Remarks by Honorable Frank M. Coffin,
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at the Eighth Circuit Judicial Conference,
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Judex Americanus: An Endangered Species?

Seldom could there be a greater lack of fit between subject and occasion than my theme, and this Conference. Here we are -- in this superb setting -- at one of the largest, best planned and most efficiently executed conferences that a judicial circuit has ever mounted . . . and I have the gall to talk about American judges as an endangered species.

The cynic would say, "Endangered? Yes! In danger of being killed by kindness." Or, "Endangered? Yes! Just as fifth century Romans wallowed in opulent living just before the barbarians breached the gates." Clearly this was the wrong place and occasion.

But just as I was preparing a brand new set of remarks on "Judges and Computer Literacy", I was bailed out of my awkward predicament. Yesterday morning my wife and I visted the Cheyenne Mountain Zoo. As we walked among those wonderful creatures, we saw many whose pens bore a small colored label. The bongo, the Diana Guenon, the Sumatra tiger, the black rhinoceros, the snow leopard -- all were proclaimed by the little label to be "Vanishing Animals". "Aha", I thought, "these people care about endangered species. I even bought at the Zoo an illustrated copy of my text.

So down to business with Judex Americanus, an endangered species. Not endangered in the sense of ceasing to exist as a functionary charged with deciding disputes, but in danger of losing his sense of identity and the internal satisfactions that over the years have drawn some of our finest minds and spirits to the bench.

There are two sets of influences tending to dry up that remote, quiet pool of serene self esteem without which judging is just another mass production job. The first has always been with us; it is generic. The second set arises out of the remorseless increase in the quantity and complexity of the caseload and the pharmacopoeia of current formulae advanced to deal with it.

First, the forces of an endemic nature that traditionally bear adversely on judges. Dr. Isaiah M. Zimmerman, a clinical psychologist, has studied in depth our endangered species.[1] He cites these commonly felt negative pressures: the unstructured loneliness characterizing the transition from lawyer to judge and the subsequent social isolation of the judge; the financial pressures, particularly for those with children of college age and aspirations; the lack of feedback from knowledgeable observers of judge's work; the "information overload" -- the sheer difficulty of absorbing all the data required to make and articulate decisions; for most judges the fragility and poignancy of the "midlife passage crisis"; the cumulative conviction that one is being barricaded in one's courtroom with some of society's least attractive people (not lawyers, I quickly add) with no prospect of surcease or escape; the consciousness that while one sees himself as overburdened the public's perception is that judges are underutilized; and the fact that the very strength of a judge, independence, too often prevents him from seeking or accepting emotional support from colleagues.

[1] Stress-What it does to judges and how it can be lessened, Vol. 20, No. 3, The Judges' Journal, Summer, 1981, p.4.

Superimposed on these chronic conditions which it might be said that a judge signs up for when he takes his oath and dons his robe are the changes in work ways resulting from the caseload explosion. Look at your own Circuit Report: filings in the court of appeals up almost 60% in the past 5 years; district court civil filings up 28% from 1981 to 1982! Today each appellate judge disposes of more cases in one month than he did in almost half a year fifteen years ago -- a 5 to 6-fold increase. This is an heroic achievement --accomplished by heroic measures . . . measures, however, that do not make a judge feel that the quality of his life and work has been enhanced.

As we look ahead, what do we see as available options promising further relief? The picture of the judiciary in an efficiency-oriented, high-tech future is something like this. It will first of all be management-focused. There will be a plethora of committees, reports, meetings, procedures, guidelines, forms, statistics, monitoring, workshops, seminars. Already one out of three federal judges serves on at least one committee of the Judicial Conference, in addition to other committees of his court and the judicial council of his circuit. Over a decade ago Judge Rubin noted that federal district judges were spending a fifth of their time in purely administrative tasks.[2] I am certain that today the proportion is between one fourth and one third. This is equivalent to the complete loss from judicial work of from 125 to 166 of our 500 active district judges.

A second characteristic of tomorrow's judicial work ways is an inevitable use of what I call immediacy technology. An increased resort to the conference call, the closed circuit TV hearing, and electronic mail are already with us. The only problem with all these time-savers is that they operate on the assumption that mature reflection, deliberation, and decision can now, like coffee, soup, and oatmeal, be instant. The next step is already on the horizon. Northwestern Law Professor Anthony D'Amato, as long ago as 1977, entitled a law review article, Can/Should Computers Replace Judges?[3] He postulated as a completely realistic exercise lawyers resolving a choice of law issue by simply feeding to a computer the facts as to place of injury, conduct, domicile, etc.; the computer would then perform a complex multivariate analysis, regressing the facts to fit other clusters of facts previously programmed and decide if the fit pointed to the foreign law or law of the forum.

