THE ATTORNEY GENERAL
WASHINGTON

July 13, 1938.

File Personal

My dear Mr. President:

I enclose herewith a gossipy and interesting letter from Brien McMahon, who is handling the Harlan County cases. I also enclose a copy of my reply to him. I thought you might be interested in some of the things that are going on there.

Sincerely yours,

Norman Thomas

The President,
The White House.

HSC:MOB

July 13, 1938.

Dear Brien:

That was a very interesting letter you wrote me. I quite appreciate the difficulties under which you labor and whatever the outcome may be I have every confidence that you and your associates will do all that possibly can be done to bring about a successful conclusion of the case.

I hear nothing but praise of the manner in which you are handling yourself and it makes me very proud to know that this is so. Please present my greetings and best wishes to your associates. They are all fine fellows and doing a grand piece of work.

With warm regards in which Mrs. Cummings joins me, I am

Sincerely yours,

Honorable Brien McMahon,
London, Kentucky.

BRIEN McMAHON

ASSISTANT ATTORNEY GENERAL
WASHINGTON

London, Kentucky,
July 6, 1938.

Dear General:

Well, trying a County is quite a job! As you know, we have been on trial since May 16th. We are now on our ninth week. As I told you over the phone, I think we put in a splendid case with one hundred fifty-five witnesses and then the flood gates were opened. I have never seen more perjury in all my experience - it is really unbelievable. For instance, today they introduced eight witnesses who swore that organizer Youngblood killed organizer Musick's son. I think we shattered them on cross, but if there is a doubtful man on the jury it does give them something to argue about. This is just a sample of what has gone before.

Judge Ford ruled that they could outline events which happened in Harlan County and surrounding Counties in Kentucky and even in Tennessee from 1931 on, to show their motive for fighting the United Mine Workers. I think the Judge's ruling is correct. In other words, if a man is being tried for murder he should be permitted to show that he heard that he was threatened by the deceased and the prosecution would not be permitted to show that in fact the deceased had never threatened him, but would have to show that the accused had never heard that he had been threatened. You may well imagine with what delight they received this ruling and how well they are taking advantage of it.

In 1931, in the depths of the depression, the United Mine Workers had just a skeleton organization in the County and three wage cuts occurred in rapid succession. The miners went on strike and some of the same gun thugs - deputy sheriffs who are now on trial - tantalized them into a battle and three of the deputy sheriffs got killed. They railroaded

sixteen of the miners to the penitentiary by the same character of perjured testimony that we are now being treated with. The starving miners broke into some stores at that time and while a graphic description of the looting and the killing has not been permitted by Judge Ford, they have, nevertheless, been allowed to cite these things as their reasons why they fought the United Mine Workers. All violence of any character in every strike, and there have been many of them, is being referred to by the defendants.

Probably worst of all is the fact that after the battle of Evarts the Communists got a strong foothold and much communistic, anti-religious and atheistic literature was circulated. One of the defendant operators gave the circulation of this literature as his reason for opposing the United Mine Workers and that is why it is now before the jury. It is filthy stuff. The only way we could combat it is in showing in truth and in fact that he had not seen the literature and that he really didn't believe what he was told, namely, that it came from raided United Mine Workers headquarters.

I still have strong hopes of some convictions, but I wanted to give you first-hand a brief picture of the situation, so that you might not be too disappointed if an adverse result is finally forthcoming. One of the most regrettable factors, to my way of thinking, is to see members of the bar with country-wide reputations, hatching up perjury.

With kindest regards to Mrs. Cummings and yourself, I am,

Sincerely yours,

O'Brien

Honorable Homer S. Cummings,
Attorney General of the United States,
Washington, D. C.

THE ATTORNEY GENERAL
WASHINGTON

July 13, 1938.

File Personal

My dear Mr. President:

Judge Denman wrote the inclosed letter to Mr. Holtzoff, who, as you know, is connected with this Department and has in charge, amongst other things, the matter of collecting judicial statistics. The letter from Judge Denman is so interesting that I thought I would send it on to you for your leisurely reading when you have time. I am frank to say that the affairs in that circuit have worked out exceedingly well and that Judge Denman has done an excellent job. The comparative statistics you will also find of some service. Incidentally, I draw your attention to the marked passage on the third page of Judge Denman's letter.

Sincerely yours,

Homer Cummings

The President,
The White House.

United States Circuit Court of Appeals
Ninth Judicial Circuit
San Francisco, California

CHAMBERS OF
CIRCUIT JUDGE WILLIAM DENMAN
POST OFFICE BUILDING

July 11, 1938.

Alexander Holtzoff, Esq.,
Department of Justice,
Washington, D. C.

My dear Mr. Holtzoff:

We have just finished our fiscal year and the Clerk has made his usual computation of the number of opinions written by each judge, a copy of which is attached.

Also is attached the prevailing opinions reported in the Federal Reporter for the same fiscal year (July 1, 1937-June 30, 1938) for all the 43 active circuit judges throughout all the circuits. The difference between the two tabulations is due to the time it takes to correct and edit the opinions after rendering them.

The Attorney General and you, with whom I have spent so many hours on the preparation of material for the Administration's court reforms, will be pleased to know that the Ninth Circuit has redeemed the promises it made to the Administration which has aided us in gradually raising our court from 3 judges in 1933 to the present 7.

I was able to state to the local law journal, "The Recorder", the following as the effect of the Administration's court reform project in this, the first fully staffed of the ten circuits:

"1. 'That we had in effect abolished terms of court by making the last day of one term the day before the next.

"2. 'That we had made the writing of briefs commence with the printing of the transcripts when the case was fresh from trial in the lower court.

"3. 'That we sat, three of us, on alternate days, thus giving clear time of a day to freshen on the briefs for the next day's hearing.

"4. 'That, akin to the practice in the British appellate courts, the judges participated freely in arguments, exposing their partially developed views of the case and extending counsel's time for argument where necessary to give him every chance to meet the ideas expressed by the court.

"5. 'We had made the court truly current within a single year's time by pressing ourselves to clear up our arrearages. That true currency is shown by our June San Francisco calendar, in which cases are heard within ten days after reaching issue on the briefs.'

"No longer, it was pointed out, is the litigant delayed in his justice by an adjournment of the court from June until October. Last summer the Ninth Circuit held its first summer session--which is understood to be the only one held anywhere--and this year calendars will be called in July, August and September.

"In fine, it was brought out, justice in the court never takes a vacation though the judges alternately take theirs."

Naturally, I felt the heaviest pressure was upon myself, because I personally made representations in Washington concerning the court's condition and need. Hence it was a pleasure to share with Judge Hutcheson of the Fifth Circuit the position at the head of the list in number of prevailing opinions appearing in the last fiscal year of the Federal Reporter. We each managed to write 65 prevailing opinions, against an average of the 43 active circuit judges of 32.5.

I think you will find, on the return of District Judge St. Sure from his summer vacation, that the Northern District of California, with its newly added District Judge, bringing the number there to 4, will clear its arrearages and, in a short time, be able to show to the litigants that their lawyers have no excuse in any single trial civil case to require more than 6 months between the filing of the complaint and the final judgment or decree.

With this circuit and one district showing what can be accomplished, it will be much easier to bring about the same conditions throughout all the federal courts.

I was very agreeably suprised to find my name mentioned in a group of those under consideration for the vacancy on the Supreme Court. I do wish someone would make the suggestion that the policy of the Administration with regard to appointments to and promotion in the federal bench is quite different. As I understand it, the age limit applies only to the creation of new federal judges. What happened in the case of Judge Williams of Oklahoma indicates that promotion from a lower to a higher bench is made regardless of age.

When are you coming out here to try that group of cases? The temperature is about 64 and might possibly get up to 75. How is it in Washington now?

Very cordially yours,

R. D.

OPINIONS RENDERED BY SEVEN CIRCUIT JUDGES IN U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT DURING FISCAL YEAR 1938 (July 1,1937-June 30,1938).

This is the first Fiscal Year in which the Court had seven Circuit Judges.

