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Address.

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ADDRESSES

REMARKS OF THE CHIEF JUSTICE

CHIEF JUSTICE WILLIAM H. REHNQUIST*

It is a great pleasure to be here with all of you this evening to participate in the Eleventh Seminar on the Administration of Justice sponsored by the Brookings Institution. Two years ago when we met in Charlottesville, I mentioned several issues of importance to the judiciary, and am happy to see that in the past two years Congress has enacted a number of measures to improve the administration of justice. The judiciary is grateful for these laws, but as they say, judicial reform is no sport for the short-winded. More remains to be done. This evening I wish to talk about the future of the federal court system.

Just about a century ago, the noted American historian Frederick Jackson Turner, in a seminal article, proclaimed the disappearance of the American frontier. Studying the patterns of westward migration in this country, he concluded that the supply of free or relatively cheap land, which had encouraged debt-ridden Americans and wave after wave of immigrants to settle the west, had been exhausted. In my view, a similar situation obtains today with respect to the federal court system. There is virtually no unused capacity in the system as it presently exists, and the difficulties of creating substantial additional capacity counsel caution, to say the least, in attempting it. We are in a position where we must think not about creating new federal causes of action, but of remitting to state courts some of the business now

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* Chief Justice of the United States. Chief Justice Rehnquist delivered this address at the Eleventh Seminar on the Administration of Justice sponsored by the Brookings Institute on Friday, April 7, 1989.

handled by the federal courts. In a moment I will nominate a couple of candidates which I think deserve remittance to the state courts.

This operation of the judiciary at full capacity is a development which has occurred since the time I was admitted to the practice of law thirty-five years ago. Early in this century, the American humorist Finley Peter Dunne, writing under the pen name of "Mr. Dooley," referred to a judge he knew in these words:

" 'E's got a good judicial temperament. 'E' don't like work."

There may have been some of this attitude in evidence among judges at the time I came to the bar in the 1950s, though I think it was not so much from laziness as from lack of a full docket. But the situation has changed dramatically in the intervening years. The average federal judge works hard at his job, and the judiciary has taken every practicable step that I can think of to increase its output. Federal courts rely on computer assistance to a degree inconceivable even ten years ago; federal judges now have more law clerks than at any time in our history. Congress has increased the number of judges, and has upgraded what used to be referees in bankruptcy to bankruptcy judges. The United States Magistrates authorized by Congress are widely used as auxiliary judges at the trial level.

The Judicial Conference has requested the creation of additional judgeships just to restore the judiciary to the position it was in a few years ago, and I am hopeful that Congress will take action on this request. But I do not think Congress would favor an indefinite expansion of the number of federal judges to keep up with an ever-increasing case load, and I don't think that simply adding new judgeships would be a wise development from the point of view of the judiciary. Therefore, when we look at the long run we must keep in mind two things: first, future Congresses are not going to cheerfully forego the authority to create new federal causes of action, an authority which has been exercised by past Congresses without number; second, those interested in the administration of justice in the federal courts should therefore concern themselves now with cutting back on federal jurisdiction in some areas.

Many types of lawsuits which can be brought in the federal courts have a distinctly "federal" flavor: prosecutions for federal crimes; civil antitrust actions; claims of employment discrimination under Title VII of the Civil Rights Act; claims brought under Section 1983. I

know of no substantial body of opinion which favors the relinquishment of this sort of federal jurisdiction to state courts.

But with respect to two types of actions which may be presently brought in the federal courts, I think a strong case may be made for at least modification if not repeal. The first of these is diversity jurisdiction, and the second is civil RICO.

Diversity jurisdiction, of course, is the authority by which federal courts hear cases that don't involve any sort of federal law claim, but in which the plaintiff is a citizen of one state and the defendant of another. It was provided for in the Constitution, and enacted by the Judiciary Act of 1789, because of concern that an out-of-state litigant would suffer prejudice at the hands of a local judge and jury in a state court.