Besides increased emphasis on management and high technology, three other characteristics of our emerging justice delivery system are best described in terms of their surgical counterparts -- resection, by-pass, and amputation. By resection I mean the resort to ways and means of shortening the intestinal tract of decision making by such devices as screening cases for disposition without oral argument, short oral decisions from the bench, utilizing staff attorneys in summary and submitted dispositions, boilerplate orders in frivolous or insubstantial cases, unpublished opinions.

The by-pass is the resort to other means of resolving disputes than judges. Rent-a-judge, a dry run of a trial before an uninvolved knowledgeable lawyer, mediation, arbitration, community justice centers, discussions directly between top company executives -- all these are part of the new wave cresting as Alternative Dispute Resolution. Even today there are no fewer than 180 dispute resolution programs in 40 states. Yesterday we judges heard a thrilling account of the pioneering of Chief Judge Luongo in the Eastern District of Pennsylvania in court-ordered but non-binding arbitration. This is well worth our most serious consideration. But in our enthusiasm

[2] Alvin B. Rubin, Bureaucratization of the Federal Courts; The Tension Between Justice and Efficiency, 55 Notre Dame Lawyer 648, 654 (June 1980).

[3] Georgia Law Review, Vol. II, No. 5, Sept. 1977, p. 1277.

we are in danger, as Professor Jerold S. Auerbach has commented in his new book, Justice Without Law?[4] of overusing the label of alternative dispute resolution as a euphemism for second class justice for the disadvantaged.

Amputation is, as in surgery, the most irreversible of reforms we are likely to see. I use this term to describe the various devices to reduce judicial workload simply by barring further access to courts of general jurisdiction. They include proposals to limit or foreclose federal review of habeas corpus cases, to widen the scope of discretionary review, to confine review of social security disability cases to the district court level or an Article I court, and to consign certain kinds of disputes to specialized courts. This has already happened with patent cases, now reviewable only by the new Court of Appeals for the Federal Circuit. But other suggestions are in the air. Professor Owen M. Fiss of Yale suggests separate courts to review tax, bankruptcy, and admiralty cases.[5] Erwin Griswold, a longtime proponent of specialized court tax review, would add "courts of appeals with exclusive jurisdiction over labor cases, over commerce, including the Interstate Commerce Commission, the Federal Trade Commission, and antitrust" and, last but far from least, "a United States Court of Appeals with jurisdiction to review . . . state . . . criminal cases, . . . federal district . . . habeas corpus proceedings, and cases involving prison regulations and conditions."[6]

The tensions inherent in the judicial vocation, the added stress generated by caseload, and the by-products of the several ways of dealing with it all spell burnout, disenchantment, frustration, a lowering of sights, and a narrowing of vision for the judges and a subtle decline in the quality of justice for lawyers and litigants. At the same time, paradoxically, I see us becoming an increasingly justice oriented society in an age when space, privacy, energy, housing, medical care and opportunity in education, vocation, and avocation may be in short supply. The inevitable trend will be for greater access to courts, not less; more rights, not fewer; more laws and regulations despite our desire to deregulate; more finely tuned equality and fairness.

A perceptive visitor from another planet or an earlier age might find it odd that all of our prescriptions for dealing with what the consultants call the "delivery of justice" problem involve either the actuality or the risk of watering down what is delivered. Professor Vining has sounded a solitary warning. He reviews the reform scene in judicial administration and pauses to comment:

> "[F]orm must follow function really much more in law than in architecture. Institutional design and institutional practice in law must seek to realize, to approach in reality, the presuppositions of legal method if there is to be efficiency in any sense of the word. Legal method . . . does not adapt to institutions. If there is no fit between the two, what we lose is law, not just an old way of doing things that we can leave behind."[7]

I would build on this warning by saying that before we rely too heavily on ways to foreshorten traditional legal method, we ought to see to what extent an increase in the deliverers of justice,

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[4] New York: Oxford Univ. Press, 1983

[5] Lecture at Sixth Circuit Judicial Conference, July 16, 1982, The Bureaucratization of the Judiciary, p. 27.

[6] The Brendan F. Brown Lecture, Catholic University of America Law School, March 23, 1983, Cutting the Cloak to Fit the Cloth, p. 36.