	OPINIONS RENDERED				
JUDGE	Prev.	Conc.	Diss.	Misc.	Total
*Wilbur, C.J.	28	1	7	6	42
Garrecht, C.J.	29	-	2	1	32
Denman, C.J.	67	2	2	12	83
Mathews, C.J.	36	4	5	3	48
Haney, C.J.	39	6	6	-	51
** Stephens, C.J.	30	3	1	-	34
** Healy, C.J.	38	2	-	2	42
Per Curiam	5	-	-	5	10
TOTALS	272	18	23	29	342

Prev. signifies prevailing opinions
Conc. " concurring "
Diss. " dissenting "
Misc. " miscellaneous " (on rehearings, motions, etc.)

*Judge Wilbur wrote the opinions in 15 heavy patent cases, clearing away many in arrearage.

**Less opinions from Judge Stephens and Judge Healy because newly appointed and hence no backlog of partially completed cases from year before.
Judge Stephens absent 2 months in completing unfinished cases as District Judge.

PREVAILING OPINIONS RENDERED BY CIRCUIT [redacted] JUDGES
IN ALL OF THE CIRCUIT COURTS OF APPEALS AS REPORTED IN
FEDERAL REPORTER (89 F. (2d) No. 7 - 96 F. (2d) No. 5)
PUBLISHED DURING FISCAL YEAR 1938

FIRST CIRCUIT

Bingham,	C.J.	22
Wilson,	C.J.	21
Morton,	C.J.	18

SECOND CIRCUIT

Manton,	C.J.	55
Hand, L.	C.J.	42
Swan,	C.J.	45
Hand, A.	C.J.	38
Chase,	C.J.	40

THIRD CIRCUIT

Buffington	C.J.	46
Biggs,	C.J.	31
Davis,	C.J.	33
Thompson,	C.J.	24

FOURTH CIRCUIT

Parker,	C.J.	31
Northcott	C.J.	27
Soper,	C.J.	30

FIFTH CIRCUIT

Foster,	C.J.	52
Sibley,	C.J.	53
Hutcheson,	C.J.	65
Holmes,	C.J.	61

SIXTH CIRCUIT

Moorman,	C.J.	12
Hicks,	C.J.	22
Simons,	C.J.	25
Allen,	C.J.	22

SEVENTH CIRCUIT

Evans,	C.J.	40
Sparks,	C.J.	40
Major,	C.J.	30
Treanor,	C.J.	7

EIGHTH CIRCUIT

Stone,	C.J.	18
Gardner,	C.J.	28
Sanborn,	C.J.	30
Woodrough,	C.J.	21
Thomas,	C.J.	28

NINTH CIRCUIT

Wilbur,	C.J.	39
Garrecht,	C.J.	28
Lemmon,	C.J.	65
Mathews,	C.J.	45
Haney,	C.J.	40
Stephens,	C.J.	20
Healy,	C.J.	32

TENTH CIRCUIT

Lewis,	C.J.	10
Phillips,	C.J.	37
Bratton,	C.J.	24
Williams,	C.J.	15

TOTAL OPINIONS 1402

43 judges, average 32.5

d i Cummings

file confidential

THE WHITE HOUSE
WASHINGTON

July 16, 1938.

MEMORANDUM FOR

THE ATTORNEY GENERAL

Just sailing. Yours about Dean Clark has come. I will hold up the appointment until the meeting of Congress.

F. D. R.

Office of the Attorney General
Washington, D.C.

July 13, 1938.

PERSONAL AND C[redacted]L

My dear Mr. President:

Following our last conference with reference to Dean Clark, I discussed the matter with Senator Wagner. He was delighted with the solution. He thinks very highly of Dean Clark and feels it would be an admirable selection. He wanted me to convey to Dean Clark his expressions of high regard and his hope that Dean Clark would accept the tender of appointment. Incidentally Senator Wagner indicated that it would relieve him of some possible embarrassments in connection with candidates whose names have been suggested in New York.

After this discussion with Senator Wagner I had an interview with Dean Clark and told him that I was authorized by you to tender him the appointment on the Second Circuit. He was greatly pleased and promptly accepted. He expressed the hope that the matter might be regarded as highly confidential, in view of his situation at Yale. I do not know exactly what the complications are but necessarily he must make quite a number of adjustments. There is also involved the question of confirmation and I imagine that he would not want to relinquish his position as Dean of the Yale Law School until he had been confirmed.

I indicated to Dean Clark that I thought this would be entirely feasible and that I saw no controlling reason why there should be any interim appointment in this case. I feel that the matter could be held until the opening of the next session of Congress. I hope that this accords with your views. There is no overwhelming reason, based upon the condition of business in the Second Circuit, that would require an appointment this Fall and if the actual nomination could be delayed until Congress comes in it would relieve Dean Clark of any possible embarrassment. I hope it will be possible to follow this course.

Dean Clark requested me to express to you his deep appreciation of your kindness and his gratitude for your confidence in him.

Sincerely yours,

Homer Cummings

The President,
The White House.

File personal

Office of the Attorney General
Washington, D.C.

July 12, 1938.

My dear Mr. President:

When I saw you at the station when you were about to depart on your trip, you informed me that you had received a red hot telegram from Carter Glass indicating his determination to resist the confirmation of your nominee Judge Floyd Roberts, recently given an interim appointment as District Judge in the Western District of Virginia. Very likely Senator Glass will cool off when the time comes.

I was reminded, however, of an incident which occurred in the administration of President Theodore Roosevelt in 1906, and which is related on pages 531 et sec, in "Federal Justice" by Cummings and McFarland. I am sending you enclosed herewith a copy of a few pages of the book covering that incident.

From all accounts I have heard your trip is an outstanding success from every point of view. I think you did a wonderful job in Kentucky, and indeed everywhere else for that matter.

With best wishes for a health-giving vacation, and with affectionate greetings, I am

Sincerely yours,

Homer Cummings

The President,
The White House.

THE ATTORNEY GENERAL
WASHINGTON

file personal

September 19, 1938.

d-1-34

My dear Mr. President:

I return the clipping from the Sacramento BEE. Personally, I think the point is well taken.

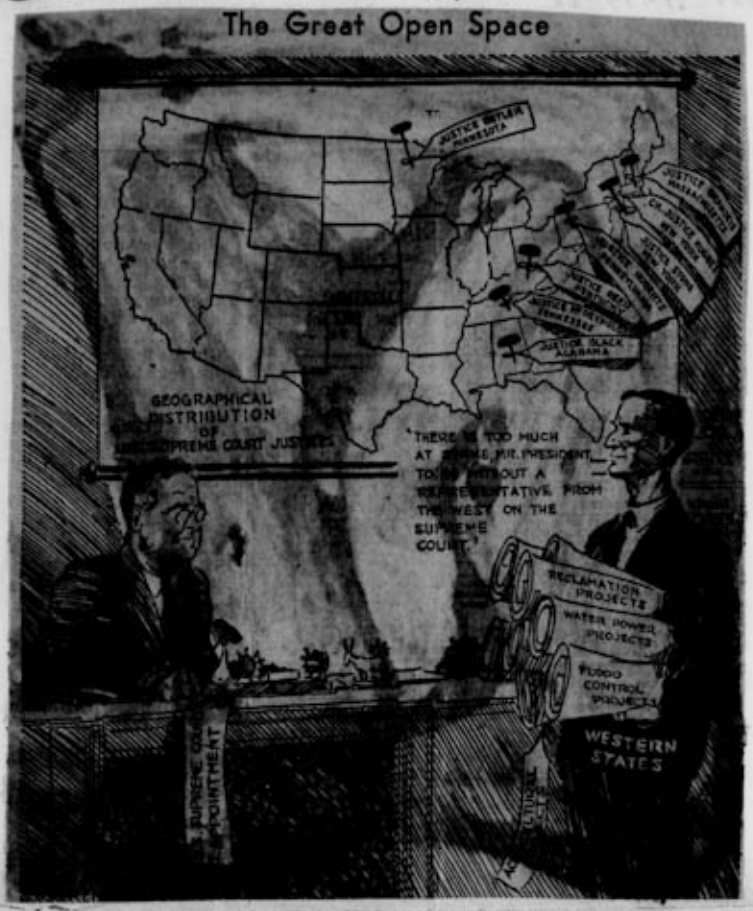
Sincerely yours,

Homer Cummings

The President,

The White House.

