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"ENDING DELAY IN LITIGATION"

ADDRESS

BY

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Chief Justice Charles Evans Hughes once said, "You cannot maintain democratic institutions by mere forms of words or by occasional patriotic vows. You maintain them by making the institutions of our Republic work as they are intended to work."

It hardly needs to be emphasized before this National Conference of Judicial Councils that because of congestion and unwarranted delays, many of our State and Federal courts are not presently working as they are intended to work. As a result, in all too many cases our citizens are being deprived of prompt and effective justice. The proper functioning of the courts is of particular interest to this Conference. I am therefore grateful for this opportunity to discuss with you some of the activities and recommendations aimed at ending delay in litigation.

The Department of Justice has been deeply concerned for some time about the inordinate delay in getting cases tried and disposed of in some of our Federal district courts. This concern arises from the fact that the Government is a party to well over half of all cases, civil and criminal, that are brought in these courts each year. We therefore instituted within the Department a special drive designed, so far as possible to eliminate all delays in Government litigation for which we may have a responsibility. While far from complete, this program has already resulted in a substantial reduction in our backlog of cases.

However, in the course of this special drive, it became apparent that nationwide habits and practices are largely responsible for unwarranted delays. A lasting solution to the problem can be achieved only as the causes are attacked on all fronts. It was therefore decided to seek the cooperation of all groups and organizations which could assist in this important endeavor.

Last year, you will recall, there was convened, at my invitation, a Conference on Court Congestion and Delay in Litigation. The presidents of the bar associations of the States and larger cities and the heads of other bar, judicial and research organizations met and agreed to coordinate their efforts and to institute a nationwide drive to bring justice up-to-date in all our courts.

In recognition of the seriousness of the situation, the Conference unanimously decided that it should be established on a continuing basis. It also authorized the appointment of an Executive Committee to further its work. This Committee met last January. After receiving and carefully considering factual material submitted from organizations, both State and Federal, it issued its initial Report. This Report, which has been given wide distribution, concluded that "prolonged and unjustified delay is the major weakness of our judicial systems today." It also stated that "unless effective action is undertaken to remedy this serious situation, it may further deteriorate and result in bringing the administration of justice in this country into disrepute."

When it is considered that the Executive Committee is composed of representatives from Congressional Committees, judicial organizations, bar associations, State governments, law schools and newspaper editors, this is a warning which deserves the most serious and immediate attention.

However, the Report also concludes that, given adequate judicial manpower and proper judicial administration, a concerted, extraordinary nationwide drive can eliminate congestion and delay without subverting fundamental principles of justice.

To accomplish this, the Report sets forth over a dozen specific recommendations, which if implemented, could eliminate delays in litigation even though delay has been permitted to become chronic in many areas. Some of the recommendations pertain specifically to action in the Federal courts. Others are of general applicability. Today I would like to limit my remarks to five recommendations which pertain to all courts, and discuss why these recommendations were selected as basic requirements for any effective program for eliminating congestion and delay.

The first proposal calls for the establishment of centralized administrative supervision of all courts in a single head, preferably the chief judge of the highest court. This administrator should have authority to promulgate uniform court rules and to assign judges to places where congestion is acute. Effective administrative supervision also requires the establishment in every jurisdiction of an administrative office to provide management and ministerial services for the courts.

By and large, the major shortcoming of our court systems has been the lack of effective centralized supervision and administration. This can be explained in part by the fact that most of our judicial systems were created many years ago. When there were fewer courts, fewer judges and fewer cases, there was little need for centralized administration. The courts operated much as did the country store of the day, leisurely, independently and adequately for the times. But while the country store has been replaced by efficient distributive facilities, very few of our judicial systems have adopted procedures designed to give better service to more people in a shorter time.

The reason for this has been public apathy and the deep-seated, but unfounded, belief that the independence, impartiality and strength of the judiciary could only be preserved if the courts were left strictly alone.

The process by which a judge reaches a decision in any given case is indeed secret and sacred. His independence in this regard must be zealously guarded. But there is nothing secret or sacred about court administration or about the fact that some judges are relatively idle while others are badly overworked. On the contrary, there is every reason for legitimate public concern when we withhold from our judicial systems adequate administrative assistance and supervision so that our judges can devote themselves effectively and conscientiously to the task of adjudicating cases.