[7] Joseph Vining, Justice, Bureaucracy, and Legal Method, Vol. 80, No. 2, Mich. L. Rev. (Dec. '81), p. 248, 249.

the judges themselves, is feasible. Such a proposition is of course heresy. Indeed, every suggestion for a mechanistic, homogenizing, depersonalized, short-cutting, mass producing way of doing judicial business is prefaced by the conventional statement, "The only alternative to doing something like this is to have more judges." The unspoken assumption, unnecessary to articulate, is that no one wants that.

Are we on sound ground in ruling out a substantial increase in the country's judicial capacity? As of 1980, the nation boasted fewer than 500 top appellate judges, 132 in the federal courts of appeals and 352 on the supreme courts of the stares. For every 3-judge federal panel there were over 5 million people and for every 7-justice state supreme court over 4 million people.[8] And there is one active federal trial judge for every one half million people. Is this excessive? Listen to these rather astounding words of Harvard's President Bok:

> "Contrary to popular belief, it is not clear that we are a madly litigious society. . . . Our courts may seem crowded, since we have relatively few judges compared with many industrial nations. Nevertheless, our volume of litigated cases is not demonstrably larger in relation to our total population than that of other Western nations."[9]

Yale's Professor Fiss opines that " [A]n increase in the organizational capacity of the judiciary (e.g., more judges and staff) may be preferable to the mass production techniques that have sometimes been devised to deal with heavy case loads."[10]

Of course, any proposal to increase the judicial capacity of the states and the nation would involve serious organizational problems, but in every other aspect of our society we have had to work out ways of dealing with large numbers. I see no inherent principle that dictates a relatively static number of judicial decision makers when people, litigation, and complexity are all on the increase. The point is that except in the debate over the need for a mini-Supreme Court, we never approach the problem of organization, chiefly, I think, because of the deep-seated abhorrence by us judges of a large increase in our numbers. Oddly but understandably, we view any significant increase in our numbers as not strengthening our status but rather cheapening the currency, as if there were a finite amount of prestige, respect, and admiration to be carefully husbanded by all of us. Like Procrustes we insist that the judicial bed remain substantially the same size even if it means lopping off the legs of litigants so they can fit into it.

Can anything be done? Not only do I answer "Yes", but in my view the most important part of the solution lies with us. I suggest the need of an approach which lies wholly within the power of bench and bar to carry out -- a Preservation and Conservation Program designed to enhance the lives, work and self image of today's judges. Only when judges feel that theirs is a unique and respected calling can we sensibly discuss increased numbers without panic, despair, or resignation. Moreover, justified self respect breeds respect from others. I therefore venture to predict that over the long pull, a deservedly enhanced respect for the occupation of judge, state or federal, at all levels holds the promise of greater acceptance of decisions from the court of first instance and of a far greater restraint and selectivity by the bar in prosecuting appeals -- in short, a wider pyramid at the bottom without a proportionate widening at the top.

Here, then is what might be called a rough outline of a Joint Bench-Bar Preservation and Conservation Program.

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[8] Coffin, The Ways of a Judge, Houghton Mifflin, 1980 at 40.

[9] Derek C. Bok, A flawed system, Harvard Magazine, May-June 1983, p. 38, 40.

[10] Fiss, id. at 22.

First -- Judges and lawyers must accept as the core of all else a unitary concept of the sacredness of all judging, the uniqueness of both the power and the responsibility of one who, by his simple reasoned say-so, can give to one party or take from another property, opportunity, and liberty itself. This function is no less important in the court of first instance. Indeed, since those decisions are often final because not appealed, the competence, dedication, and integrity of that long thin line of nisi prius judges is perhaps the most critical organ of the judicial anatomy. We should make no distinction between trial and appellate judges as to value and prestige. Nor between state and federal judges, nor between judges of courts of general jurisdiction and judges of specialized courts. The application of a unitary concept of judging involves both respecting the sacredness of the function and insisting on excellence in performance of the function. The concept should not exclude judicial officers such as magistrates, bankruptcy judges, or administrative law judges. Indeed, upon the emergence of the 1,158 federal administrative law judges from any suspicion of feudal fealty to the 29 government agencies they serve and upon their increased credibility depends the workability of the vast arena of administrative law with oversight by comparatively few Article III judges.

Second -- In addition to this unitary view encompassing all judges we should self consciously seek ways and means to restore to both the practicing lawyer and the practicing judge some of the sense of nobility, of spaciousness of mind, of humanism that once were associated with at least the leaders of the bar in any community. In a recent interview, the highly respected dean of Harvard's faculty of arts and sciences, Henry Rosovsky, had this to say:

> "When I look at the professions today, when I look at what the critics of the professions say -- law, business, medicine -- it is perfectly obvious that what is needed is not more technocracy, but more understanding of life in its varied dimensions."[11]

It is again a conviction of mine that the deliberate pursuit of interior enrichment, calmness, and wisdom will both make us feel better about ourselves and inevitably make others feel better about us. Now is not the time for details such as retreats for reflection on non-professional subjects, a different kind of continuing education, or sabatticals. I merely suggest that liberal enrichment be included as a permanent item on the agenda of both state and federal bar associations and the judicial conferences of the country.

