are the only avenue to justice. In our search for "better ways," we must never forget that.

Law schools have traditionally steeped the students in the adversary tradition rather than in the skills of resolving conflicts. And various factors in the past 20-25 years have

combined to depict today's lawyer in the role of a knight in shining armor, whose courtroom lance strikes down all obstacles. But the emphasis on that role can be carried too far. Only very few law schools have significant focus on arbitration. Even fewer law schools focus on training in the skills -- the arts -- of negotiation that can lead to settlements. Of all the skills needed for the practicing lawyer, skill in negotiation must rank very high.

It is refreshing to note that the Dean of a new law school said he hoped the school would play a leading role in preparing lawyers to find fresh approaches to resolving cases outside the courtroom. He said:

> The idea of training a lawyer as a vigorous adversary to function in the courtroom is anachronistic. With court congestion and excessive litigiousness drawing increasing criticism, it is clear that lawyers in the future will have to be trained to explore nonjudicial routes to resolving disputes.[1]

This echoed the theme of the 1976 Pound Conference of which this Association was a cosponsor. Obviously two of those "non-judicial routes" are arbitration and negotiation, and it is very encouraging to find a new law school opening with this fresh approach. A third approach is greater use of the techniques of the administrative process exemplified by the traditional workmen's compensation acts. The adversary process is expensive. It is time-consuming. It often leaves a trail of stress and frustration.

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[1]Dean Charles Halpern, Law School, City University of New York.

One reason our courts have become overburdened is that Americans are increasingly turning to the courts for relief from a range of personal distresses and anxieties. Remedies for personal wrongs that once were considered the responsibility of institutions other than the courts are now boldly asserted as legal "entitlements." The courts have been expected to fill the void created by the decline of church, family, and neighborhood unity.

Possibly the increased litigiousness that court dockets reflect simply mirrors what is happening worldwide. The press, TV and radio, for hours every day, tell us of events in Asia, Africa, Europe and Latin America where there is seething political, social and economic turmoil. It is not surprising that our anxieties are aggravated.

In 1975, Professor John Barton of Stanford cautioned that:

> As implausible as it may appear, ... increases over the last decade suggest that by the early 21st century the federal appellate courts alone will decide approximately 1 million cases each year. That bench would include over 5,000 active judges, and the Federal Reporter would expand by more than 1,000 volumes each year.

We do not need to rely on this scholar's perception to know that the future prospects are neither comfortable nor comforting.

Costs of Litigation

Our litigation explosion during this generation is suggested by a few figures: from 1940 to 1981, annual Federal District Court civil case filings increased from about 35,000 to 180,000. This almost doubled the yearly case load per judgeship from 190 to 350 cases. The real meaning of these figures emerges when we

see that federal civil cases increased almost six times as fast as our population.

From 1950 to 1981, annual Court of Appeals filings climbed from over 2,800 to more than 26,000. The annual case load per judgeship increased from 44 to 200 cases. That growth was 16 times as much as the increase in population. A similar trend took place in the state courts from 1967 to 1976, where appellate filings increased eight times as fast as the population, and state trial court filings increased at double the rate of population growth.

It appears that people tend to be less satisfied with one round of litigation and are demanding a "second bite at the apple," far more than in earlier times.

We, as lawyers, know that litigation is not only stressful and frustrating, but expensive and frequently unrewarding for litigants. A personal injury case, for example, diverts the claimant and entire families from their normal pursuits. Physicians increasingly take note of "litigation neuroses" in otherwise normal, well-adjusted people. This negative impact is not confined to litigants and lawyers. Lay and professional witnesses, chiefly the doctors who testify, are also adversely affected. The plaintive cry of many frustrated litigants echoes what Learned Hand implied: "There must be a better way."

A common thread pervades all courtroom contests: lawyers are natural competitors and once litigation begins they strive mightily to win using every tactic available. Business executives are also competitors and when they are in litigation

they often transfer their normal productive and constructive drives into the adversary contest. Commercial litigation takes business executives and their staffs away from the creative paths of development and production and often inflicts more wear and tear on them than the most difficult business problems.

We read in the news of cases that continue not weeks or months, but years. Can it be that the authors of our judicial system, those who wrote constitutions 200 years ago, ever contemplated cases that monopolize one judge for many months or even years? A case recently terminated has been in court 13 years, and has largely occupied the time of one judge for half that time, with total costs running into hundreds of millions of dollars.

I doubt the Founding Fathers anticipated such results. That these cases are infrequent is not the whole story. In 1960, there were only 35 federal trials that took more than one month. By 1981, these protracted cases multiplied five times, and that is not the end of the story. All litigants standing in line behind a single protracted case -- whether it is a one-month, a three-month or a longer case -- are denied access to that court. This becomes more acute if that litigant cannot recover interest on the award or is allowed interest at 8 percent while paying double or more on a home mortgage or other debts.

