

ADDRESS

BY

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AT

THE AMERICAN LAW INSTITUTE
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Mr. President and Fellow Members of the American Law
Institute:

It is an honor to greet this body of lawyers and a pleasure to see old personal friends as you gather for a work session in the Nation's Capital. It is altogether appropriate, of course, that a member of the Supreme Court participate in the welcoming rites. You represent the legal profession in a great undertaking to restate the law; I am sure it has not escaped your attention that the institution of which I am a member is actively engaged in the same enterprise. The consideration that you show me on this occasion I take to be an example of the fine sportsmanship which should prevail among competitors.

I was told by your president that "too elaborate an address is unnecessary." Your president is a master of the art of dressing up his desire for brevity in the cloak of forbearance for the speaker. But I shall say a few of the things that are on my mind, in spite of the admonition.

Some of us who began attending these sessions close to a quarter of a century ago look back on those days with a certain nostalgia. Perhaps we were all a little naive; perhaps I was more naive than the others. But as I remember it now, what may be called the "climate of opinion" at those earlier gatherings was quite different than it is today. The labor on restatement of the law was commenced on the assumption that the body of private law as embodied in court decisions was reasonably settled and fairly stable—at least, that most of it would hold good while the restatement was being formulated. Of course, we knew that from time to time particular decisions would be overruled and that some rules of law would and ought to be changed by legislation. But we did not anticipate any fundamental change in the attitude of courts to the law itself, or toward its development, with traditional regard for its continuity which is a characteristic of the common law method.

A few days ago, however, Lord MacMillan, known pleasantly to many of us, in lecturing on "Law and Custom" at St. Andrews University said something that may awaken a response in you. It was this:

"The lover of our ancient laws and institutions, which we have inherited from our fathers, cannot but look on with some dismay at the process which we see daily in operation around us whereby the customary common law of the land, which has served us so well in the past, is being more and more superseded by a system of laws which have no regard for

the usages and customs of the people, but are dictated by 'ideological theories.'

"There will soon be little of the common law left either in England or in Scotland, and the Statute-book and the vast volumes of statutory rules and orders will take its place. The work of our courts is more and more concerned with the interpretation of often unintelligible legislation, and less and less concerned with the discussion and development of legal principles. Advocacy has consequently lost much of its intellectual interest and scope."

When I read that, I could not help but think of our own Mr. Justice Cardozo, whose reverence for the common law and common law methods was so poignantly expressed in his address at our third annual meeting almost 25 years ago. On that occasion he compared the common law to a magical coat described by one of Swift's characters—a coat which, it was said, would grow in the same proportions as the body of the wearer. Mr. Justice Cardozo said with some feeling that the common law had done just that—and that it was "still a good coat"—"far too good to be thrown away."

It is not easy from where I sit to judge whether Lord MacMillan's present fears or Judge Cardozo's earlier hopes represent current conditions in this country as a whole. The Supreme Court, except incidentally and not too successfully, was never an expounder of the common law. By *Erie Railroad v. Tompkins*, 304 U. S. 64, and related cases, and by its practice of declining to review

state law questions in diversity cases, the Supreme Court has closed its own door to independent speculation as to common law principles. What, therefore, appears to me as a decline in the place of the common law in our scheme of things may be a Washington disturbance which does not reach state courts or other federal courts. But I suspect it is a part of a more or less world-wide impatience with the gradual and deliberate pace of growth under the judicial process.

The titanic struggle for power now being waged between nations and between classes within the nations is as much one to change legal systems as to change political or economic systems. This involves far more than changing rules of property to achieve greater socialization, far more than imposing a Continental system of judicial procedure, far more than setting up a secret political police force. It goes to the very nature of the court itself and would alter the foundation on which our Western civilization has built its legal systems.

The concept which dominates all Communist teaching has been stated by Soviet authority in these simple words: "The Court has been, and still remains, as it ought to be according to its nature,—namely, one of the organs of governmental power, a weapon in the hands of the ruling class for the purpose of safeguarding its interests."