Third -- A demonstrated willingness on the part of both bench and bar to police ourselves. We have already come a long way in the past decade. The statistically miniscule number of serious judicial discipline cases make the headlines; conscientious adherence to the almost monastic ethical standards by nearly all the nation's judges apparently is a non-story. The press and public, always dubious about judges and lawyers, are skeptical of all efforts to keep our own house in good order. Our only hope is that our unflagging efforts will eventually be respected.

Fourth -- Paralleling our internal oversight of ethical standards should be an informed, comprehensive and sustained effort to monitor and evaluate the efficiency and quality of courts at all levels. We need feedback, both critical and supportive. Sometimes trial judges carry on, consciously or unconsciously, as petty despots for years without encountering any articulated and sophisticated protest. By the same token a courageous and conscientious judge may be wrongfully pilloried in the press with no respected voice being raised in defense. It seems to me that the bar could play a vital role in helping think through and stimulate responsible court

[11] Boston Globe, June 9, 1983, p.2.

monitoring efforts.

Fifth -- Bar leadership in encouraging public demand for excellence in judicial appointments and elections. It seems to me to be more important than any system or technique for choosing judges that the public be led to demand excellence. When governors, senators, and presidents realize that people expect only the best to be chosen to perform the sacred adjudicative duties, good politics and good government will converge.

Sixth -- A carefully designed recognition system. True, superficial awards for "distinguished trial judge", "distinguished appellate judge", etc., may do nothing but inculcate cynicism among those who know that Judge X gets all of his sparkling epigrams from his clerks or that Judge Y is at rock bottom the most blatant publicity seeker imaginable. But an award system that is so well devised that it merits Nobel or Pulitzer prize-like credibility for its discriminating judgments can do much to strengthen the judiciary's own sense of self worth as well as create an informed public constituency which knows good work when it sees it.

Seventh -- A different kind of continuing education program for schools, colleges, the press, and public. All of us, in every state, have a rich lode of the most authentic, concrete, persuasive educational materials concerning the nature and value of excellence in judging -- the judges themselves. But time is moving on -- some of our greatest exemplars are pushing even their blessed longevity to the limit. I urge with whatever sense of immediacy I am able to summon that judicial and bar organizations and institutions such as the Federal Judicial Center and the National Institute for State Courts design and carry out oral history projects, first putting on film and with sound the wit and wisdom of those lawyers and judges who began their practice early in this century, then moving on to others with a particular strength worthy of highlighting.

I cannot think of a healthier kind of event than to expose secondary school, university, and law students, and citizens of Houston, Milwaukee, Seattle, and Philadelphia as well as Fargo, Omaha, San Diego, and Worcester, to a Bailey Aldrich of my own circuit, a Henry Friendly of the Second, an Albert Maris of the Third, a Clement Haynsworth of the Fourth, a John Minor Wisdom or John Brown of the Fifth, a Harry Phillips of the Sixth, a Luther Swygert or Thomas Fairchild of the Seventh, your own Floyd Gibson (not to mention your gifted cadre of senior district judges), and others such as Elbert Tuttle of the Eleventh. And of course there is an impressive Pantheon of state judges like Roger Traynor, Stanley Fuld, Walter Schaefer, and Samuel Roberts. What would we not give to have continued access via film to the personality and observations about his profession of Martin Van Oosterhout. I should add that your own Circuit Justice Blackmun has already provided a model in the rich interview he gave on CBS this past year. No one could watch that and not feel better about the nature of judges and judging.

These efforts should also embrace developing a speakers' bureau of dedicated lawyers and judges, and putting words on paper in the form of books, essays, and articles on what we perceive as examples of the highest tradition in lawyering and judging. Our minds are almost too sophisticated in these days of the computer. But our spirits are simple and they thrill to be aware of inspiring role models. One law teacher told me that he wished there were more interiorly credible and revealing biographies of judges. So do I, particularly of judges who have faced the complexities and pressures of contemporary judging.

This is, then, my agenda for a program to conserve an endangered species, Judex Americanus . . . and I would add Advocatus Americanus. It is undoubtedly over-simplistic and not nearly comprehensive enough. But it is a beginning.