Modern Application of Arbitration

We must now use the inventiveness, the ingenuity and the resourcefulness that have long characterized the American business and legal community, to shape new tools. The paradox is

that we already have some very good tools and techniques ready and waiting for imaginative lawyers to adapt them to current needs. We need to consider moving some cases from the adversary system to administrative processes, like workmen's compensation, or to mediation, conciliation, and especially arbitration. Divorce, child custody, adoptions, personal injury, landlord and tenant cases, and probate of estates are prime candidates for some form of administrative or arbitration processes.

Against this background I focus today on arbitration, not as the answer or cure-all for the mushrooming case loads of the courts, but as one example of "a better way to do it."

If the courts are to retain public confidence, we cannot let disputes wait two, three, or five years to be disposed of as is so often the situation. The use of private binding arbitration has been neglected. Lawyers in other countries, who admire the American system, are baffled that we use arbitration so little and use courts so much.

There is, of course, nothing new about the concept of arbitration to settle controversies. The concept of mediation and arbitration preceded by many centuries the creation of formal and organized judicial systems and codes of law. Ancient societies, more than 25 centuries ago, developed informal mechanisms, very much like mediation and arbitration, to resolve disputes.

In the time of Homer, for example, the community elders served as civil arbitrators to settle disputes between private parties. By the fourth century B.C., this practice was a settled

part of Athenian law. Commercial arbitration was a common practice among Phoenician traders and the desert caravans of Marco Polo's day, and later in the Hanseatic League.

American arbitration generally can be traced back at least to 14th century England when trade guilds and trade fairs adopted arbitration ordinances. Beyond the mercantile arbitration systems there was also common law arbitration.

An early use of arbitration in America was of Dutch origin. In 1647, in what is now New York City, an ordinance created the "Board of Nine," which arbitrated minor civil and mercantile disputes. In colonial Connecticut, Pennsylvania, Massachusetts, and South Carolina, various arbitration mechanisms were established to deal with debt or trespass and boundary disputes. As early as 1682, the Assembly of West New Jersey enacted a law which provided:

> And for the preventing of needless and frivolous Suits, Be it Hereby Enacted ... that all Accounts of Debt ... of Slander ... and Accounts whatsoever not exceeding Twenty Shillings, ... Arbitration of two [neutral] Persons of the Neighbourhood, shall be tendered by some one Justice of the Peace who shall have Power to summon the Parties ...

Despite the early use of arbitration in this country, and despite legislative efforts to secure a prominent place for that process in this country, two strong adversaries emerged: first, some judges, fearing that arbitration would deprive them of their jurisdiction, jealously guarded their powers and resisted arbitration. Secondly, lawyers, mistakenly fearing that arbitration would adversely affect their practice, zealously pursued court litigation. Ironically, experience has shown that

litigants can secure acceptable arbitration results and lawyers are not excluded from that process.

The American Bar Association had a large part in drafting the U.S. Arbitration Act, which called for binding arbitration to cut delay and expense. Yet for all that early support of arbitration, it has not developed as an alternative to adversary litigation in the courts. Old attitudes and old habits die hard.

Recent Developments

It is often difficult to discern the precise time when new developments occur relating to the human condition, but I think that for at least the past 20 years there has been a slowly -- all too slowly -- developing awareness that the traditional litigation process has become too cumbersome, too expensive and also burdened by many other disadvantages.

In 1976 we took note of these problems in commemorating the 70th Anniversary of Roscoe Pound's indictment of the American judicial and legal systems. That Conference brought arbitration sharply into focus. In opening the Pound Conference, I urged that we make a "reappraisal of the values of the arbitration process...." The Association responded promptly to the Pound Conference and there are now committees taking a fresh look at alternative means of dispute resolution. Our President, David Brink, has given the broad subject priority status.

What we must have, I submit, is a comprehensive review of the whole subject of alternatives, with special emphasis on arbitration. It is now clear that neither the federal nor the state court systems are capable of handling all the burdens

placed upon them. Surely the avalanche that is bound to come will make matters worse for everyone.

I do not suggest in any sense that arbitration can displace the courts. Rather, arbitration should be an alternative that will complement the judicial systems. There will always be conflicts which cannot be settled except by the judicial process.

There are important advantages in private arbitration of large, complex commercial disputes:

-- Parties can select the arbitrator, taking into account the special experience and knowledge of the arbitrator.

-- A privately selected arbitrator can conduct all proceedings in a setting with less stress on the parties; confidentiality can be preserved where there is a valid need to protect trade secrets, for example.

-- Arbitration can cope with complex business contracts, economic and accounting evidence, and financial statements. A skilled arbitrator acting as the trier, can digest evidence at his own time and pace without the expensive panoply of the judicial process.[2]

-- Parties to arbitration can readily stipulate to discovery processes in a way that can control, if not eliminate, abuses of those processes.

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[2]To operate a U.S. District Court with a jury costs approximately $350.00 per hour.