Very learned people have debated back and forth whether so-called "diversity" jurisdiction in the federal courts is needed today in the way it was needed at the time it was created by the Judiciary Act of 1789. I do not propose in my brief remarks tonight to take sides in this controversy. We have had diversity jurisdiction for two hundred years, although Congress has over the years repeatedly modified the basis for it: last year the amount in controversy requirement was raised to $50,000.

But there is one part of diversity jurisdiction as it now stands that I think is very difficult to justify, and which accounts for a very substantial number of the cases filed in the federal district courts. That is the part allowing the resident plaintiff who starts a lawsuit and who is a resident, say, of the state of Virginia, to sue in a federal court in Virginia, rather than a state court, simply because it names as the *defendant* in its lawsuit an out-of-state person or corporation who is not a resident of Virginia. Whatever may be the arguments for maintaining diversity jurisdiction with respect to an out-of-state plaintiff who sues an in-state defendant in Virginia, few would seem to support the idea that there will be local prejudice against an in-state plaintiff, and therefore, that he should be entitled to take advantage of filing in federal court. If the in-state plaintiff sues in state court, then, under existing law, the out-of-state defendant—the party that could suffer prejudice against "foreigners"—may *remove* the case to federal court. But there is no reason for letting the plaintiff start out in federal court.

Each year approximately 71,000 cases based on diversity of citizenship are filed in federal court. Repeal of the right of an in-state plaintiff to take advantage of this jurisdiction would probably cut this

number in half, and afford a marked and noticeable decrease in district court filings.

Some bar associations, and indeed some federal judges, oppose even this sort of limitation on diversity jurisdiction, but when the reasons for their opposition are analyzed they are singularly unpersuasive. The lawyers say either that they prefer to have a choice of two courts in which to file such suits, or that they think the judges in the federal courts are better than the judges in the state courts. The judges say that they find diversity cases more interesting to try than many lawsuits based on federal law, and that diversity jurisdiction brings many lawyers into federal court who would not otherwise be there. But there is simply no reason for federal taxpayers to furnish federal courts for the trial of cases which have no reason for being in federal court. If the lawyers in a particular state believe the judges of that state are less able than their counterparts in the federal courts, they should take the necessary action to secure the upgrading of their own state judiciary. And if some federal judges really prefer trying cases based entirely on state law, perhaps they would be happier as state court judges.

If the nation were wondering how to spend a budget surplus, or if Congress were eager to create new federal judgeships, these reasons might be sufficient to support the retention of a kind of jurisdiction which we have had for a number of years. But we all know that appropriated funds are in very short supply for the judiciary, as for the rest of the government, and that there is little sentiment in or out of Congress to create a large number of new judgeships. That being the case, the arguments in favor of retaining diversity jurisdiction for the benefit of resident plaintiffs are, in my opinion, quite insufficient.

I think the situation is roughly comparable to the sort of commuter railroad that runs on the old B&O tracks from Harper's Ferry, West Virginia, some fifty miles into Union Station in downtown Washington. Its purpose is to serve commuters who live far outside the range of the bus and subway system that serves metropolitan Washington. But when the line starts up, the train is only half full with passengers from the outlying areas. The railroad, in order to increase revenue, decides to start picking up passengers in the nearby suburbs of Washington—Takoma Park and Silver Spring—even though these people are served by the subway and bus systems.

So far, so good. The railroad has made a sensible economic decision. But now time passes, the population in the outlying areas grows

and the train is full by the time it gets to the nearby suburbs. Do you put on a second train to accommodate the close-in passengers? If you're in private business, the answer is *yes*; you have a good product, you make more money by increasing sales. But if you're the government, and operate at a substantial loss, the answer is *no.* The purpose of the line is to serve people who can't be served by other forms of mass transit, and you accomplish that purpose with only one train.