Sacramento Bee 9/1/38



Hon. James A. Farley, Chairman

My dear Jim.

For your information. This carries a lot of T.N.T and is worth studying

Sincerely

John

9/1/38

d-1

September 21, 1938.

Dear Homer:-

Many thanks for yours of the twentieth and the copy of the speech — which is grand.

As ever yours,

The Honorable
The Attorney General,
Department of Justice,
Washington, D. C.

Office of the Attorney General
Washington, D.C.

September 20, 1938.

The President,
The White House.

My dear Mr. President:

This supplements what I said over the telephone a few nights ago about the Connecticut situation.

When I reached New Haven the day before the Convention and had conferences there on September 12 with our friends, I found the situation as I had depicted it to you when I talked with you at Hyde Park and as I had analyzed it a couple of months ago. There was not the remotest chance of a deadlock. The nomination of Lonergan was so clearly foreseen that the Kopplemann movement became somewhat absurd and, I regret to say, was conducted in a manner which was neither helpful to him nor to anyone else.

For your information, I think I ought to say that on Monday, July 18, I had a talk with Mr. Kopplemann on the telephone at which time he was considering the possibility of announcing his candidacy. I told him I had gone over the situation very thoroughly and I was satisfied that, if Senator Lonergan made a strong New Deal speech and pledged his fealty to the leadership of the President, it would cut the ground from under any movement to defeat him. And, moreover, that I would have to say it was a "New Deal speech" and that no friend of the President could find fault with it. I further told him that I had reason to believe Lonergan would make such a speech. I, therefore, advised Mr. Kopplemann to delay action until he saw how things came out. I told him that I did not want to see him get out on a limb and have the limb sawed off. He thanked me for this advice and said he would think it over.

That very afternoon, Monday, July 18, Senator Lonergan made his speech. I do not know whether you have seen a copy of it or not but it was a vigorous "New Deal speech" and embodied a promise to go down the line with you. It was so much better than I had anticipated that I was gratified and relieved. That same day I gave out the statement which was quoted in the press and which, no doubt, you have seen. Shortly thereafter, perhaps a day or two, I sent you a radio message as to the situation.

Mr. Kopplemann did nothing after July 18, in the matter of announcing his candidacy, until Wednesday, the third of August. He, therefore, apparently took about two weeks to think the matter over and then took the leap. Why he did this, or upon what ill-advised counsel he relied, I have no means of knowing as I was in Wisconsin at the time. His candidacy went from bad to worse. Its only effect was to stir up animosity and give the opposition press an opportunity to picture the battle as "A New Deal" defeat. All hands would have been better off if he had heeded my advice.

In the meantime the campaign by Archibald McNeil, who also had gone into the contest without the slightest encouragement from me, was completely blanketed. When the Convention met at Groton, Connecticut, it was apparent that McNeil would have very few Delegates, perhaps only the Delegation from Bridgeport and this Delegation for one ballot only. He, therefore, withdrew and seconded the Lonergan nomination.

At the last moment a lawyer named Thomas C. McDonough entered the race - partly to save the New Britain delegation from embarrassment, partly in the vain hope of a dead-lock and partly for advertising purposes.

The Kopplemann managers kept up a bold front, but anyone with an ounce of political sense knew how it would come out. The final result was

Lonergan	953 ½	Kopplemann	106 ½	McDonough	24½

The only real contest in the Convention was over the Lieutenant Governorship. The leading candidates were Thomas Hewes and Joe Tone, the Labor Commissioner of Connecticut. The latter had quite a good deal of support and did fairly well. The great bulk of the delegates, however, preferred Hewes, especially as Governor Cross will probably not run again and the Lieutenant Governor, if elected, would be in a favorable position for the nomination for Governor two years hence. In view of the Waterbury scandals, which had affected Lieutenant Governor Hayes, it was obvious that great care should be exercised in nominating his successor.

Tommy Hewes has had a good deal of experience as advisor to Governor Cross and has rendered public service in connection with Civil Service reform in Connecticut and in connection with the Governor's Reorganization Bill, and is universally respected. Moreover, the Governor wanted him. Tone had ardent friends and bitter enemies. In addition to this Tom Spellacy, and the remnants of his machine, brought out a candidate of their own and inspired the candidacy of still another contender, the idea being to deadlock the Convention and control the situation.

Under these circumstances, there was nothing left to do except to push through the candidacy of Hewes. This was done successfully and the final vote was

Thomas Hewes	714	Edward F. Ahern	110 ½
Joseph M. Tone	207	Thomas F. Ryle	52

The present state organization has now, in four successive conventions, fought off the Spellacy organization until it is battered beyond repair. Lonergan was not purged but Spellacy was. Our organization is a good one and is led by men of character and we are in excellent shape to go on with the campaign. Our people seem to have confidence in the result of the election. The Republicans are in terrible shape and have but little hope.

As a measure of political wisdom the nomination of Lonergan was clearly indicated. I had thoroughly canvassed the situation on my previous visits to Connecticut, and kept in constant touch with it while away. There was no outstanding candidate who could oppose him with any hope of success. Such an attempt might very well have brought on the dominance of the Spellacy group and would have so disorganized the Party and so discouraged those who have been trying to build up a respectable leadership that there would have been little hope of electing the ticket.

The Platform acclaims your achievements and pledges fealty to your leadership. It is a progressive document and ought to have a wide appeal. Senator Maloney's keynote speech was admirable. It did my heart good to hear the delegates cheer every mention of your name.

The course matters took made it appropriate for me to address the Convention in its closing hours. The speech went over with a bang. I enclose a stenographic copy of it.

I have just received a letter from Archibald McNeil, a copy of which I also enclose. I am sending it to you because now he sees what he did not see before.

Sincerely yours,

John Cummings

COPY

ARCHIBALD McNEIL

ANCHORAGE DRIVE
BRIDGEPORT,
CONNECTICUT.

September 16, 1938.

Hono. Homer S. Cummings, Attorney General
2700 Tilden Street,
Washington, D. C.

My dear Homer:

I recall your favorite remark that "if the Democrats of Connecticut would follow my advice, they would be better off in most instances". This statement so often expressed by you was never more correctly demonstrated than in this past convention. It is now clearly obvious to me that there never was a chance to defeat Lonergan's nomination, even had the Administration thrown its influence and support to another candidate. However, I have no regrets for my own attitude and participation during the campaign, and as you probably know, I volunteered to take the platform and seconded his nomination and also voted to cast the Bridgeport vote for Gus.

I have written him, as per copy attached hereto, and presume the boys will call upon me at least to assist in securing the necessary funds for the campaign.

With kindest regards,

Cordially yours,

(s) Arch

AMcN;en

Stenographic Report

of

REMARKS BY HONORABLE HOMER CUMMINGS

Attorney-General of the United States

at the Democratic State Convention,

at Groton, Connecticut,

Wednesday, September 14, 1938.

MR. CHAIRMAN, LADIES AND GENTLEMEN OF THE CONVENTION:

I thank your distinguished presiding officer for his courtesy in calling me to the chair. I congratulate him most heartily upon his fine and statesman-like speech of last night. It was an inspiring utterance. I congratulate him also upon the superb manner in which he has conducted the proceedings of this Convention. Connecticut is proud of him and of his outstanding public service; and I am proud of his friendship. (Applause)

It is good to be at home, amongst old friends and to clasp the hands of those with whom for so many years, in fair weather and in foul, I have fought here in Connecticut the battles of Democracy. One of the greatest joys of my life in these latter years has been to render that service in an association of friendship and mutual confidence with a beloved and inspired leader, who in a dark hour lifted up the hopes of the nation, set our country upon the ways of prosperity, wrought the neglected reforms of a generation, and restored order and confidence to stunned and discouraged people. (Applause) I bring you the salutations and affectionate greetings of President Franklin D. Roosevelt. (Great Applause)

This is a New Deal Convention. (Applause) No one has been or could be nominated here who did not accept his leadership, and who did not in his heart of hearts resolve to support the President as he seeks to carry forward his program of humanity and justice. (Applause)

As for myself, with great delight I greet, upon the eve of another victory, the embattled, unconquerable, cheerful, sometimes contentious, frequently turbulent, but nevertheless harmonious and unterrified hosts of

Democracy. (Laughter and applause) And, in a spirit of abundant sympathy, I commiserate with that group of unhappy, discouraged, battered, and disorganized statesmen who are to meet later this week in New Haven to go through the ritual of a perfectly useless performance. (laughter). Without leadership, without program, without principles, without courage and without hope, they will not be offended if I suggest that their organization, if it may be called such, is the vermiform appendix of the body politic, irritating at times, but totally unnecessary. (laughter and applause).