One example of an effective statutory, although not binding, arbitration program is found in Pennsylvania. The impact upon court backlogs in that state has been significant. In Philadelphia, in the first two years after the jurisdictional level was increased to $10,000, the entire civil calendar backlog was reduced from 48 months to 21 months. In 1974, more than 12,000 of approximately 16,000 civil cases were resolved through arbitration.

We must, however, be cautious in setting up arbitration procedures to make sure they become a realistic alternative rather than an additional step in an already prolonged process. For this reason, if a system of voluntary arbitration is to be truly effective, it should be final and binding, without a provision for de novo trial or review. This principle was recognized centuries ago by Demosthenes, who, in quoting the law, told the people of Athens:

> [W]hen [the parties] have mutually selected an arbiter, let them stand fast by his decision and by no means carry on appeal from him to another tribunal; but let the arbiter's [decision] be supreme.

Anything less than final and binding arbitration should be accompanied by some sanctions to discourage further conflict. For example, if the claimant fails to increase the award by 15 percent or more over the original award, he should be charged with the costs of proceedings plus the opponent's attorney fees. Michigan is one of the states that has experimented with this kind of sanction and such programs deserve close study.

The ABA Programs

The Association has taken a positive step by broadening the jurisdiction of the "Special Committee on Resolution of Minor Disputes" and it is now designated the "Special Committee on Alternative Means of Dispute Resolution."

That was a good step, but with all deference, I suggest to you, Mr. President, and to the Association, that either the existing committee be altered or an enlarged commission be created. Such a commission could well include distinguished leaders of the Bar and distinguished representatives of business and other disciplines.

The Association should now proceed carefully with an in depth examination of these problems. This cannot be done routinely or casually. Rather, it must be done on the scale of the 1969 monumental work of the American Law Institute on the jurisdiction of the American courts.

If there are objectors, as there may be, to this proposal, objections will serve to sharpen the analysis of the alternatives and guide us in making arbitration effective.

For 200 years, our country has made progress unparalleled in human history by virtue of a willingness to combine ancient wisdom with innovation and with what was long called "Yankee ingenuity."

The American Bar Association has been a leader in virtually every major improvement in the administration of justice in the past quarter of a century. During my tenure in office, alone, your support made possible the Institute for Court Management, the Circuit Executives for Federal Courts, the Code of Judicial

Conduct, the National Center for State Courts, expanded continuing education for lawyers and judges and training of paralegals. All of these were aimed at delivering justice in the shortest possible time and at the least expense.

The proposal I submit today could well be another major contribution by this Association to make our system of justice work better for the American people.

Department of Justice

EMBARGOED FOR RELEASE
UNTIL 3:15 P.M. EDT (12:15 P.M. PDT)
WEDNESDAY, JULY 28, 1982

REMARKS

OF

THE HONORABLE WILLIAM FRENCH SMITH
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

THE NINTH CIRCUIT JUDICIAL CONFERENCE

HOTEL DEL CORONADO
SAN DIEGO, CALIFORNIA

It is a pleasure for me to meet with such a distinguished group of jurists and attorneys at the judicial conference of what I consider my "home" circuit. One of the main purposes of circuit conferences is to facilitate the exchange of views on judicial administration between judges and practitioners.

I am reminded in that context of an old story about a novice attorney and the guidance given him by a veteran trial judge. The judge had just appointed the fledgling counselor to represent an indigent defendant in a criminal case. The attorney was happy to have the work, but confided to the judge that he was inexperienced in criminal matters and did not know how to proceed in representing his new client. The judge smiled and assured the attorney that he would have no problem.

"Just retire with the defendant to that private room over there," the judge advised, "learn all the relevant facts, and then give the defendant the best advice you can."

The attorney and the defendant went into the room, but after a half hour only the attorney emerged. The bailiff rushed into the room to find an open window and no defendant.

"What on earth have you done?" demanded the outraged judge.

"Well," responded the lawyer, "I did just what you told me to do. After I learned all the relevant facts from my client, I gave him the best advice I could."

I'm confident that the exchange of views between judges and lawyers at this conference will have more beneficial effects than it did in that story.

One area that concerns all of us who are interested in the administration of justice is the burgeoning caseload of our federal courts. Since 1960 annual civil filings in the district courts have more than tripled. In the same period appeals increased seven-fold. And the trend is continuing unabated. For the twelve-month period ending this March thirty-first, civil filings were up 12 percent and appeals were up 11 percent over the previous twelve-month period. In the Ninth Circuit, district court civil filings were up 8 percent and appeals were up 7 percent. In just the last five years appeals in the Ninth Circuit have increased by almost fifty percent.

