Department of Justice

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"IN QUEST OF SPEEDY JUSTICE"

ADDRESS OF

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OF THE UNITED STATES

Before the

AMERICAN BAR ASSOCIATION

LONDON, ENGLAND

NOTE: This is the official text of Attorney General Mitchell's speech. It may be fully quoted and attributed to him. Due to time limitations, however, a shorter version will be delivered.

In the novel, Bleak House, Charles Dickens built his story and his message around a civil case before the High Court of Chancery that had dragged on for generations. Two or three of the solicitors in the cause, he wrote, "have inherited it from their fathers, who made a fortune by it..."

> Innumerable children have been born into the cause; innumerable young people have been married into it; innumerable old people have died out of it.

This classic case of courtroom delay, as well as the whole theme of belabored justice that runs through Bleak House, come to mind again today--not here in England, whose courts are a model of swift justice, but in the United States. And because we are in Britain, the mother of the common law, we can look at our own problems with more perspective and compare our methods with those which have worked so well here.

In our own country, delay in civil cases has long been notorious. But now the infection has spread to criminal cases, where "speedy trial" is guaranteed in the Sixth Amendment to the Constitution. In our larger cities delays of five to six months between arrest and trial are normal. Cases of delay up to two years are not uncommon. It is

not surprising that the New York jail riots in the fall of 1970 were blamed largely on trial delays--more than 40 percent of the inmates had waited at least a year to be tried.

In such desperate situations, there is a great temptation to subordinate the ends of justice to the urgent task of clearing the calendar. To keep cases from coming to trial, negotiated pleas have become the order of the day. One veteran defense counsel has said, "If every defendant refused to plead and demanded a trial, within a year the system would collapse."

Delay has also overtaken the trial period itself--the time in a Federal criminal proceeding has roughly doubled in the past decade.

But it is when we get to the post-trial stage that months can turn into years. It is no problem to cite cases in which the post-trial review has dragged on for a dozen years.

I submit that such a system of justice is in some respects a caricature of justice. It denies the very blessing it is supposed to confer.

Little wonder that the American public is concerned about its system of justice--while confidence in that system is indispensable to an ordered society.

Little wonder that, according to a recent poll, only 23 percent of the adult population think the American justice system is working well today.

Little wonder that many have adopted a cynical distrust of the courts--an attitude that cropped up as early as Shakespeare's time. In Part II of Henry VI, a mob goes to London for the now-familiar purpose of trying to stop the Government. You'll recall the lines of Dick the butcher: "The first thing we do, let's kill all the lawyers."

I think you'll agree with me that if this is the state of affairs today, it's time something were done about it.

Recommendations have come from many sources. One approach to assure speedy trials is simply to dismiss all criminal cases if they are not brought to trial in a given period, and this has actually been adopted in some courts. It has been proposed that a trial on a Federal offense shall be commenced within sixty days--excluding certain specified possible delays--and that otherwise the case shall be dismissed with prejudice.

This, in my view, is what might be called a non-solution. The purpose of the Sixth Amendment is, among other things, to assure a speedy trial--not to withhold the processes of justice altogether. Under this approach, innocent defendants are not vindicated and guilty defendants are not forced to recognize their wrongdoing. And, of course, in the case of the guilty person who is set free, the public pays the price in further crimes perpetrated both by the uncorrected criminal and by others who are emboldened by his example.

It takes no prophet to foresee that such an arbitrary solution would strengthen the defendant's hand in negotiating a guilty plea to an unreasonably lenient charge. In fact, under such circumstances the sudden rush of defendants to claim their right to trial, far from unclogging the courts, would overwhelm them.

Clearly, this solution attacks only the symptom of court delay, not the causes. In an effort to satisfy the Constitution's Sixth Amendment, it runs counter to the Constitution's very preamble--to "establish Justice." Carried to its logical conclusion, this approach would not only dismiss cases, it would dismiss the function of the courts. It says to us that no justice is better than slow justice. I will not say that

this meat cleaver approach reflects the mind of Dick the butcher, but it does provide a classic example of throwing the baby out with the bathwater.

Such a solution is even less defensible when we observe the speed of justice in the British system, which is after all the source of the common law and our entire legal tradition. It is my understanding that criminal cases in Great Britain are generally brought to trial within 60 days of the defendant's arrest. The trials themselves are usually disposed of within a few days, and the most protracted trials are measured in days rather than in weeks or months. In the infrequent cases where appeals are filed, final disposition is usually made within three months.

I bring this up not to suggest that we adopt the British system as it is, because many of the conditions and problems in the two countries are different. For one thing, our system is complicated by separate state and Federal court jurisdictions. But I do suggest that we can learn from the British system, and that its success in providing speedy justice shows that the task can be achieved.