The country needs Roosevelt and Roosevelt needs to have his hands upheld in the difficult days that are ahead. Much has been done, but much remains to be done. From this convention hall, as with one voice, we send him a message of faith, allegiance, and affection. (Applause)

Oh, I know there have been differences in the past. There are people who prefer to dwell on these things, but as for myself, I am concerned not with the past, but with the future. Let the dead past bury its dead. We are all marching in the same direction and under the same leadership. The only contest amongst us is a measuring of our common fealty to the greatest leadership that America has known in generations. (Great applause) Again I say the country needs Roosevelt. He is striving, in a few short years, to supply the reforms and readjustments that ought to have been spread over the last twenty years. He is doing the work that the Republican Party left undone in the long and distressing period from Harding to Hoover. He knows that the best way to protect our institutions from domestic disorder and from alien and subversive influences is to make those institutions serve the purposes of our vital and growing people. While other men talk of preserving Democracy, he is devoting his great ability,

his high intelligence, his understanding heart, to the task of making Democracy work. I say to you in all seriousness that President Roosevelt is the one best bet of Democracy in a distraught world. (Applause)

If you look across the waters to the troubled peoples in foreign lands, you will find little encouragement for the criticism of conditions in this country. To mop up unemployment by putting millions into the Army and setting more millions to work manufacturing munitions of war may be one way to meet the unemployment situation, but it is not in accord with American ideals. And let me add this, too: With millions of storm troups set upon a hair trigger for release into another international conflict, with constantly accumulating bombing planes ready to destroy the cities and the populations of Europe, with supplies of poisonous gas being feverishly prepared for their hideous pupose, with one country already plunged into the vortex of a ghastly, fratricidal conflict, and with two great nations slaughtering thousands upon the field of battle, and destroying countless numbers of innocent non-combatants, we are justified in uttering a fervent prayer of gratitude to God that we have in the White House a man who loves peace, and above all men else, knows how to preserve it with honor. (Cheers)

And so my message to you is to close ranks, to submerge minor differences, and to march on to still greater achievements under the guidance of our beloved leader, the greatest figure in the civilized world, President Franklin D. Roosevelt. (Applause and rising demonstration)

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file personal

THE ATTORNEY GENERAL
WASHINGTON

September 22, 1938.

My dear Mr. President:

Enclosed herewith you will find an impromptu after-dinner speech which I made at a dinner given by the Chicago Bar Association in honor of Lord Macmillan. It is very brief, and I thought you might be interested in reading it.

Sincerely yours,

Homer Cummings

The President,
The White House.

AN ADDRESS IN HONOR OF THE RIGHT HONORABLE LORD MACMILLAN

HOMER CUMMINGS

PSF
Justice

Stenographic Report of an

ADDRESS by the

Honorable Homer Cummings

ATTORNEY GENERAL OF THE UNITED STATES

before

The Chicago Bar Association

on the occasion of a dinner in honor of

THE RIGHT HONORABLE

LORD MACMILLAN

LORD OF APPEAL IN ORDINARY, LONDON

August 2, 1938 · Chicago, Illinois

AN ADDRESS IN HONOR OF THE RIGHT HONORABLE LORD MACMILLAN

HOMER CUMMINGS

Mr. Chairman, Lord Macmillan, Members of The Chicago Bar Association, Ladies and Gentlemen:

I AM, of course, very grateful to your distinguished President for his generous words of introduction. The manner in which I was persuaded to come here he has so fully revealed as a family secret that I need not dilate upon that aspect of it any further. [Laughter.]

I think, however, that I ought to say that any invitation that draws me to this city is always a welcome one. Many of you know, and perhaps all of you would be interested to know, that I was born in Chicago. I was born here at a very early age [laughter] and removed from this place at the mature age of eighteen months without any prior consultation with me on the part of my parents [laughter], although family history records that as the train drew out of the station, I set up a vociferous protest. [Laughter.] That, undoubtedly, was due to a premonition that I was leaving perhaps the greatest city in the world. [Applause.]

It is fine, indeed, to be here and very delightful to hear such generous things said about my work. It is true that a large proportion of my time, as Attorney General, has been given to the problem of accelerating the administration of justice in the Federal courts. I have long believed and still believe that delay in the administration of justice is the outstanding defect in our judicial system.

We of the legal profession have so long been accustomed to the law's delays that we have not realized as fully as we ought the inherent vice of it and the demoralizing effect which it inevitably has upon the administration of the affairs of our country. So, I was very glad indeed to have had a part in bringing about the adoption of the rules which come into effect on the 16th of next month.

The law that permitted the Supreme Court to draw the rules had, as you know, been long under consideration by the American Bar Association. In a moment of discouragement at the meeting at Grand Rapids in 1933, the effort was discontinued. I thought that I would have a try at it myself, and so the law was drafted and introduced in 1934 and miraculously passed within about ninety days from the time it was urged upon the consideration of the Congress. [Applause.]

As I have confided to other audiences, this is probably due to the fact that I am somewhat of a politician. [Laughter.] I found it desirable and helpful to approach the appropriate committees by numerous and devious methods. [Laughter.] I think that you might be interested to know that there was a time when it was touch and go whether the rules would go through

or not. I labored with the committee in the Senate and with the committee in the House, and finally by personal appeals, pathetic persuasion, and something approaching imprecations, had caused most of the opposition to dissolve.

There was, however, in the House Committee of the Judiciary one recalcitrant person with whom I had extraordinary difficulty. He told me he had made speeches against the idea, that he was on record against it, and that when the matter came up in the House he would be obliged to protest.

The situation was such that only unanimous consent would permit it to pass, and one voice raised in opposition at that critical moment would have been fatal to the entire project.

I labored with that man for hours, and finally we compromised. He agreed to adhere to his principles, and in order that he might not forego them, further agreed to absent himself from the House when the matter came up. [Laughter.] It was by such a narrow margin that this great reform came about; and now we are pluming ourselves upon it and taking great consolation in the fact that this forward step has been taken. I am free to say that I personally regard it as the most striking advance that has been made in the administration of justice in this country in half a century. [Applause.]

I think, too, that much will depend upon the manner in which the bench and the bar approach the rules when we come to their interpretation and their use in practice. If these rules succeed, as we think that they will succeed, then indeed we may hope that the principles embodied in them will ultimately become part of

the practice in many of the now backward States, and that utlimately we shall have in this country a rounded and effective system of procedure.

I have noticed that your Chairman, in his generous address, made some reference to the activities of the Department of Justice in the field of crime and crime prevention. I need not go into that aspect of the matter, because the peril under which we were laboring and the manner in which we dealt with it are pretty generally known to our people throughout the country. But I have often thought that unless we could create a condition wherein our homes were safe from invasion, and the sanctity of human life was in some degree respected, unless the administration of both the civil and criminal law could move on in an orderly fashion, it would be well-nigh impossible for the Government to deal successfully with the intricate and difficult domestic problems which always vex a great and vital people.

Without order we cannot progress; and I think that is true of international affairs as well. How can the nations, laboring under the dread and peril of war and the possibility of a complete break-up of civilization—how can they deal, each nation within its own scope and jurisdiction, with those insistent problems that the people are urging their governments to solve?