These seem like dry statistics, but the judges in this room know what they mean in real terms. District judges today process fifty percent more filings than they did in 1960, and court of appeals judges hear four times as many cases as in 1960. Under the guidance of Chief Judge James Browning, the judges on the Ninth Circuit Court of Appeals have taken steps to increase their individual workloads even further and more efficiently dispose of the cases presented to them. The growing burden, however, is bound to have an effect on the judicial product and the quality of justice administered in this country.

The problems have not escaped the attention of the Department of Justice. We are actively supporting a wide range of legislative initiatives which will, if enacted, significantly lessen the burden on the federal courts. We support the abolition of diversity jurisdiction, which accounts for a quarter of the civil filings in the district courts and about 14 percent of appeals in the circuit courts. Leaving state law matters to the state courts is in accord with the federalism principles at the basis of this Administration's legal philosophy. There is no longer any persuasive rationale for diversity jurisdiction, and its abolition would free the federal courts for their primary task of interpreting and enforcing federal law.

We have also proposed a major revision of the federal habeas corpus laws, to impose a statute of limitations and provide that issues fully and fairly litigated in state court not be subject to relitigation in federal court. Our purpose is to restore finality in criminal law, but an incidental effect would be the removing of an unnecessary burden on the federal courts, since state prisoners filed over 8,000 habeas cases in federal courts last year. The only thing to commend the vast majority of those cases, to paraphrase Judge Learned Hand, "is the hardihood in supposing they could possibly succeed."

We are also considering the proposal to create special tribunals to decide certain types of factual disputes arising in the administration of welfare and regulatory programs. The resolution of many such disputes does not require the resources or expertise of an Article III court. The creation of such

tribunals was proposed over five years ago by a Justice Department Committee headed by Judge Bork. The growing caseload of the federal courts makes renewed attention to the proposal imperative.

Attention must also be given, however, to the root causes of the litigation explosion. As the Chief Justice remarked in his most recent annual report on the judiciary, "Americans are increasingly turning to the courts for relief from a range of personal distresses and anxieties" which had previously not been considered the subject of legal redress. The problem is caused in large part by Congress, which legislates without sufficient thought to the burdensome litigation it may engender.

In part, however, the judiciary has over the years brought this overload on itself. The judicial activism that has characterized the past two decades has invited far greater use of the courts to address society's ills. Through loose constructions of the "case or controversy" requirement and traditional doctrines of justiciability -- such as standing, ripeness, and mootness -- courts have too frequently attempted to resolve disputes not properly within their province. Other judicially created doctrines, such as expanded constructions of the judiciary's equitable relief powers and the multiplication of implied constitutional and statutory rights, have also invited more and more federal litigation.

Stopping and reversing the expansion of litigation in the federal system clearly requires the Congress and the Executive to re-visit some of the legislative and regulatory schemes that have

given rise to large numbers of cases. It also requires greater doctrinal self-restraint by the courts themselves.

A major response to the rising caseload came in 1978, when Congress passed the Omnibus Judgeship Bill and provided 152 new federal judges. The effects of that bill are now being seen in a rising number of terminated cases emerging from the Courts of Appeals. In the twelve-month period ending March thirty-first, the Ninth Circuit terminated 17 percent more cases than in the previous twelve-month period. Nationwide the courts of appeals terminated 14 percent more cases. That is, of course, good news. The whole idea of the new judges was to enable the courts to cut down some of the backlog that had been developing. The combination of steadily increased filings in the courts and the new availability of more judges to process them, however, has brought forth a new problem in the administration of the federal courts. Simply put, there is a serious question whether the Supreme Court will be able to keep up with the growing volume of cases decided by the lower federal courts.

In the term just completed, the Supreme Court decided 180 cases by full opinion -- an 18 percent jump from the previous term. During last term the Justices accepted some 210 cases for argument -- up 15 percent from the previous term, and up 36 percent from the term before that. The court has available for argument next term 24 more cases than it had at the start of last term, and an astounding 48 more cases than were available at the start of the term before last. The message behind these

statistics is clear: the Supreme Court is being compelled to accept and decide more cases than ever before.

This problem was both predictable and predicted. Writing in 1978, the Chief Justice noted: "When the 152 newly created federal judgeships are filled and operational, decisions of those judges will likely generate a significant increase in cases subject to review on appeal or certiorari in this Court." That has in fact happened, and the ultimate result has been the further taxing of our most valuable and most limited judicial resource, the Supreme Court.

The increased burden on the Supreme Court cannot, of course, be met as the burden on the lower courts was, with the addition of more judges. The ability of the Supreme Court to decide cases is finite; the Court can adequately consider only a certain number of cases. Justice White has stated that the Court is performing at full capacity. As he put it, "we are now extending plenary review to as many cases as we can adequately consider, decide and explain by full opinion." What is truly disturbing about that statement is that it was made four years ago, during a term in which the Court disposed of 19 fewer cases by full opinion than it did last term and disposed of 600 fewer petitions.