The most striking feature of this concept is its primitive mingling in the court of the two functions that Western civilization years ago divided between the courts and the legislature. This is not surprising, for it comes to us

from a country whose legal institutions are at least 300 years behind the Western world in legal development and which has had little experience with representative legislatures. It comes from a people whom the Renaissance, the Reformation and the great democratic awakening that followed our own and the French Revolution, have never touched. Their history has no Magna Charta, no Bill of Rights. Their heroes include no Lord Chief Justice Coke to remind the Czar that he rules "under God and the law," no Jefferson, no Montesque. Lenin, Stalin and their compatriots stepped into a system of customary law deeply influenced by centuries of absolutism, and their view of the function of a court, instead of being an advance over ours, is simply an adherence to an old authoritarian practice.

Of course, we democratic peoples recognize that the policy of the law is, and should be, made by what you may call a "ruling class." Under our own system, legislation is shaped by a majority of the representatives of majorities of electors in the various constituencies. Our concept of the court presupposes its acceptance of decisions on policy by the legislative majorities that from time to time prevail, except where an overriding policy is set forth in the Constitution.

But when a ruling majority has put its commands in statutory form, we have considered that the interpretation of their fair meaning and their application to individual cases should be made by judges as independent of politics as humanly possible and not serving the inter-

ests of the class for whom, or a majority by whom, legislation is enacted.

The danger of the competition between our Western and the Eastern concept of courts is that the latter is so much easier to apply. To carry out the Soviet conception requires a judge only to know which side he is on. But to observe the democratic separation of functions so as to leave policy making to the political bodies and make the function of interpretation a professional matter, requires training, constant intellectual effort, deliberation and detachment. And it is guided and aided by the experience of generations of common law judges found in the precedents.

But as the courts are obligated by the principles of our representative government to independence in construing the language of statutes, so they owe a similar obligation of fidelity to the legislative bodies in applying their policies. If the separation of functions is to be observed, it is necessary that the utmost clarity prevail in the communication of the legislative will as to policy. I read from time to time of laws enacted by Congress of which it is said it will require several years to learn how the courts will apply them and what meaning courts will give to them. Then, too, I occasionally learn of a statute that means one thing one year and another the next. This seems to be accepted as necessary and usual, but it really indicates that there is something wrong in the process by which law is communicated in this country. It will not do to blame all of this confusion on bad

draftsmanship, appropriate as that criticism may be at times. It will not do to blame it all on the English language for its inexactness and lack of precision.

The unfortunate fact is that neither Congress in the choice of language it will use, nor the Courts in the meanings they will ascribe to Congress, have really effective guidance from consistently accepted principles of interpretation. Of course, a complete and automatic code of interpretation is not possible. But in its one hundred and fifty years of interpreting federal statutes, the Supreme Court has been less willing to commit itself to considered guides to interpretation than have many of the State Courts. Neither has Congress undertaken to formulate any comprehensive rules on this subject. For the individual Justice to be left so much at large presents opportunity and temptation to adopt interpretations that fit his predilections as to what he would like the statute to mean if he were a legislator. Indeed, sometimes there is not much else to guide him.

The subject is too large and complicated for comprehensive treatment on this occasion. It involves inconsistent practices on such vexing problems as these: When will re-enactment of a statute carry adoption of previous administrative regulations or court decision? When will consideration of a statute without changing it mean Congressional approval of prior judicial interpretation? Statutes that impose criminal and civil penalties or create liabilities, or all of these, are sometimes said to be construed strictly, sometimes liberally, and sometimes a mid-

the course is taken. Should there be a prescribed, uniform approach to such statutes and, if so, what should it be? What attitudes should be taken toward statutes that contravene common-law doctrine in a federal system where there is no general federal common law? How far will we go to construe a law so as to avoid raising a constitutional question? How shall our construction differ in the case of what lately is called "humanitarian legislation" from other enactments, which by contrast must be regarded as "inhumanitarian,"—the tax laws perhaps,—and how shall we as judges distinguish the one from the other?