Another approach would provide bigger but not necessarily improved courts--more judges, more courtrooms, bigger staffs. Some or all of these steps have already been tried in many cities, including Washington, and they have generally been helpful.

But we have to recognize that these measures are a palliative, not a cure. These are just more buckets to bail out the boat, rather than plugging the hole.

There are also some other proposals that show promise of improving the courts.

One is to bring new efficiency to the judiciary through the use of trained administrators, computers to police the calendar and the cases, and the like.

Another is to reduce the volume of written language--the briefs, the transcripts, the opinions--that accompanies the judicial process in the United States, but not in Britain, and slows it through the mechanical needs of typing, printing and reproduction. More effort could be made to assure that appeals will be heard within 30 to 60 days, thus reducing the need for the printed briefs and transcripts which we now require. In fact, if appellate decisions were this prompt, many of the appeals ordinarily made for delaying purposes would never be brought in the first place.

Another proposal is to relieve the courts from hearing many types of cases, such as drunk arrests and other offenses that might be more appropriately dealt with by agencies outside the judicial process.

Still another is to reverse the tendency to take more and more of society's problems to the courts and thus to burden them with still more duties. Too often a quick solution is for the legislators to outlaw a particular practice and provide for criminal prosecution, when in fact the judiciary may be less equipped to handle the responsibility than an administrative agency.

Having enumerated these useful remedies, I have to say that if every one of them were adopted throughout the American court system, we would still have slow justice. I have cited them because I want to isolate the real subject of my remarks--the Hydra of excess proceduralisms, archaic formalisms, pretrial motions, post-trial motions, appeals, postponements, continuances, collateral attacks, which can have the effect of dragging justice to death and stealing the very life out of the law.

We face in the United States a situation where the discovery of guilt or innocence as a function of the courts is in danger of drowning in a sea of legalisms.

I refer to the overabundance of pretrial hearings designed mainly to deprive the jury of material and relevant evidence.

I refer to meticulous requirements that can only be characterized as ritual for its own sake.

I refer to the endless post-trial appeals so well described by the dean of American district attorneys, Frank S. Hogan of New York:

> Every conceivable aspect of the case, including things that were never thought of at the trial, will be argued and reargued to panels of state and Federal appellate judges whose appetite for reexamination seems inexhaustible. Indeed, it is possible to say that there is virtually no such thing as finality in a judgment of conviction.

Let me cite as an example a robbery case in which the suspect could only be arrested if he could be identified by the victim, but it was impossible to get the suspect in a lineup because there was yet no probable cause for his arrest. With commendable ingenuity, the sergeant in the case summoned both the suspect and the victim to the U. S. Attorney's office at the same time, without either of them knowing why. There were 10 or 12 people in the room when the victim arrived. He immediately recognized and made known his identification of the accused. Yet the conviction of the defendant was reversed by a higher court because a lawyer had not been present at the identification!

We see in such examples the flowering of whole generations of legalisms, one upon another, until a gulf of obscurity separates the law from the people. Many defense attorneys will raise every conceivable argument, however frivolous and long-drawn, either out of pure litigiousness, or to protect themselves against future charges of "ineffective assistance of counsel." And the courts often let them go to such unreasonable lengths, with consequent delay, for fear that the appellate courts will somehow find error, even in the most reasonable

attempts to control excess litigiousness. I am reminded of the devastating cartoons in which Daumier satirized the courtroom affectations of his day.

In dissenting against one reversal of the type I have described, Chief Justice Warren Burger, then a member of an appellate court, had this to say:

> I suggest that the kind of nit-picking appellate review exhibited by reversal of this conviction may help explain why the public is losing confidence in the administration of justice. I suggest also that if we continue on this course we may well come to be known as a society incapable of defending itself--the impotent society.

Nor is it enough that direct appeals can keep a case going through the courts for years. A whole new Pandora's box of collateral attack has been opened. Years after a conviction has been affirmed on appeal, every aspect of a case is combed for possible charges of Constitutional violation, which can bring about a retrial and drag the case once again through the courts. There is no limit to the number of collateral attacks permitted. Some prisoners have filed as many

as 40 or 50 petitions. Each time a petition is granted, the basic case is reopened in the original trial court. How can we expect the prosecution to produce proof over and over again, while witnesses disappear and memories falter?

Many of these petitions are brought in the very hope that the prosecution will have lost key evidence. Besides frustrating justice, this growing practice floods the courts with cases that were already tried. One District Attorney has said, "Our old cases come back in a great wave, threatening to engulf the gasping trial courts, already up to their chins in current business."