I submit that this is a very troubling development for a judicial system dependent on the Supreme Court for the final and authoritative resolution of questions of federal law. In the words of the Chief Justice:

"It is not a healthy situation when

> cases deserving authoritative resolution must remain unresolved because we are currently accepting more cases for plenary review than we can cope with in the manner they deserve."

Not only may inter-circuit conflicts remain unresolved, but individual circuits may develop whole areas of law contrary to the views of a majority of the Justices. When those views finally do find expression in an opinion of the Supreme Court -- an expression delayed because of the press of the volume of cases on the Court -- the resulting disruption could well be severe.

One possible solution which has been discussed for some time is the creation of a National Court of Appeals between the circuit courts and the Supreme Court. Although we recognize the problems motivating this proposal, the Department of Justice opposes it. We think an additional court would actually increase the burden on the Supreme Court, and create more litigation. It would also diminish the prestige of the existing courts of appeals.

One proposal which has received the active support of the Department calls for the abolition of the mandatory jurisdiction of the Supreme Court. The Supreme Court could better supervise the development of law in the federal circuits if it had compete discretion over its own docket. Every case which the Supreme Court must hear because of mandatory jurisdiction represents one less case the Court could have heard because of its importance. Chief Justice Burger has urged that "all mandatory jurisdiction

of the Supreme Court that can be, should be eliminated by statute," and the Department of Justice fully agrees.

Even the salutary step of increasing the Supreme Court's control of its own docket, however, will only moderately alleviate the problem of the Court's declining ability to supervise the development of federal law in the circuits. The surge in litigation and the increase in judicial resources to handle this litigation mean that a progressively smaller percentage of cases will be reviewed by the Supreme Court. More and more the courts of appeals will, for practical purposes, have the final word. As Justice Stevens noted in 1981:

> "The federal judicial system is undergoing profound changes. Among the most significant is the increase in the importance of our Courts of Appeals. Today they are in truth the courts of last resort for almost all federal litigation."

Circuit judges must nonetheless apply the law in accordance with the views of the Supreme Court. The fact that Supreme Court review is more unlikely because of pressures on that Court's docket does not mean that circuit courts may be any less sensitive to following the positions of the Court, to the extent those can be discerned. Quite the contrary. Since review by the high court will probably not be available, circuit courts must be particularly careful to avoid striking out on new paths that create tensions the Supreme Court may not readily be able to resolve.

Of course, following the guidance of the Supreme Court is not always the easiest of tasks. The Court often paints in broad outlines, leaving it to the lower courts to fill in the details. Division on the Court also often prevents the announcement of concise rules. As Justice Frankfurter noted, the task of an inferior federal judge is often "to interpret the mysteries and the mumbo-jumbo of the nine Delphic oracles, and, at the pain of a spanking, find clarity in darkness." For our part, the Department of Justice will urge principles upon the courts that enhance the quest for clarity -- for example, by avoiding a reliance upon loose and expansive interpretations of law grounded primarily in personal predelictions of judges rather than meaningful principle and distinction.

The problem of the overload of the federal judiciary is a serious one not only for the federal judiciary as an institution but for the quest for justice itself. We are fast approaching a time -- if we have not reached it already -- when the litigation burden on the federal court system will overrun the ability of that system to generate a coherent body of law. The current pressure on the federal courts threatens to result in an uncoordinated and inconsistent body of federal law. As the sharp increase in its workload demonstrates, the Supreme Court is struggling to keep up.

As the Supreme Court becomes less able to oversee the development of federal law, however, it also becomes important for the federal district and circuit courts to pay greater attention to the process of judging itself. Judicial restraint

must become an ever-present consideration for all federal judges. I do not mean to suggest that the size of the docket should affect the decision in any individual case. I do mean to say, however, that the current burden on the courts should sensitize all judges to the always present need to exercise restraint in formulating new rights or expanding doctrines. For if we continue down the present path, the federal judicial system will -- through sheer overload -- lose its historic capacity for protecting our most basic rights and freedoms. If the volume of cases prevents the development of an authoritative and coherent body of federal law, we will have forfeited our proud claim to live under a government of laws, not men.

Things have reached a point where I am reminded of a story about the great John Marshall. The Chief Justice was trying to dislodge a particular law book from a high and tightly packed shelf. He succeeded instead in dislodging the entire row of books, which struck him on the head and knocked him to the floor. A librarian instantly rushed to his aid, but the venerable old Chief was unhurt and answered the offer of assistance by saying:

"I am a little stunned for the moment.
I have laid down the law often, now
this is the first time the law has
laid me down."

Today, the multiplication of implied rights, the blurring of legal distinctions, and the dramatic increases in cases, threaten to lay low our legal system itself. The greatest exercise of

restraint by all three branches will be necessary to ensure that we are stunned only for the moment.

Finding solutions to the problems we face will require the best efforts of all three branches of government. The concern of the Department of Justice in this area begins at the beginning: since January 1981, we have been deeply involved in the appointment of 53 district judges, 14 circuit judges, and, of course, one Supreme Court Justice. We have supported the creation of new judgeships on the basis of the careful and non-partisan assessment of need by the Judicial Conference.