Peace is not a gift; it is an achievement, and the world will have peace when men deserve it. But this we know—that life is the common adventure of all mankind, and under the complexities of modern existence, also a common destiny. There can be no peace except a peace common to all the world, and no lasting prosperity that is not shared by all. And it

has sometimes perplexed me, Lord Macmillan, to realize that art is international, literature is international, science is international, but law is not international; and somewhere, hidden in that thought is the answer to many of our difficult problems. [Applause.]

So, when a great jurist from another nation comes to visit us, something peculiar and especial tugs at our heartstrings. The visit of Lord and Lady Macmillan has been an event in American life. This great man who sits at my right has drawn upon the abundant reservoirs of his generous nature and we have all been refreshed and encouraged. Rich in experience, rich in service, rich in honor, he has had a distinguished career; and he possesses, in marked degree, those engaging human qualities that are a part of his priceless gift of friendship. I trust that I may be permitted to indulge the hope that as he goes back across the water and as the events of the years carry him on, there will always be a place in his memory for those devoted friends here who are following his career with affectionate interest. [Great applause.]

[illegible] U. S. GOVERNMENT PRINTING OFFICE: 1938

Department of Justice,
Washington.

September 23, 1938

MEMORANDUM FOR THE ATTORNEY GENERAL

Control of Commodity Prices by the Federal Government during Wars not Involving the United States as a Belligerent

Recently the President asked what could be done by the Federal Government to control prices of commodities in the event of wars in which the United States is not a party belligerent. Conferences on the subject have been held between Assistant Attorney General James W. Morris, Assistant Solicitor General Golden W. Bell, Special Assistant to the Attorney General Alexander Holtzoff and J. T. Fowler and Edward First, attorneys, representing the Department of Justice; Paul H. Appleby, Assistant to the Secretary and Mordecai Ezekiel, Economic Adviser, representing the Department of Agriculture; Guerra Everett, Chief of Division of Commercial Laws and Joseph Meehan, Chief, Division of Business Review, representing the Department of Commerce, and Admiral Christian Joy Peoples, Director, Procurement Division, Treasury Department.

I.

As before and during the World War the prices of some commodities increased and those of others decreased, adequate control would require means to anticipate and regulate undue fluctuations both upward and downward. By control of prices is meant not only the direct fixing of them but also the indirect regulation of them through control of the causes by which they are affected, from which they result, and of the existence of which they are manifestations. Most of the price problems at the time of the World War were caused by the methods used in private and governmental financing. It is essential, therefore, that control of the general financial and monetary situation be considered along with that of commodity prices since what commodity price problems will have to be faced will depend in large part upon the financial

policies adopted. What means the Federal Government has power to exercise to effect control is one question; but which of the divers methods available to it are best adapted to accomplish the ends desired from economic, social and political viewpoints is an inseparable practical question of equal importance that cannot be treated didactically at any given time but must be studied constantly in the light of the unpredictable and variable circumstances to which wars give rise.

II.

Direct control or fixation of prices by the Federal Government would require legislation by the Congress. While the Supreme Court apparently cannot be said to have passed upon the Federal power to regulate prices of commodities in interstate and foreign commerce, its decisions, especially those of recent date, indicate the probability that the Court as now constituted would uphold legislation providing for direct regulation, particularly in an exigency such as war which, notwithstanding this country be not party to it, would have the effect of disrupting prices and the orderly flow of our interstate and foreign commerce. It is unnecessary to do more than enumerate some of the cases which with those cited in them lead to this inference: Block v. Hirsh, 256 U. S. 135; Levy Co. v. Siegel, 258 U. S. 242; Tyson v. Banton, 273 U. S. 418; Nebbia v. New York, 291 U. S. 502; Carter v. Carter Coal Co., 298 U. S. 238; West Coast Hotel Co. v. Parrish, 300 U. S. 379; Labor Board v. Jones and Laughlin, 301 U. S. 1. See also Department's briefs in Carter v. Carter Coal Co., supra, and United States v. Hood, United States District Court, District of Massachusetts; Houston, East and West Texas Railroad Company v. United States (Shreveport case) 234 U. S. 342; Wisconsin Railroad Commission v. C. B. & Q. Railroad Co., 257 U. S. 563.

III.

Indirect control of commodity prices and the conditions by which they are affected may be - and is being - accomplished to some degree under such existing legislation as the following which could be supplemented by the Congress as occasion might demand:

> Dealings in agricultural commodities can be controlled under the second Agricultural Adjustment Act - Agricultural-Marketing Agreement Act of 1937 (50 Stat. 246, U.S.C., title 7, sec. 601).

Production and marketing of many basic agricultural products can be controlled under the Agricultural Adjustment Act of 1938 as amended (Public No. 430, 75th Congress, 52 Stat. 31).

Exports can be regulated under the Neutrality Act of May 1, 1937 (50 Stat. 121, U.S.C., title 22, sec. 245 a).

The use of ships for exports, assignment of cargo space, etc., can be indirectly controlled by the Maritime Commission under the Merchant Marine Act of 1936 (49 Stat. 1985, U.S.C., title 46, sec. 1101).

The provisions of the Trading With The Enemy Act, authorizing the President to control transactions in foreign exchange, gold and silver bullion, currency, credit, etc., and to prevent the hoarding of bullion, which were originally applicable only during a war, were reenacted and extended so as to be applicable "during any other period of national emergency declared by the President." (Act of March 9, 1933, 48 Stat. 1, U.S.C., title 50, App. sec. 5 b).

The Bituminous Coal Act of April 26, 1937, c. 127, 50 Stat. 72, 80 (U.S.C., title 15, sec. 833 c), authorizes the National Bituminous Coal Commission to establish maximum prices for coal.

The Sugar Act of 1937, c. 898, 50 Stat. 903, 904 (U.S.C., title 7, sec. 1111), authorizes the Secretary of Agriculture to fix quotas in such manner that prices to consumers shall not be excessive.

The Natural Gas Act of June 21, 1938, authorizes the Federal Power Commission to fix prices for natural gas moving in interstate commerce.

The Act of August 26, 1935, c. 687, 49 Stat. 803, 852 (U.S.C., title 16, sec. 824 e), authorizes the Federal Power Commission to fix rates for electricity moving in interstate commerce.

IV.

Indirect control of commodity prices, through monetary, financial, and fiscal operations influencing the general price level, has been greatly strengthened by the following legislation and agreements:

Transactions in foreign exchange, gold and silver bullion, currency, credit, etc., can be regulated under the Emergency Banking Relief Act of March 9, 1933 (48 Stat. 1, U.S.C., title 50, App., sec. 5 b), the Gold Reserve Act of 1934 (40 Stat. 337, U.S.C., title 31, sec. 442 and 734), and the Federal Reserve Act.

The Tripartite agreement in September, 1935, and its subsequent extension to Holland, Switzerland, and Belgium.

Under the Banking Acts of 1933 and 1935, the Federal Reserve Board has increased powers to regulate the general credit situation through the functioning of the Open Market Committee, and to further control the operations of member banks.

Federal insurance of deposits through the Federal Deposit Insurance Corporation forestalls the occurrence of bank runs.

Since 1933 a number of governmental agencies have been created with powers to make loans to industry and agriculture.

The Securities and Exchange Commission, with powers to regulate the functioning of the Stock Exchange, has been established.

The Federal Government has increased powers to influence the price structure through credit operations, and if necessary through the purchase and sale of government securities or other securities on the market.

V.

Based upon the data made available in memoranda from the Department of Commerce, the Department of Agriculture, and the Procurement Division of the Treasury Department (copies of which are attached)

an analysis has been made of economic conditions and governmental authorities now existing as compared to those obtaining immediately prior to the emergency caused by the outbreak of the World War. This analysis, which follows, is for the purpose of indicating the methods of price control which would probably be needed to deal with any emergency which might arise from the outbreak of war at this time.

VI.