A modernized court system has been established in New Jersey. After years of effort, and primarily because of the perseverence of Chief Justice Vanderbilt, a wholly outmoded court system was discarded, and a streamlined judiciary was established by constitutional amendment over the opposition of most judges and lawyers. Cardinal features of this system are a simplified, unified court structure consisting of five courts, the vesting of rule making authority in the courts and administrative supervision in the Chief Justice, and the creation of an administrative office. Within three years after this system came into being, Chief Justice Vanderbilt was able to report that "The problem of chronic calendar congestion had been solved in New Jersey, and at the same time the cases were by common consent being better tried than under the old system." /Emphasis added/

It is therefore little wonder the Executive Committee has recommended the establishment of similar management practices as a basic requirement for any effective judicial system. For as long as there is administrative inefficiency and duplication, unrealistic and inequitable distribution of assignments, and an octopus-like court structure without coordination of purpose or work, then we can hardly expect our courts to keep pace with the ever-increasing litigation which results from a growing economy and population.

The second recommendation of the Executive Committee, which is closely related to the first, is for the maintenance of meaningful and up-to-date judicial statistics. A survey conducted by the Institute of Judicial Administration discloses that adequate statistics are lacking in some jurisdictions and in others those kept are so old or incomplete as to be meaningless. Yet, how can any judicial system operate effectively if it cannot determine its work load?

Properly kept judicial statistics can be of the greatest value. They will reveal how much work is done in a given time in a given court. If the statistics are sufficiently detailed, they will reveal who is doing the work.

Statistics are the basis upon which sound assignment of cases can be made. They are essential in order to determine what courts have heavy backlogs and are in need of help. They can be useful in law revision work.

Statistics serve an important purpose in securing legislation for the courts. Legislators quite properly ask for basic facts in

support of requests for additional judgeships or increased appropriations. At the present time, for example, the Judicial Conference of the United States, together with the Department of Justice and others, is strongly pressing for legislation to provide 39 additional Federal district judgeships and 3 new circuit judgeships. In connection with each recommendation, the Administrative Office of the United States Courts supplied the Congress with a full factual report in justification for each judgeship requested. We are firmly convinced that this factual material warrants the creation of each of these requested positions.

There is also the question of how often statistics should be compiled and what they should contain. As a minimum,--and if I may interpolate for a moment, I think it unfortunate that in matters of such importance we must continually talk in terms of "minimums", but as a minimum, it is recommended that every jurisdiction maintain figures showing the time required from the filing of cases until their final disposition, on how long cases are held after submission until decision, and on how long it takes on the average to have a case decided on appeal. To be of maximum use, these figures should be compiled at least on a quarterly basis. Once this primary information is correlated, it is not a difficult task to expand the coverage or to break down the figures into more detail. In New Jersey, for example, each judge submits a weekly report showing the status of every case assigned to him. In any event, effective and efficient court administration depends upon the availability of factual information and the more detailed the information, the more effective is likely to be the administration.

The third recommendation has as its objective the adoption of modernized rules of procedure with particular emphasis on the effective utilization of pretrial conferences and discovery procedures.

I am aware of the reluctance of the legal profession to adopt new procedures before their effectiveness has been fully demonstrated. But it is puzzling to me why some judges and lawyers are still skeptical of the advantages of pretrial. Its effectiveness has now been established beyond question. It permits a preliminary review of the pleadings so that non-contested facts can be admitted and not put to proof. Questions of relevancy of documents and evidence can be resolved. Legal issues can be narrowed. Confusion at the trial can be avoided by prior planning. But most important, the court and the lawyers become familiar with the case. The result is a better trial more efficiently tried. It is significant that the Judicial Conference of the United States at its meeting last September formally expressed its view "that pretrial should be used in every civil case before trial except in extraordinary cases where the district judge expressly enters an order otherwise."

In view of the many benefits which flow from effective pretrial, it is my opinion that any case important enough to try is important enough to pretry.