There are other problems confronting us besides those I have touched upon today. To cite one prominent example, we must devise a new bankruptcy system in the wake of the Supreme Court's recent conclusion that the present system is unconstitutional. And we must have that new system in place by October 4, when the Supreme Court's mandate will issue. That pressing problem, and the others I have discussed today, demand a full and frank dialogue between the judiciary and the Department of Justice. I have participated in just such a dialogue at the Williamsburg Conferences and am happy to continue the process by meeting with all of you here today. I have brought with me my assistant, Jonathan Rose, who as head of the Office of Legal Policy assists me in confronting issues of judicial administration and reform. Together we would be happy to address any questions you may have.

Department of Justice

ADDRESS

OF

THE HONORABLE WILLIAM FRENCH SMITH
ATTORNEY GENERAL OF THE UNITED STATES

AT THE

THE UNIVERSITY OF SOUTHERN CALIFORNIA LAW CENTER

GRADUATION CEREMONY

6:15 P.M. E.D.T.
THURSDAY, MAY 12, 1983
BOVARD AUDITORIUM
UNIVERSITY OF SOUTHERN CALIFORNIA
LOS ANGELES, CALIFORNIA

Thank you, Dean Bice. It is always a pleasure to be in Southern California, and it is a special pleasure to address a graduating class of this distinguished law school.

There is a story told about Oliver Wendell Holmes when he was in his eighties, nearing the end of his distinguished career on the Supreme Court. The great jurist found himself on a train and, confronted by the conductor, he couldn't find his ticket. Recognizing Holmes, the conductor told him not to worry, that he could just send in the ticket when he found it. Holmes looked at the conductor with some irritation and replied:

"The problem is not where my ticket is. The problem is, where am I going?"

Upon discovering your presence in law school, many of you may have wondered, Holmes-like, where you were going. Today you have at least one answer to that question -- you were heading toward the successful completion of three years of law school, toward, in fact, this very day.

This may be an obvious answer, but the three years you have just finished are extremely important. For they represent a ticket of sorts -- a very valuable ticket, one that can gain entry to many interesting and rewarding careers. It is an honor for me to join your families and friends and teachers in congratulating you on your accomplishment.

Law-school graduates typically travel many paths after graduation. Some of you will go into general practice, some into trial work. Some will find yourselves in specialties like patent and tax law. Some of you will practice corporate law in large firms. Some will be lobbyists, using your legal skills to represent a variety of organizations before government. And some of you will wind up in government, perhaps in Washington, in the Department of Justice. A few of you may become judges, a few politicians, and a few may decide to teach future generations of attorneys. Persons trained in the law obviously do a great many things. You rightly should be excited about your prospects, both immediate and long-range.

Today I would like to share with you my thoughts on the relationship of the legal profession to the changing nature of American society.

Governed by the rule of law and devoted to commercial enterprise and the pursuit of happiness, America has always been and will continue to be a litigious nation. That is an abiding characteristic. In the past three decades, however, the citizens of our society have been turning to the courts in unprecedented numbers and for a variety of new reasons. Time magazine says -- I believe correctly -- that in this area of our society "a virtual revolution" has been taking place.

The features of this revolution are plain enough. As never before, courts have been voiding federal and state statutes and discovering numerous new constitutional rights, protections and entitlements. Many Americans, emboldened by huge awards in personal injury suits, have been going to court seeking damages that in previous decades would not have been considered even remotely recoverable.

Meanwhile, federal and state legislatures have been writing laws at unprecedented rates. And administrative agencies have been churning out vast numbers of new regulations. Many of these laws and regulations have become the subjects of litigation.

Civil case filings in all courts, state and federal, trial and appellate, have grown dramatically in the past 30 years. As Erwin Griswold -- former Solicitor General of the United States and former dean of the Harvard Law School -- has pointed out, the belief is now widespread that "every controversy should be resolved in the courts, and every reform should be achieved in the courts."

Chief among the leaders of this revolution have been individuals who have been trained in the law. The growth in the number of individuals studying the law is staggering. Law school enrollments have tripled since 1950, growing at a rate six times faster than that of the general population.

Meanwhile, the work of many lawyers has been changing. If the judicial invalidation of statutes and assertions of policymaking authority have been a conspicuous characteristic of our time, so, too, has the vigor of lawyers in opposing democratic or majoritarian desires and in representing parties whose complaints in another time would have been considered most bizarre.

The question I would like to pose today is whether this revolution, which began before most of you were born, is one we should applaud. I will not try to offer a complete assessment -- that would try the patience of any listener, and indeed any speaker. Instead I will focus on areas that most concern me.

