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MEMORANDUM FOR TEX LEZAR

FROM: Anonymous Source (hereinafter referred to as "AS")

I have the following thoughts, not for attribution, with respect to the forthcoming ABA speech:

1. The ABA and the Promotion of Causes. Balance is a lawyerly virtue that needs to be displayed whenever the organized bar sets forth to state views on issues of public policy. A laudable goal does not mean that we should compromise or dispense with careful analysis of particular means or options to achieve such goals. (Herein, indirectly, of Legal Services Corporation and of promoting civil libertarian causes in connection with reforms to the exclusionary rule, bail and other aspects of the criminal justice system. More thoughts in this latter connection follow at point 2.)

2. The ABA and the Criminal Justice System. Too frequently, criticism of recent procedural developments in the criminal justice system, particularly with respect to the rights of individuals charged with crime, are interpreted as evidencing a lack of solicitude for constitutional liberties. The modern criminal justice system has, unfortunately, failed to win the respect of the American people. We must carefully analyze why the system is in such ill repute, and be responsive, within our constitutional framework, to the need for improvements. As lawyers, we should not be unduly defensive or closed-minded as to criticisms of judicial extensions of far-reaching judicial decisions which reshaped criminal procedure since the time of the Korean War. This is particularly true where those decisions can be reasonably criticized under neutral principles as evidencing judicial policy-making in the area of criminal procedure.

3. The ABA: Of Lawyers and the Role of Law in Society. Traditionally, lawyers have represented conservatizing elements in society, by advocating gradual change and change within existing institutions. The very concept of stare decisis represents an attachment to gradualism, of growth by accretion, in our system of ordered liberty. In recent years, lawyers have taken on a more vigorous role in opposing democratic or majoritarian desires, but not through

the advocacy of gradual change. Rather, lawyers have sought through advocacy to induce the judicial branch to intervene and oppose actions sought by the people through the political branches of government. While the protection of individual liberties against unbridled majoritarian desires is fundamental to our constitutional framework, lawyers frequently urge courts to exercise powers entrusted to the elected branches of government that are accountable to the people. This recent development is most strikingly illustrated by activist lawyers and interest groups who openly seek social change through judicial intrusion into the orderly functions of the legislative and executive branches. Government by judicial decree is sought by many members of the bar, and encouraged through modern legal education as carried on in many of our educational institutions. Lawyers have also sought through their advocacy as lawyers in the Executive Branch to carry on personal causes and to seek to implement sincerely held private views as to sound public policy.

At least in part due to lawyer activism, our society has become unduly litigious. No ready answer exists as to reducing litigiousness. (De Tocqueville on lawyers' role in America is apropos here.) But while litigiousness will remain, what should not remain is the present system of lawyers' handling all disputes. Moreover, lawyers must be recognized by the organized bar as impediments to the speedy resolution of disputes. Abuse of discovery is well recognized as rampant in our system, and courts are frequently loath to impose sanctions to curb abuse. Stringent limitations should therefore be placed on civil discovery.

(AS notes that the immediately foregoing is somewhat prosaic, given the intensity and number of those calling for procedural reforms to speed up the process. There may, nonetheless, be value in this Attorney General lending his support in principle to such efforts.)

Good luck!

A handwritten signature consisting of the letters 'A' and 'S' in a cursive, stylized font.