Worse, the competence of the lower courts is continually in question, with the result that they are losing their authority and the public is losing its confidence in them. In any other profession such inordinate backing and filling, such technical challenges years after the bridge had been built or the surgeon had operated, would be preposterous.

And the evil effect is not confined to the courts. What about the uncorrected prisoner who, as long as he believes he can be freed, will not acknowledge moral responsibility--the first step toward

correction? When potential criminals are encouraged because they know there is slight chance of conviction, much less imprisonment, when the convicted felon never reaches the moment of truth and faces his own guilt, it is not just the courts that are affected by our present plague of courtroom gamesmanship, it is the whole criminal justice system.

With all this I do not advocate lessening the due process rights of the accused. The spread of standard practices to assure these rights among all courts has been a decided advancement in American justice.

I am speaking of the distortion of these practices for the purpose of thwarting justice. And how far we have traveled along that road may be seen by comparing the court conditions I have described with those here in Britain, where justice is speedy, where the case backlog is manageable, and where appeal is the exception rather than the rule. A capsule comparison of the two criminal justice systems was made

by Lord Denning, Master of the Rolls, at a meeting of the California State Bar in 1969. Both systems dispense justice, he declared, but there is an important difference. "When a serious offense is committed we lock the defendant up and give him a speedy trial. You do neither."

Certainly the American bench and bar can address the problem of speedy justice and develop solutions that are suited to American conditions. This Association has taken the lead with its Criminal Justice Project, whose reports have been providing the states with proposed standards for criminal justice procedures. Other bar associations, judicial councils, university law schools and state legislatures are studying aspects of the problem. As directed by President Nixon, the Department of Justice is examining the reform of Federal criminal procedures.

Yet not enough work has been oriented toward the basic causes of delayed justice that I have described. My plea is for the profession to intensify its reforms in these conceptual areas--to revive the court's primary function as a finder of fact, to restore finality as one of the attributes of justice, to breathe life into the ancient adage, "Justice delayed is justice denied."

For its part, the bar needs to review some serious ethical questions. Every attorney is, after all, an officer of the court, and

is duty-bound to preserve its effectiveness. When, for example, he seeks unnecessary postponements in the hope that witnesses will disappear, he is abandoning that duty. He is not free to use every means at his disposal to defend his client, but only those means within the law and the canons of ethics.

And without going further into his obligations to the court and to society, let me remind him of the obligation he owes his client. Too often the trial attorney acts as though he is representing an issue rather than a client. To win a point he may press it far beyond any benefit to his client. There are times when his client is better served by negotiation than by pursuing a legal argument through the court system. No trial should be the vehicle for an issue at the expense of the client's welfare.

In its turn, the bench is in the best position to halt the stampede of delaying tactics that is overrunning the name of justice itself. It can exercise more judgment in identifying and resisting those devices designed to obstruct rather than to promote justice. It can take affirmative action to speed the process of justice by meeting with the parties before trial to clear away immaterial matters and prepare to

focus on the real issues. It can consider devising a system to deal with all questions of fundamental fairness at the trial and in normal review, as a substitute for the endless post-conviction collateral review which so burdens our present system.

The judiciary can also examine the drift of American criminal justice from a larger perspective. It can begin to recognize that society, too, has its rights, including the right to expect that the courts will do justice, that the innocent will be cleared, and the guilty will be corrected.

It can give as much attention to the Constitutional right to a speedy trial as it does to other Constitutional rights.

It can recognize that perhaps it has been too preoccupied in the exhilarating adventure of making new law and new public policy from the bench, and that this function of the courts has outdistanced the more sober task of judging guilt and innocence.

The crowded calendars, the breakdown of speedy justice, the loss of public confidence in the courts--these are the advanced symptoms of an ailment that has permeated our justice system. The ailment should have been cured long before the patient reached the chronic stages of infirmity that I described.

This is why I deeply believe that American administration of criminal justice has reached a crossroads. Shall we continue on our present course until slow justice becomes no justice? Until courtroom posturing becomes a subject for the acid pen of a latter-day Daumier? Until it is said in our courts, as it was said in the court Charles Dickens described, "Suffer any wrong that can be done you, rather than come here?"

Or shall we alter our course, shunning the road to courtroom obfuscation, and taking the road of courtroom common sense? Shall we resurrect the basic role of justice--that of determining innocence or guilt? Shall we insist that Constitutional rights <u>can</u> be protected without immobilizing our courts with unnecessary procedures and litigation?

The answer to these final questions must be a resounding "Yes," and the time to begin action is now.