For Release
upon Delivery

"MODERNIZING FEDERAL PROCEDURE"

- - - -

Extracts from an Address

by

HONORABLE HOMER CUMMINGS,

ATTORNEY GENERAL OF THE UNITED STATES

- - - - -

Delivered on the occasion of the
Dinner of the American Bar Association
under the auspices of the

Section of Judicial Administration
and the
National Conference of Judicial Councils.

- - - - - -

Cleveland, Ohio.

July 25, 1938.
7 P.M.

MODERNIZING FEDERAL PROCEDURE

Attorney General Cummings said, in part:

On numerous occasions I have stressed the fact that "delay in the administration of justice is still the outstanding defect of our Federal judicial system." We, as lawyers, are under a continuing obligation to bring our methods into harmony with modern needs. After all, we sometimes seem to forget that the courts and the processes of justice are primarily for the service of litigants, and not for the purpose of supplying a forum where the technicalities that arise in ingenious minds may have an arena of their own.

I have long been interested, deeply interested, in seeing how justice functions and wondering how it can be made to function better; and I suppose that is what we all ought to be thinking about. It strikes me that a lawyer's relations with his client are such as to give him an exaggerated notion of the importance of a particular piece of litigation; and we are not disposed, either philosophically or as a matter of the expenditure of time, to give sufficient consideration to the way in which this great machine operates.

I have felt that my position as Attorney General imposed a duty on me to take an active part in the fight for judicial reform.

The analysis that I was able to make led to the conclusion that, for the most part, delays in work of the courts resulted from three principal causes: first, a lack of simple uniform legal procedure; second, a lack of adequate judicial personnel; and, third, a lack of administrative machinery for the management of the business of the courts. To the task of

attacking each of these causes I addressed myself as well as I could.

Fortunately, due to a statute enacted in 1789, a uniform procedure prescribed by the Supreme Court prevailed in the district courts in respect of suits in equity and admiralty. On the other hand, as a result of the badly conceived Conformity Act, chaos reigned in respect of civil procedure for actions at law. There were 49 variations of procedure, varying from common law pleading -- with its ancient panoply of pomp and circumstance, its exactitude of reasoning that delighted the casuist -- to the most modern type of code pleading. It would be superfluous to relate to this audience the long and disappointing experiences of the American Bar Association in endeavoring to secure the enactment of an act of Congress which would repose in the Supreme Court power to make uniform rules.

That struggle has borne its fruit. It was not a useless struggle. I always resent the idea that any struggle in a good cause is ever a useless struggle. There may be disappointments, of course; there may be setbacks; there may be periods of disillusionment; there may be times when people say, what is all this worth? But there is also a time when those who make the fight, those who keep the faith, will rejoice that they did keep the faith, that they did fight for the cause, and that they never surrendered to pessimism and defeat. So the fight of the American Bar Association was not in vain. It was educational; it permeated the bar, so that there was a great background of belief and faith. It is true the American Bar Association, in a moment of discouragement at Grand Rapids, officially gave up the fight. They said it could not be done. I got to thinking about that. I am rather a believer in forlorn causes, anyway. It

occurred to me that it could be done.

Finally, taking my courage in my hands, I went to New York and made a speech on the subject at a meeting of the New York County Lawyers' Association. I remember very well that Mr. Boston was to preside (he was, as you know, formerly president of the American Bar Association). He came to the station to meet me and took me to his hotel, where he ministered to my needs and encouraged me in various delightful ways. Finally, he said, "What are you going to talk about tonight?" "Well," I said, "I am going to make an appeal to have the Congress pass an act authorizing the Supreme Court to make rules." In a languid sort of way he said, "Oh, yes, that is all very well, but you will not get to first base." Nevertheless, I made the speech, the audience applauded politely, and the campaign was on. That was on the fourteenth of March, 1934, and within about ninety days from the date of that speech the bill was signed by the President of the United States.

I ought not to wear my heart too conspicuously upon my sleeve, but I think I may tell you that the only reason I was able to get that bill through is that I am something of a politician. The lawyers had not handled it very well. So I went up to Congress unarmed and alone; I thought I would not have any committees. The minute you come to Congress with an imposing group of distinguished lawyers who talk down to the members of the committee, at that moment you are lost. I appealed to principle; I put it on personal grounds; I put it on every ground I could think of. I used good arguments and poor arguments, and, fortunately, the bill went through, and the twenty-five years of struggle came to fruition. Since that time the Supreme Court, acting through a committee, and the Department of Justice,

acting through a committee, have been at work on these rules. They were formally submitted to the Congress at the opening of the last session. That session terminated, without adverse action, and the rules will become effective on September 16.

I do not assert that the new Rules are perfect. I do not suppose that any human product is perfect; but I say they record the greatest advance made in the administration of justice in half a century. The rules are simple; they are direct; they permit of the solution of legal problems with a minimum of technical difficulty. If they need amendments or changes, the Supreme Court will make them. Experience will dictate what modifications should be suggested, and very readily they will be supplied. It is even now intimated that the Supreme Court may keep a standing committee for the purpose of investigating complaints or suggestions that may be made from time to time, so that improvements may be made as we go along.