The second train would serve only people who already have alternate transportation available. The fact that these passengers think the train is more comfortable than the bus, or that the conductors on the train are higher type people than those on the bus, shouldn't make any difference. And the fact that the conductors on the train think that the close-in passengers are a better class clientele than the ones who got on at Harper's Ferry shouldn't make any difference either. Maybe these conductors should switch to driving the buses. I hope that Congress will seriously consider eliminating this aspect of diversity jurisdiction.

Now let me turn to civil RICO. Civil filings under the Racketeer Influenced and Corrupt Organizations law have increased more than eight-fold over the last five years, to nearly a thousand cases during calendar year 1988. While that number has held somewhat steady during the past three years, there is every reason to think that we can expect a substantial increase in this already high number because of the statute's lucrative treble damages provisions and the extensive coverage recently afforded civil RICO actions by the national media, legal publications, and continuing legal education programs.

Virtually everyone who has addressed the question agrees that civil RICO is now being used in ways that Congress never intended when it enacted the statute in 1970. Most of the civil suits filed under the statute have nothing to do with organized crime. They are garden-variety civil fraud cases of the type traditionally litigated in state courts. Why does the statute work this way? In part, because it creates a civil counterpart for criminal wire fraud and mail fraud prosecutions. It does this by stating that acts indictable under those provisions, as well as many other types of criminal acts, are capable of establishing the "pattern of racketeering" which is the predicate for a civil RICO action.

Whether it is a good idea to have a civil counterpart for wire fraud and mail fraud is at least open to question, it seems to me, quite apart from the question whether treble damages should be awarded. When

the mail fraud statute was originally enacted in 1872 as a part of a routine revision of the postal code, it generated no congressional debate or other legislative history explaining its purpose. Since then scholars have expressed the view that its intent was to reach swindlers and defrauders who fell outside the scope of "rudimentary criminal codes, conceived for rural societies and confined by state lines and local considerations." Similarly, when the wire fraud statute was initially passed eighty years later in 1952 it served to establish a parallel offense to mail fraud and thereby close a "loophole . . . in the law," which left citizens and licensees at "the mercy of some clever schemer."

With the growth of long distance communication and technology, mail fraud and wire fraud—which applies to all telephone calls—have a much wider sweep now than they did when the statutes were enacted. On the criminal side this greater breadth is kept under control by the use of prosecutorial discretion by United States attorneys. They concentrate on the fraudulent schemes which are either too big or too widespread for efficient state prosecution. Garden-variety frauds and swindles are left to the state courts.

But there is no such thing as prosecutorial discretion to limit the use of civil RICO by plaintiffs' attorneys. Any good lawyer who can bring himself within the terms of the federal civil RICO provisions will sue in federal court because of the prospect of treble damages and attorney's fees which civil RICO holds out. So the question must be asked whether the kinds of frauds and swindles that have been held to come under civil RICO are really the sort of things that Congress intended to bring into the federal courts when it passed that statute in 1970. And, if not, should not this statute be at least modified?

The legislative history of the RICO Act strongly suggests that Congress never intended that civil RICO should be used, as it is today, in ordinary commercial disputes far divorced from the influences of organized crime. The legislative package which included RICO originated in the Senate. Although earlier proposals had contained treble damages provisions, no such terms were included in the bill which passed the Senate; its civil remedies were limited to injunctive actions by the United States. During hearings on the Senate bill before the House Judiciary Committee, Representative Steiger proposed the addition of a private treble damages action "similar to the private damage remedy found in the antitrust laws." He believed that "those *wronged by organized crime* should at least be given access to a

legal remedy." The House Committee approved the proposed amendment, and when the bill was summarized on the House floor, its sponsor echoed the view that the amended provisions were intended to be a weapon in the war against organized crime. He described the treble damages provisions as "another example of the antitrust remedy being adapted for *'use against organized criminality.'* " The amended bill was passed by the House. The Senate did not seek a conference, and adopted the House version. However, while the legislation was still pending before the House, Senator McClellan, the bill's Senate sponsor, expressed the view that the new treble damages provisions would be "a major new tool in extirpating the baneful *influence of organized crime* in our economic life."