Much of the revolution of the past 30 years has been brought to us by judges and lawyers. On many occasions the courts, without constitutional warrant, have struck down actions by legislative bodies and midwifed new rights. The courts have given us what I call government by judicial decree.

Government by judicial decree is objectionable not on conservative or liberal political grounds, but rather on grounds that it offends the very nature of our constitutional government. To the degree that it invades the legislative function, it displaces representative government.

By wrongly voiding legislative acts and thus usurping power that properly belongs in federal or state or local legislatures, the courts close down, as former Attorney General and Supreme Court Justice Robert Jackson once pointed out, "an area of compromise in which conflicts have actually, if only temporarily, been composed." Furthermore, they impose their own policy choices upon the people affected, whether they are the people of the nation, a particular state, a city or county.

Very often, these choices represent imperfect policy-making. The fact-finding resources of courts are limited. And judges are necessarily dependent on the facts presented to them by the interested parties. Legislatures, on the other hand, have expansive fact-finding capabilities that can reach far beyond the narrow special interests being urged by parties in a lawsuit. Legislatures have these capabilities precisely because they are so closely related to the people. They have constituencies to which they are directly accountable.

The policy choices of legislatures thus are presumptively better than those of judges. But even if these choices are unwise or poorly considered, they still should be respected by the courts. The courts' review should extend, in the case of constitutional questions, only to the constitutionality of an action or statute, not to its wisdom. In general, the courts should void the policy choices of legislatures only when they contravene clear constitutional principles. U.S. Circuit Court Judge and former Solicitor General Robert Bork put it well when he wrote: "Courts must accept any value choice the legislature makes unless it clearly runs contrary to a choice made in the framing of the Constitution."

By inviting citizens to forgo elective politics and instead bring lawsuits, government by judicial decree has encouraged acceptance of the view that the only avenue to justice lies through the courts. But that is not accurate. The courts are not the only avenue to justice, or even always the best one. The legislature is quite capable of achieving justice, as witness the enactment of the Civil Rights Act of 1964. Furthermore, contrary to much that is popularly written and said today, the courts, like other branches of government, are quite capable of doing injustice.

It was, after all, the Supreme Court which in 1857 declared that Congress lacked the authority to prohibit slavery in the territories. And it was the Supreme Court which, during the first decades of this century, stopped a state legislative effort to ameliorate sweat-shop conditions in the baking industry; invalidated minimum wage and maximum work hour regulations; struck down statutes condemning "yellow dog" contracts; and refused to allow states to restrict entry into the ice business, or to regulate the price of theater tickets or gasoline.

We must always keep in mind, as Justice Holmes once observed, that "the legislatures are ultimate guardians of the liberties and welfare of the people in quite as great degree as the courts."

Government by judicial decree reflects in large part a failure by the courts to restrain themselves. Recent years have witnessed the erosion of restraint in considerations of justiciability -- in matters of standing, ripeness, mootness, and political questions. Meanwhile there has been an expansion of several doctrines by which state and federal statutes have been declared unconstitutional -- in particular, the analyses that have multiplied so-called "fundamental rights" and "suspect classes." Furthermore, there has been an extravagant use of mandatory injunctions and remedial decrees. Indeed, at times, it has become hard to distinguish courts from administrative agencies; for example, in some cases the courts have taken charge of local sewage systems - and prison systems.

The courts are to a certain degree responsible for the growing caseload that is overwhelming them. The caseload burden has sometimes forced curtailment of oral argument and led to assembly-line procedures for disposing of cases. It has not allowed enough time for reflection or mastery of records. In 1975 Circuit Judge Duniway lamented that he and many of his brothers and sisters on the court "are no longer able to give to the cases that ought to have careful attention the time and attention which they deserve."

The lack of judicial restraint has led to a substitution of judicial judgment for legislative and executive judgment. And missing in much of this government by judicial decree has been a proper understanding of the Constitution.

At the Department of Justice, we are urging judicial restraint upon the courts whenever the nature of the issues presented in both practical and constitutional terms require the more considerable resources of a legislature to resolve. We hope that more and more courts will exercise restraint in regard to questions of justiciability, analysis of fundamental rights and suspect classes, and use of mandatory injunctions and remedial decrees.

The principle of restraint needs the support not only of judges but also of lawyers. Lawyers, to be sure, must zealously represent their clients by using every weapon in their arsenal. And lawyers should not be daunted when they lose. Justice Rehnquist, in the Vermont Yankee Nuclear Power case in 1978, was right to excoriate an appellate court for swallowing an argument on a "peripheral issue"; but the lawyers who presented that argument to the court were right at least to try this long shot -- they were discharging their duty to their clients.

Lawyers, however, have obligations outside the courtroom. As citizens and as members of their bar associations, they have an obligation to preserve our form of government, which requires that policy-making authority reside in the elected branches of government, not in the unelected judiciary. As citizens and members of the bar, lawyers should urge self-restraint upon the courts.