The economic, social, political and legal aspects of any action calculated to control prices are interrelated and will vary with the methods adopted for such control. Broadly speaking, these methods may be divided into two classes, - those which are indirect in nature and those which are, instead, direct in their application. The former strive to control the many forces which are the basic and contributing causes of price movements, whereas the latter seek to operate directly upon the establishing of price levels. If it is determined that the indirect methods will accomplish the desired ends, these should be availed of. In so far as it may be determined that they will not accomplish their purposes, the direct methods may be invoked. Study and experience may show, however, that the indirect approach will be adequate with respect to most, but not all, of the price problems, and that, for the purposes of satisfactory price control, there will have to be effected a combination of the direct and indirect methods. The use of the taxing power for purposes of price control, while not alone sufficient, could perhaps be a helpful supplementary measure to either method or to a combination of both. In charting a course of action for price control, it becomes necessary to examine the economic conditions prior to and during the World War, the available means for the control of our economic structure in 1914, and to compare them with the economic and governmental forces in operation today.

<u>1914 and 1938 - A Comparison</u>. Prior to the outbreak of the war in 1914, business activity had been declining slowly for about a year, and industrial output in the summer of that year was slightly below normal. The recession was intensified by the European conflict with its consequent disruption of international trade and its financial repercussions. Wholesale prices, relatively high after an advance which had extended over nearly two decades, were under pressure. The outbreak of hostilities was a major, though not the sole factor, in the wide variations in individual prices in the latter half of 1914. The general wholesale price level,

however, did not advance, and prices of farm products and raw materials were lower in December than in July. It was not until the last quarter of 1915, when industrial output moved about 10 percent above normal that the broad forward movement in prices started.

The upward trend of prices, starting in 1915, extended through the war period and in November 1918 the general wholesale price level was double that of July 1914. After some hesitancy in 1919, prices rose to a post-war peak in May 1920 when the wholesale index was 148 percent above the July 1914 figure. The depression of 1920-21 carried wholesale prices down 44 percent. It is to be noted that after 1916 industrial production did not rise further, and from this point forward, the rapidly rising dollar totals of business represented mainly the declining purchasing power of the dollar. With our resources fully employed, increased demands were reflected in price rises.

These demands resulted from the tremendous purchasing power of foreign nations. This was made possible not only by the liquidation of foreign owned assets, but in even greater measure by the lending abroad of enormous sums by American private lenders and later by our Government. The financing of the war here through enormous deficits at a time when industrial production was at peak capacity added to the disruption of the price structure and domestic economy.

The effect of a European War now upon the present price structure would necessarily depend upon a multitude of factors including, of course, any affirmative steps which might be taken, directly or indirectly, to control price movements. In bold contrast, however, to the situation which existed in this country in 1914, today the Government has established a more ordered economy, and has created machinery which is operating to promote the economic welfare of the nation and is designed to meet any change in the economic scene. The Neutrality Act and the Johnson Act are striking examples of forces at work to control the flow of merchandise and credit abroad which were not present in 1914. The importance of this control over the extension of credit is paramount. It is apparent that it can operate as a limitation upon the creation of a purchasing power which would make for an abnormal rise in prices after our full production capacity had been reached.

That a European War would not create immediately a general high price level may reasonably be assumed. To the contrary, a sharp decline in prices might be expected at the outset which would be halted by an inflow of orders for goods from belligerents, as well as from those who normally are supplied by these belligerents. Because our industrial

plant is now operating at no more than two-thirds of its capacity, and widespread unemployment now exists, it would seem certain that a very large increase in demand would result in increased production rather than an increase in price. Only when production had reached capacity, would demands, in the absence of control, result in a sharp increase in the price level. An ample supply of agricultural products now on hand and expected in 1938-1939 would likewise prevent an immediate rise in farm prices generally. However, again in the absence of some form of control, the continued and enlarged demand for our products from abroad and from within would in time lead to increased prices. The danger ahead, therefore, is that of serious fluctuations in our economic activity first with a threatened reduction and later with a large expansion and price inflation.

The Indirect Method of Controlling Prices. Price distresses are effects rather than causes. It is desirable, therefore, to recognize these causes and, once recognized, to try to direct them. This may be called the indirect method of controlling prices.

Vast powers of indirect control and numerous agencies for the execution of those powers, now exist in the Federal Government.

Adequate powers of monetary, fiscal, and credit control exist but are scattered through many agencies. The creation of a new central authority to centralize financial policy, and to coordinate the action of all these various agencies in the fulfillment of that policy, would be essential to rapid and effective action in time of emergency.

The many agencies dealing with the utilities industries, and those dealing with housing and construction, are each in need of similar centralized policy making and control for effective emergency action.

In the commodity field, the existing mechanisms for coal, oil, and farm products could continue to be used, with necessary legislative changes as altered needs might require, but similar mechanisms do not exist for industrial products. Indirect controls for industrial commodities might be fashioned along the lines now made use of to stabilize the prices of agricultural products, or along other lines, determined in either case by a detailed study of the complex industrial problems. The operations in the commodity field, likewise, would need centralization through some new central authority, establishing policies for all agencies operating in that field.

With the various agencies of the Government properly marshalled, the full effort may be made to detect and control the causes underlying price fluctuations. Thus, the recognition that wartime expansion in

demand may produce bottlenecks in the machine tool and equipment industries, and in trained workers, for example, might lead to arrangements for increased industrial production in many basic lines, backed by R. F. C. loan or purchase agreements. This would build up reserve supplies of primary or secondary war materials, both as a device for supporting industrial activity during the first impact of wartime depression, and as a means for subsequent indirect control of commodity prices by eliminating bottlenecks ahead of the need. So, too, the records of fact-finding agencies could be used to determine if and when it was desirable to place export quotas upon excessive exports.

Therefore, in addition to the four new centralizing authorities, to establish consistent policies and coordinate programs in the financial, utility, construction and housing, and commodity fields, an over-all super authority would be needed to centralize policies and unify operations in all four fields. Such a structure of unified direction of the existing and necessary new authorities would make it possible to use indirect controls to cope with the economic problems produced by wars in foreign countries and by the new peace with far greater effectiveness than during the days of 1914 to 1920.

The Direct Method of Controlling Prices. The direct control of prices may be effected by legislative action with accompanying compulsory means of enforcement or by voluntary cooperative movements having legislative approval and centralized direction.

If it is determined that direct price control must be resorted to, it seems to be the better view that, at least until such time as this Country might become a party to a war, direct price control should be limited to the establishment of maximum prices by action which is voluntary in nature. The fixing of definite prices is probably not desirable.

With respect to agricultural products the Government might continue to utilize the existing machinery to set upper limits of agricultural prices as the emphasis is shifted from the present minimum to maximum price control. However, with respect to the direct control of prices of industrial output, new structures, based as far as possible upon the framework which is now in existence, would, as in the case of indirect control, have to be created.

Thus, the trade associations which now exist for nearly all industries is an available framework for peacetime as well as wartime application of price control. Commodity committees composed of representatives of industry, of the Government, and of the consuming public, could be set up in each industry to parallel trade association allignments. The commodity committees could be used to determine fair maximum prices for the voluntary application of the trade associations. One policy-forming

Price Control Authority to coordinate the work of the commodity committees would probably be necessary.

Probably it could also be arranged so that foreign belligerents would make their purchases in the United States through such agencies as would enable our Government to maintain a liaison with them, the commodity committees, and trade associations, thus making available full information to the policy-forming committee for the determination of price control policies. Any additional administrative or legislative measures necessary to make price control measures more effective would thereby be brought to light.

The Choice of Methods. In meeting any coming emergency policies should be chosen that will not only work in the emergency but will smooth the period of transition to peace without again bringing about another great post-war depression. In this light it appears that the indirect method of control should receive the greater emphasis, with direct control as a subsequent and supplementary measure to be employed only when it is determined that the indirect method is not sufficiently effective.

As heretofore stated, the Government of the United States is in a much better position today to maintain order in its economy than it was at the time of the World War. If full advantage is taken of the lessons of the World War and the post-war depressions, and of the achievements of this Administration, the Government should be able to meet quite soundly the problems that would be posed by a new war and a new peace without endangering the mechanisms of economic adjustment built up with such great effort during the last few years.