There are people who do not like them. Oh, yes, there are old-fashioned people who do not like them. I remember when I came to the bar in Connecticut, I had the fortune, the good fortune, of never having to practice under the common law procedure. We had a code. There was an old lawyer in the town, a fine old gentleman and a good lawyer, too, who was enamoured of common law procedure. It was just intricate enough to fascinate him. He used to come to see me and talk about it, and he would criticize what he called "this new-fangled practice act." Indeed, he exhausted the vocabulary of vituperation. I thought I would find out how long the new practice act had been in effect. I found it had been passed twenty-five years before, yet it was still new to him. There are people with minds

like that, and you cannot do much with them. They are good fathers, fine people, fine citizens; but when it comes to moving on you have to move either over them or around them. They are still back in the Dark Ages.

By the Act of February 24, 1933, the Supreme Court was given similar power in respect of proceedings in criminal cases after verdict. A gap still remains in the rule-making power of the Supreme Court that should be bridged. I have reference to procedure in criminal cases prior to verdict.

The situation in respect to this branch of procedure is anomalous. It is governed neither by the principles of conformity to state practice, nor by the power to make uniform rules on the part of the Supreme Court. Some points are governed by scattered, desultory statutory provisions. For others we must look to Section 722 of the Revised Statutes.

Federal criminal procedure is governed by a strange admixture of various Federal and state statutes and rules of common law as modified by state constitutions and state legislation. To follow the tortuous trail of modifications is often a trying task. Under such a system there exists an inevitable element of uncertainty and delay. But even if the trail through the forest of modifications were a clear one, still the Federal courts would not be free of the entanglements of ancient common law procedure.

I believe that the rule-making power of the Supreme Court should be extended to criminal procedure prior to verdict. Such a step would give us a comprehensive, rounded system of judicial rule-making, and all aspects of pleading, practice and procedure would then become uniform and would be governed by rules promulgated by the Supreme Court.

The second need in connection with the improvement of the judicial machinery was an increase in the number of judges. There are roughly 50,000

cases on the dockets of the Federal courts at all times. The new cases that are filed approximately equal those that are disposed of, and consequently there is always a backlog of 50,000 undisposed of cases. Sometimes the pressure is in one district and sometimes in another; sometimes a judge is ill; sometimes, being human, he is not as industrious as we hope he might be; while at other times he may be overwhelmed with work.

At my urgency a bill was enacted by the Congress last spring creating twenty additional judicial positions in various circuits and districts in which the need was most pressing. This measure is almost as important as the rule-making power itself, because if you lack adequate man-power you cannot administer justice, no matter what rules you have.

The other reform is still to be achieved. It has to do with the administrative machinery of the courts. There is not an enterprise anywhere in America that could be conducted successfully under the haphazard methods characterizing the business of the courts. There is no unifying force; there is no central focal point for the dissemination of information; there is no directing power. What we need, of course, is an administrative officer for the Federal judicial system, appointed by the Supreme Court and functioning under its supervision or the supervision of the senior circuit judges. Such an official would serve two purposes. First, it would be his duty to devote his time and energy to assisting the courts to arrange their business in an efficient manner and devising ways and means to expedite the disposition of the cases on the dockets. He would go into the various districts, observe the state of the dockets, and the manner in which they are handled, gather information, and suggest improvements in methods.

The second purpose that would be served would be the performance of

such administrative duties as the preparation of the annual budget for the courts; the justification of that budget before the appropriation committees of the Congress, the purchase of supplies, the fixing of salaries of clerks of court and their assistants, the maintenance of quarters, and the million and one details that pertain to administration. It is a strange anomaly that all these matters are today handled by the Department of Justice. The Attorney General should not have this authority, and personally I do not want it. The Federal Judiciary is one of the three coordinate branches of Government, and it was intended that it should be completely divorced from the executive and legislative branches. The judiciary, indeed, is independent in respect of the decision of cases that come before it for determination. But its internal administration has been placed under the control and supervision of one of the executive departments, and that, the department which is the most frequent litigant in the courts. Complete independence of the judiciary, including administrative independence, is the end for which I believe we should strive.

The bill to create an administrative office for the courts, to be headed by a director, was drafted at my direction and was introduced at the last session of the Congress. It was favorably considered by the Senate Judiciary Committee and by the House Judiciary Committee, but in some mysterious manner it became "stuck on the ways." We have not been able to get the measure reported out. High officials of the American Bar Association have helped in the various reforms that I have been discussing. I am grateful for their generous cooperation and for the cooperation of the Association. After all, there is little difference of opinion among the foremost lawyers

of America on those matters. In time we shall achieve the reform that I have just discussed. When we shall achieve it, I know not; but I know that somehow, some day, it will be the law of the United States.

We love the profession; we love the practice of law; we believe that it is a vital part of the life of America; and we ought to use every power that we have so to administer justice that the heartbreaking delays that have been traditional since the days of Shakespeare should not exist in a modern state. We are so accustomed to delay, it is so much a part and parcel of our experience, that we have almost ceased to be shocked by it; and yet the delay in the administration of justice is one of the shocking things about America.

I feel very deeply about these things. I feel deeply about them not only because I am a public official in a particular position, but because I am a citizen of a country that I love and because I am a member of a profession whose honor I cherish. I want to see our profession recapture, as it were, some of the spirit of the spacious days when it led the thought of America. That is an ideal that any man may worthily cherish for his chosen calling.