A criticism leveled at pretrial is that it is sometimes employed as a vehicle for forcing settlements. Pretrial, as the name indicates, is designed to prepare the case for trial. It is, of course, true that as a result of proper pretrial a substantial number of cases are settled which otherwise might have gone to trial. But wherever pretrial conferences are properly conducted, settlement is considered an incidental result

flowing from the fact that the parties have a better appreciation of the merits and defects of their case.

It is entirely proper that settlement discussions take place under judicial supervision when the purpose of the conference is clearly understood by everyone. Judicial guidance is desirable to assure that the interests of both parties are properly assessed and that any settlement reached is just and fair. But there should in no case be any coercion. Nothing could be more damaging to the judicial process or more inconsistent with its purpose than that it be employed as a device to coerce out-of-court settlements.

As to discovery procedures, the whole purpose of a trial is to get at the truth of matters in issue, not to perpetrate injustice by surprise or cunning. With adequate judicial supervision so that discovery procedures cannot be employed for harassment, or other ulterior purposes, it is clear that the interests of justice are served as each side is permitted wide latitude in obtaining documents and evidence necessary for proper preparation of his case. Experience has demonstrated that the scope of discovery and its proper use are matters most appropriately considered and regulated at the pretrial conference.

The fourth recommendation pertains to the adoption of businesslike methods for supervising court calendars that will result in more efficient use of the time of judges and to give full recognition to the responsibility of the court to control the progress of litigation.

Most judges and lawyers agree that proper calendaring procedures are the key to effective court administration. It is common knowledge that there is considerable deadwood in any docket. Many cases are filed

without any real expectation that they will ever be tried. This practice reflects little credit on our profession. The fact that many cases will never come to trial would not in itself be serious if they did not tend to hold up the cases behind them on the docket. But as long as a case is just a statistic, it must be presumed that the parties intend to try it.

Frequent calendar calls bring out of moth balls cases which are cluttering up the docket for no purpose. But equally important, screening calls serve to alert lawyers that their case is moving towards trial. It has been demonstrated that it is not the possibility of trial but its imminence which results in the withdrawal or settlement of cases which will never be tried.

There is also general agreement that calendar control should also consist of setting a trial date well in advance and then rigidly enforcing court rules against unwarranted continuances or postponements. Should it appear that some lawyers or law firms are taking on more business than they can handle when reached for trial, the court should adopt or enforce rules which will result either in the employment of more trial lawyers or a wider distribution of cases among the bar. In the last analysis, judges have the responsibility, and also the power, to bring cases to their proper conclusion promptly and effectively, and it is plainly in the public interest that this be done.

The final recommendation of the Executive Committee is for frequent conferences of members of the bar and judges to encourage cooperation in efficient judicial administration and improvement through self-criticism, evaluation and interchange of views. This Conference is well aware of the effectiveness of such meetings. Constructive criticism leads to constructive

reform. Judges and lawyers have a common interest in seeking to secure effective justice to all our people. It is, therefore, of the utmost importance that they seek jointly the means which will best accomplish this common purpose.

In my opinion, every jurisdiction with a serious problem of congestion and delay should establish a special committee to be concerned exclusively with the problem. Such a committee, which might be a special standing committee of the local bar association, should draw its membership from judges, lawyers, and prominent civic leaders in the community. Special programs to meet special local problems should be worked out and put into effect. Public attention should be focused on judicial problems to create public support for their correction.

In attempting to discuss in these few minutes the five substantive proposals which the Executive Committee recommended as basic requirements for any effective program to eliminate court congestion and delay, it may well be that I have over-simplified the subject. This is not intended, for all of us who have had occasion to consider this problem are aware that there is no one simple or right solution.

However, I cannot over emphasize my concern. It is clear that the great challenge to our profession today is to find the means to bring justice up-to-date, bearing always in mind that speed is only a means to achieving realistic justice. I urge each of you to lend your support to this important undertaking, for in the words of Chief Justice Taft: "There is no field of governmental action so important to the people as our courts, and there is nothing in those courts so essential to the doing of justice as the prompt dispatch of business and the elimination from procedure of such requirements as will defeat the ends of justice through technicality and delay."