I, like other opinion writers, have resorted not infrequently to legislative history as a guide to the meaning of statutes. I am coming to think it is a badly overdone practice, of dubious help to true interpretation and one which poses serious practical problems for a large part of the legal profession. The British courts, with their long accumulation of experience, consider Parliamentary proceedings too treacherous a ground for interpretation of statutes and refuse to go back of an Act itself to search for unenacted meanings. They thus follow Mr. Justice Holmes' statement, made, however, before he joined the Supreme Court, that "We do not inquire what the *legislature* meant, we ask only what the *statute* means."

And, after all, should a statute mean to a court what was in the minds but not put into the words of men behind it, or should it mean what its language reasonably conveys to those who are expected to obey it?

The Constitution evidently intended Congress itself to reduce the conflicting and tentative views of its members to an agreed formula. It was expected to speak its will with considerable formality, after deliberation assured by three readings in each House. Its exact language requires Executive approval, or enough support to override a veto. How far, then, should this formal text and context be qualified or amplified by expressions of one or several Congressmen in reports or debates which did not find place in the enactment itself?

There is a tendency to decrease the measure of the ambiguity which originally justified resort to legislative history. But even if the ambiguity is genuine and substantial, do we find more solid ground by going back of it? It is a poor cause that cannot find some plausible support in legislative history, which often includes tentative rather than final views of legislators or leaves misinterpretation unanswered lest more definite statements imperil the chance of passage.

The custom of remaking statutes to fit their histories has gone so far that a formal Act, read three times and voted on by Congress and approved by the President, is no longer a safe basis on which a lawyer may advise his client, or a lower court decide a case. This has very practical consequences to the profession. The lawyer must consult all of the committee reports on the Bill, and on all its antecedents, and all that its supporters and opponents said in debate, and then predict what

part of the conflicting views will likely appeal to a majority of the Court. Only the lawyers of the Capital or the most prosperous offices in the large cities can have all the necessary legislative material available. The average law office cannot afford to collect, house and index all this material. Its use by the Court puts knowledge of the law practically out of reach of all except the Government and a few law offices.

But perhaps the most unfortunate consequence of resort to legislative history is that it introduces the policy controversies that generated the Act into the deliberations of the Court itself.

There is no greater aid to law enforcement, and to the judicial process generally, than clear understanding of what the law requires. This, no doubt, is what led Mr. Justice Cardozo to describe your restatement project as a "high enterprise." Confusion or conflict in comprehending the meaning of the law, while sometimes inevitable, should be reduced by every possible device. When Congress has in mind one thing, and its enactments are given different meanings in the courts, it results in repealers and amendments, sometimes retroactive and in confusion, litigation and controversies that weaken and discredit not only the judicial process but the law in general, and government itself. Yet, as matters stand today, I do not see how Congress can know, even roughly, the effect that will ultimately be given to any language it may use. And I do not see how the bar can, with any

large measure of confidence, advise clients in complicated business transactions what their liabilities or duties are.

Though it would not dispel all the doubts which are inherent in the situation, it would help give objectivity to the process of interpretation and assurance to drafting of statutes, if we could have general acceptance by the Bench as well as the Bar of a few basic principles of statutory construction. Perhaps the Institute could devise a disinterested restatement that would commend itself as an acceptable standard for enactment by Congress, or for application by the courts.

Perhaps the situation requires an approach such as was adopted in devising the Federal Rules. Do not misunderstand me—I am not now naive enough to think that if any such course were agreed upon nothing would be left to what Mr. Justice Cardozo called those “tentative gropings, those cautious experiments, those provisional hypotheses, that are part of the judicial process.” I know that such full agreement is beyond the power of even this distinguished group of lawyers. And I suspect that, even if that millennium did arrive, we judges would perhaps slowly, but ever so surely, demonstrate that either because of its legislative history or despite it, “millennium” in fact, or in juridical contemplation at least, means much less than a thousand years.

Nevertheless, the problem confronts judges, and particularly Federal judges, every day; and it is worthy of any effort you might deem proper to make its eventual solution more likely and more immediate.

But I must not further offend against your president's injunction against an elaborate speech.

It is a fine thing that we have these meetings of our profession. Here we can haul each other over the coals and focus attention on trends of ill omen for the profession. And not least important is the fact that we can liquidate our conflicts and worries in social sessions. There, in those more mellow moments, we may continue discussion of this, or of less baffling subjects.