Lawyers, by the way, have another obligation that deserves mention. The past 30 years have witnessed increasing acceptance of the view that it is better to go to court than to settle differences privately. To be sure, lawyers must serve their client to the best of their abilities, but lawyers should remember that often the best service they can provide a client is to keep him out of court. It was Lincoln who said, "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, expenses and waste of time."

Furthermore, we should be more modest about what lawyers must do. It is hardly obvious that lawyers -- and, for that matter, judges -- need to be involved in every dispute. Such "non-judicial" routes to justice as arbitration, negotiation and administrative process deserve greater employment as alternatives that can complement the judicial systems.

Judges and lawyers are not the only ones deeply involved in the litigious revolution of our times. So, also, are the institutions responsible for their training -- the law schools.

The judicial policy-making of the past three decades has been aided and abetted by the view that the Constitution is simply the precedents to the case at hand. Unfortunately, this view is all too often taught in our law schools. Knowing precedent is of course important, but central to constitutional interpretation should be the text of the Constitution, the intent of the framers, and the historical context of the document.

How often are law students asked to read the Federalist papers or study the records of the Constitutional Convention? How often are they asked to understand separation of powers, as this concept has developed over 200 years? And if these intellectual underpinnings are frequently neglected in law schools, is it any wonder that ultimately they come to be neglected by our lawyers in argument, and our judges in their decisions, and indeed by our citizens in their understanding of the law that binds, or should bind, us together? There is perhaps no more compelling need in legal education today than instruction in the law and legal institutions of our founding period.

Law schools reflect the intellectual currents of the age, and the ones of our time happen to be positivism and instrumentalism. These philosophies are rarely made explicit. But in the phrase of former Assistant Attorney General Roger Cramton, now Dean of the Cornell Law School, they are "part of the intellectual woodwork of the law school classroom."

This silent woodwork is an amazingly effective professor. It teaches a student to believe that all things are relative (except of course relativism itself), and to view law merely as a tool to achieve whatever one wants. There are no right answers for many students; just winning arguments.

Law schools today would be well advised to examine the intellectual woodwork of their classrooms. Law is not merely instrumental, a device to enable you to get what you want, a technique that can be manipulated according to the end sought. Law is not a means of gratifying one's wants.

What must be understood today is that law has an inner morality that protects us all. Alexander Bickel called it the "morality of process." It is found in legal technicalities -- what Bickel called "the stuff of law." Government by judicial decree has denied the morality of process and thus the importance of legal technicalities. As Bickel noted of the Warren Court, it "took the greatest price in cutting through legal technicalities, in piercing through procedure to substance." If we are to preserve our form of government, it is the stuff of law that must be taught to and respected by the students who will soon enough become the nation's lawyers and judges.

I realize that today I have been a little rough on the legal profession. Let me assure you that I dissent from Shakespeare: I am not about to suggest that we kill all the lawyers, or the judges, or the law professors, and certainly not law school students. But I believe that the revolution of our times is something all of us trained in the law must be concerned about.

For not only have we become too concerned with courts and too inattentive to how we can govern ourselves through the elective branches. And not only have we failed to see how the very organization of our government works to preserve liberty and equal rights for all. Our preoccupation with litigation also has caused us to neglect something most fundamental.

Writing in Federalist 55, James Madison said that our form of government "presupposes," to a higher degree than other forms of government, the existence of certain qualities of human nature. These qualities include prudence, civility, honesty,

moderation, a concern for the common good -- in short, what Madison and his colleagues called virtue. "To suppose that any form of government will secure liberty or happiness without any virtue in the people," said Madison at the Virginia Convention in 1788, "is a chimerical idea."

The revolution I have described today has not only failed to nourish these values, it has also weakened them. We have become impatient with the voluntary morality of life in society and grown to prefer the compulsory morality of the courtroom. We have become accustomed to thinking about and demanding our rights in courts of law, and neglecting our responsibilities to our families and neighbors and institutions. We have put our faith in courts of law, and law itself, to make us good men and women, and indeed to set the world aright.

But the legal order cannot by its mere existence in code, law, and document nourish the values upon which it rests and depends. Civility cannot be litigated into being; and decency and responsibility cannot be the products of legislation or bureaucratic fiat. Knowledge of law and legal experience do not make men and women good.

Walter Lippman once wrote that "the acquired culture is not transmitted in our genes and so the issue is always in doubt." Let me emphasize that neither is the acquired culture transmitted, at least in its most important form, in courts of law. As Judge Learned Hand once said, "A society so riven that the spirit of moderation is gone, no court can save; . . . a society where that spirit flourishes, no court need save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish."

I wish you the best in your legal careers. But I leave with you the thought that your most important contribution to this society will be less what you do as a lawyer than what you do as a citizen in transmitting the acquired culture on which our society and form of government depend. And I offer you a challenge: that what you do as a mother or a father, a volunteer or a neighbor, may in the final analysis be your best and finest service to America.