Notwithstanding the new legislation's expressed purpose of seeking "the eradication of organized crime in the United States," the RICO provisions did not specifically refer to organized crime, because of the difficulty of defining that activity and because it was believed that requiring proof that a defendant fell within such a definition would handicap efforts to achieve the remedial objectives of the law. Consequently, the statute was intentionally written in general terms so as to permit flexible application.

In its present form, civil RICO has a tremendous reach. For example, civil RICO claims have been raised in actions relating to divorce, trespass, legal and accounting malpractice, inheritance among family members, employment benefits, and sexual harassment by a union. As Justice Byron White wrote for our Court in 1985, notwithstanding Congress' use of "self-consciously expansive language" RICO, "in its private civil version . . . is evolving into something quite different from the original conception of its enactors."

In one case, elderly "life care" residents of a religious retirement community claimed that the owner had used fraud to induce them to sign contracts and had mismanaged community finances. Because the owner was judgment-proof, the residents relied on a clause in the RICO statute which permits actions not only against the owners or operators of a criminal enterprise, but against persons "associated" with it. Among others, they sued the Prudential Insurance Company, the community's mortgagee, and ultimately secured a large settlement from Prudential.

In another suit, civil RICO was invoked in an effort which some have described as standing labor law on its head. A bus company, which suffered property damage and lost profits during a strike by

employees, claimed that a union official had threatened several times to inflict property damage on it, and had once threatened to burn company buses. The company alleged that this constituted extortion, a "racketeering activity" under RICO, and that the union was therefore attempting to influence the company's affairs through a pattern of racketeering activity. A federal appeals court panel held that the case could go to trial.

More recently, civil RICO was employed to hold 26 protesters at an abortion clinic in Philadelphia liable for more than $100,000 in damages and attorneys fees. Numerous similar cases are pending.

RICO's treble damages provisions create a powerful incentive for attorneys to attempt to bring facts traditionally thought to establish other causes of action within the ambit of the statute. For example, in 1988, in the first successful use of RICO in a wrongful discharge case, the trial court's award rose to $43 million when trebled.

Proposals for curtailing civil RICO have been introduced in the last three Congresses. Suggested reforms range from the complete abolition of all civil RICO actions to more modest modifications. Among the latter are the restriction or abolition of treble damages, the imposition of a prior criminal conviction or special injury requirement, and the denial of relief where the predicate illegality is confined to ordinary fraud. Others have suggested that civil RICO plaintiffs should be required to prove that the alleged racketeers derived pecuniary gain from the activity. This would allow the statute to apply to run-of-the-mill organized crime figures, but would exclude more altruistically motivated persons, such as political protesters. Some reformers urge that the "pattern of racketeering activity" requirement be redefined to necessitate proof of on-going criminal activity, rather than two unrelated criminal incidents. This, they say, would narrow the net of potential liability while still allowing civil RICO to strike against criminal infiltration of legitimate businesses and labor unions. Some individuals have even suggested that in view of RICO's treble damages provisions, the statute should be amended to allow for equally generous sanctions for frivolous claims.

I take no position as to which of the reform proposals are acceptable or which is best, but I do think that the imposition of some limitations on civil RICO actions is required so that federal courts are not required to duplicate the efforts of the state courts. No one doubts that the victim of a fraudulent scheme should be able to obtain redress in a court. The question is under what circumstances should that take

place in a *federal* court? Overlapping criminal remedies do not present much of a problem, because state and federal prosecutions tend to work things out on a sensible basis of resource allocation. But there is no such control in the case of overlapping civil remedies. Plaintiffs make the choice that best suits their interests, and if treble damages are available in federal court, but not in state court, the cases will gravitate to the former.

Each of the three branches—through court opinions, legislative proposals, or submissions to Congress—has recently expressed recognition of the need for reforming civil RICO. I think that the time has arrived for Congress to enact amendments to civil RICO to limit its scope to the sort of wrongs that are connected to organized crime, or have some other reason for being in federal court.