The positive control of prices would tend to disrupt the existing marketing systems and business structures, and would arouse resentment on the part of individuals. In so far as it would lead to suppression of democratic action and limitations on individual freedom, it would create resentment on these grounds as well. The more extreme and rigorous the measures used in wartime the greater the danger of complete sweeping away of control after the war. This was the post World War reaction to wartime regimentation, and it expressed itself in the cry of "back to normalcy." The more that the administrative organs already developed or other indirect methods like them can be effective in dealing with emergency conditions and can be used as continuous agencies to smooth the transition back to peacetime, the less the danger will be of New Deal gains to date being lost as a result of wartime measures.

Further Study Recommended. It is recommended that the problem be explored further and in greater detail either by this committee, enlarged so as to include representatives of all departments and agencies

having an interest or responsibility in these matters, or by a continuing permanent committee established to deal with the general problem. It is also recommended that the Industrial Mobilization Plan of the Army and Navy, as adopted in 1936, which does not attempt to enlist the services that could be rendered by the agencies already described, be referred to the new continuing committee, or the National Resources Committee, for re-examination and reformulation. Such review could proceed on the basis of administration-wide cooperation of all agencies involved, with due regard to peacetime consequences as well as wartime effectiveness and to economic, political, and social considerations. The Plan, devised thus far solely from the military and wartime point of view, would as a result be materially strengthened and broadened to include economic and social interests as well.

Respectfully,

JAMES W. MORRIS,
Assistant Attorney General.

GOLDEN W. BELL,
Assistant Solicitor General.

ALEXANDER HOLTZOFF,
Special Assistant to the Attorney General.

PSF
Justice
Cummings

Mary to file

THE ATTORNEY GENERAL
WASHINGTON

September 29, 1938.

My dear Mr. President:

I received your memorandum about Presiding Judge McClelland and enclose a copy of a letter I have written him today. "Let the galled jade wince, our withers are unwrung."

Sincerely yours,

Homer Cummings

The President,
The White House.

HSC:MOB

September 29, 1938.

My dear Judge McClelland:

For sometime I have been intending to speak to you about the status of the Presiding Judgeship in your Court, but one thing or another has intervened and I thought I would drop you a note on the subject.

The President takes the view, in which I concur, that the Presiding Judgeship should not be permanent in character but that changes should be made from time to time so that the principle of rotation might in some degree be established. Under these circumstances he has in mind making a change not later than the first of November. I felt, however, I ought to write you about this so that you might know what was in the offing and not be caught by surprise.

I think it is quite unnecessary for me to tell you of the high regard the President and I have for you and our feeling of deep appreciation and admiration for the distinguished service you have rendered throughout your career on the bench and especially since you became the Presiding Judge.

With warm regards and very best wishes, I am

Sincerely yours,

Signed
HOMER CUMMINGS

Honorable Charles P. McClelland,
Presiding Judge,
United States Customs Court,
201 Varick Street,
New York, N. Y.

BSF
Justice
Cummings

Office of the Attorney General
Washington, D.C.

October 7, 1938.

File
Personal

PERSONAL AND
~~CONFIDENTIAL~~

The President,
The White House.

My dear Mr. President:

Yesterday I had a rather trying interview with Judge McClelland, of the Customs Court. He came down at his own suggestion following the receipt of my letter.

With regard to the position as Presiding Judge, he says that anything you and I want will, of course, will satisfactory to him, but he would be pleased if the change could come about as a result of his own voluntary suggestion. He plans to write a letter to me suggesting that he be relieved of the duties of Presiding Judge and that you designate someone else.

Incidentally he told me that when he first got my letter he thought he would retire from the bench altogether, but he hardly liked to take that step. This gave me an opportunity to talk to him very frankly on the subject and I went over many aspects of it. As above indicated, it was a rather painful interview. He said if he gave up his work on the Court, to which he had devoted so many years of his life, he would have nothing on earth to do and he did not think he would live six months. I may say that he is looking exceedingly well and for a man of his age is amazingly vigorous.

I asked Judge McClelland why he did not retire from the bench, keep an office in the building, and do work when called upon from time to time, and also take a long vacation. He said he could not leave home. He then went into some details of his private life. His wife is only five months younger that he is and for ten years she has been an invalid and her mind is practically gone. He says that no power on earth would take him away from her. We talked for a long time and it is still possible that instead of merely giving up the Presiding Judgeship he will retire altogether.

Judge McClelland said I could assure you that in any event he would retire in ample time so that you might have an opportunity to appoint his successor.

Sincerely yours,

Homer Cummings

file personal

PSF
Justice
Cummings

THE ATTORNEY GENERAL
WASHINGTON
October 5, 1938.

My dear Mr. President:

Last Monday night Cecilia and I went to the opening of the new play "Abe Lincoln in Illinois". It is a fine and moving production and was excellently presented.

I was very much diverted by the opening scene of the third act which stages the rebuttals of Lincoln and Douglas in one of their famous debates. I did not think the words put in the mouth of Douglas were exactly fair to him, but, nevertheless, the speech of Douglas sounded for all the world like Senator Burke talking about the Supreme Court plan and the Lincoln reply sounded like one of your speeches on the same subject. The modern implication was so obvious that the audience burst into delighted laughter at frequent intervals. I am almost persuaded that the author of the play was a New Dealer taking malicious delight in doing a good job on modern conservatism.

Sincerely yours,

Homer Cummings

The President,
The White House.

File personal

THE ATTORNEY GENERAL
WASHINGTON

October 13, 1938.

My dear Mr. President:

As perhaps you may have noticed in the newspapers there was held a so-called institute in Washington, D. C., for the study of the new Rules of Civil Procedure. The first session occurred October sixth, and succeeding sessions were held morning and evening during the rest of the week. Roughly speaking eleven hundred lawyers were in attendance. I opened the session with an address on the subject of the new rules and the way in which the reform was brought about.

Moreover, similar institutes have been held in many of our leading cities. The lawyers are intensely interested and the lectures, of course, deal with the new rules and their application. Lawyers throughout the country are eagerly scanning the new rules, which, as you will recall, went into effect on the sixteenth of September. No matter what else we have done, or may have failed to do, at least we have set the whole legal profession studying law.

Sincerely yours,

Homer Cummings

The President,
The White House.

file personal

THE ATTORNEY GENERAL
WASHINGTON

November 2, 1938.

My dear Mr. President:

Enclosed herewith you will find copy of an address I expect to deliver in Greenwich, Connecticut. It will also be carried on a state wide radio set-up.

You will recall that former President Hoover recently spoke in Hartford. I thought you might be mildly amused by my references to him, which you will find on pages four and five.

Sincerely yours,

Homer Cummings

The President,

The White House.

FOR RELEASE
AFTER DELIVERY

"AMERICA MUST NOT TURN BACK"

Address by

HONORABLE HOMER CUMMINGS

ATTORNEY GENERAL OF THE UNITED STATES

Delivered at

Greenwich, Connecticut

on

Saturday, November 5, 1938

at 9:30 P.M.

"AMERICA MUST NOT TURN BACK"

by Homer Cummings

Attorney General of the United States.

Mr. Chairman, Ladies and Gentlemen:

It is gratifying to return to Connecticut to salute old-time friends and to have the privilege of discussing issues which so deeply concern my home state, and the country of which we are a vital part.

The Democratic Party has given to Connecticut many of her most distinguished Governors. To the list of illustrious sons, we have, in these later years, added another name. I salute with affection and respect Governor Wilbur L. Cross, an accomplished scholar, a wise leader, a truly great man - one so clear and fair in all his dealings, so imbued with the spirit of service, so secure in the affections of the people, so successful in the administration of his great office, that I make no doubt that the verdict of Connecticut will be "Well done thou good and faithful servant." To him and to our distinguished senior Senator, Augustine Lonergan, whose years have been full of honor and useful public service, and to those who are their colleagues upon the ticket, I extend my sincerest wishes for success in November.

Next Tuesday the people must choose once more between the Old Deal and the New Deal. In the past six years we have carved our way through a veritable wilderness of social and economic problems. In fact we have come so far that we have almost forgotten the dark days of 1932. I sometimes think that Americans forget too quickly. Of course, it would avail

us nothing to recur constantly to that period of wreckage and despair. On the other hand, it would be unfortunate for us to forget those experiences and the bitter lessons they taught if by so doing we became insensible to the need of rearranging our disordered social and economic house; and supinely waited for disaster to overtake us again.

The election of 1932 swept into power a political party imbued with a liberal spirit. It was an unentangled party and owed no allegiance to Wall Street or to any form of privilege. No one owned the party but the people. The great reforms of that first four year period were reflected in business indexes, in car loadings, in bank deposits, in prices and in wages. But, more important, they were reflected in the minds and hearts - yes, and even in the faces - of the people. Slowly, steadily the upturn began. In very truth the American people were getting a New Deal.

Then came what I suppose was inevitable. As business began to prosper, as stocks rose to higher levels, as bank closings became a thing of history, as foreclosures ceased, as it became clear that we were really turning the corner to prosperity, the forces of reaction grew less humble and more vocal. They arose from their bended knees and demanded that the Government cease interfering with business. They insisted that such matters as the elimination of sweatshops and child labor be sidetracked. This was no time, they urged, for social reform, this was no time to protect the right of labor to bargain collectively. After all, we were coming into a prosperous era again and that was sufficient. Why bother with old-age and unemployment insurance? Why regulate public utilities and prevent stock market frauds? Why bother to insure bank deposits? Why proceed against monopolies? Why do anything? Why not let well enough alone?

Not only were the dark days of 1932 forgotten and their lessons ignored, but the selfish short-sighted interests that Roosevelt had rescued took courage to begin an assault upon him, the like of which has not been known since the days of Washington, Jackson and Lincoln. Moreover, they showered the government with thousands of unnecessary suits, enmeshed the administration in litigation, invoked the injunctive power of the courts, and strove by legal action to wreck the very machinery,which had given them, and all the rest of us, renewed life and hope. It was a veritable conspiracy to stall action by paralyzing the government and its various agencies. Who can doubt that one of the major factors in the recent temporary recession was the unseemly struggle to sabotage reform? When the events of that period are recorded and fully understood they will reveal an amazing chapter in American history.

Many of our most vocal statesmen, who criticize the New Deal, and can see no virtue in it, are undoubtedly sincere, but they are strangely lacking in vision. They seem to be incapable of grasping the fact that America is a great, vital and growing nation; and that which was sufficient a decade ago is inadequate now. They dread change, they fear new things, they think in terms of the past, they live in the twilight of an inferiority complex. They remind me of the story of the U. S. Patent Commissioner back in the 1850's who made a formal report of the business of his Department and solemnly recommended that the Patent Office be abolished on the ground that everything that could possibly be invented had already been invented. He was the Herbert Hoover of his day. Since that time we have known the telephone, the electric light, the bicycle, the automobile, the airplane, the radio, the moving picture, and countless other devices that are part of the daily life of our people.

While the New Deal has presented a program of constructive action, those who have opposed it have been noticeably inarticulate. What is the substitute program of the Republican Party today unless it be undo what has been done - to retreat? I defy anyone to define it in any other terms.

Those who speak for the Republican Party almost without exception advocate a program of reaction. Their platform is "Down with Reform and back to the days of McKinley and Harding." To this slogan they all do reverence with the exception of Herbert Hoover, who, like the voice of the pelican in the wilderness, plaintively suggests an amendment like this: "Also please! back to the days of Herbert Hoover." Recently Mr. Hoover suddenly reappeared in Hartford, for all the world like Banquo's ghost at the banquet table of the Republican Party. He exhibited his political wounds, received in the house of his friends, and appealed for vengeance. The consternation in Republican circles was apparent from one end of Connecticut to the other. Oh! How they had hoped that we had forgotten about Herbert Hoover!

Shades of 1932! It is as though a perturbed spirit had arisen from the financial and social ruin of that period to warn the living that the cause of death is the way of life. Mr. Hoover suggests that the country might well take the next two years to "stop, look and listen." Now there is a program of progress for you! Stop what? Presumably Roosevelt. Look at what? Listen to what? Presumably Herbert Hoover.

Mr. Hoover asserts that whatever the New Deal has accomplished in the way of preventing business abuses is all very well, but he hastens to add that "We do not need to pull down the temple of liberty to catch a few cockroaches in the basement." Assuming that this is the language of statesmanship and that Mr. Hoover is an authority on entomology, I still inquire,

what parts of the temple of liberty have been torn down? He fails to particularize. That there were bugs in the basement he admits. But I am sure that they were less like roaches skipping harmlessly over a marble floor, than like termites secretly undermining the foundations.

Yes, there were termites and plenty of them: child labor, sweat shops, industrial strong-arm methods, long hours of labor, starvation wages, fraudulent stock schemes, closed banks, disillusioned youths, homes and farms sold under foreclosures, insecurity, poverty, hunger and despair. We have spent the last five years stamping out these evils, the necessary work is still going forward; and the temple of liberty still stands.

But President Roosevelt is equally concerned with that other temple which is without turrets and columns and marble floors -- the modest home of the average American family. He is determined that our citizens be properly housed, clothed, fed, and that they be given an opportunity to make a living and be afforded some real measure of security. To that cause he is devoting his great energy, his high intelligence and his understanding heart.

Mr. Hoover asserts in his Hartford speech that we must have "new and genuine banking reform." This is a most amazing utterance, coming as it does from the man who presided during the financial collapse of 1932. Those who stood amid the wreckage of the Hoover administration will recall that 6,067 banks had been forced to close their doors with a resulting loss to countless innocent people. Money went into hoarding not only in safe deposit boxes but in mattresses and in holes dug in the cellar.

Nowadays the people who come within the protecting folds of the new banking laws do not have to lie awake nights worrying about their deposits.

Mr. Hoover says, "We need to obtain better housing." He speaks as though he were totally unacquainted with the activities of the Federal Housing Administration under which program 1,300,000 homes have been either built or repaired. In addition to this 800 million dollars have been allocated to slum clearance projects under the U. S. Housing Authority. And let me say, that if existing laws need betterment or clarification it would be wise to entrust the work to the friends of such laws and not to those who scoffed at them when they were first proposed.

Much is made of the public debt. We are dejectedly informed that we are being led to bankruptcy. We are warned that our children are going to have to pay for the profligacy of today. Our critics have been extremely careless in talking about this matter of the public debt. They have overlooked entirely the investments which have increased the wealth of the country and which will return bigger and better dividends as the years go on.

If a business establishment decides to build a new plant it may have to borrow money for that purpose. While the borrowed money is a debt, the building which it erects is an off-setting asset. In the Federal Government our system of bookkeeping is entirely different. When we borrow money to create a permanent improvement our budget shows the indebtedness, but it does not show any corresponding allowance for the asset thereby secured. This is the way the Government books have been kept from time immemorial. The money

borrowed is not wasted; it is put to a useful purpose. Certainly it was not waste for the Federal Government to grant 45% of the cost of financing the construction of the Greenwich Fire and Police Department building, the Municipal Incinerator, and the addition to the High School. I doubt if there is a person within the sound of my voice who is not proud of these improvements and glad they were made. The same observations could be made with reference to the outright grants to the Town of Greenwich, totaling $534,000, which went into improvements in the local schools, sewers, highways and parks. But let us take another illustration. In this delightful town of Greenwich, we have an excellent post office. It cost, to be precise, $149,921.58. That sum, like the others mentioned, is part of Uncle Sam's debt. But nowhere on Uncle Sam's balance sheet is there any item to show that we still have the Post Office and that it is worth a lot of money to Greenwich, to Connecticut, and the Government of the United States. So far as the books show the money might just as well have been dumped into the sea.

Almost two billion dollars have been expended in the work of the Civilian Conservation Corps. Who is there that objects to that? Apart from the fact that this sum represents a human investment in young American manhood, involving almost two million boys, the outlay has produced tangible capital assets. Well over a billion trees have been planted. Sixteen million acres of land have been reforested. The boys have built 100,000 miles of roads and trails, 65,000 miles of telephone lines, 4,000 fire lookout stations. The man power and materials have been furnished for a nationwide erosion control program. They have built a chain of wild life refugees, and four million check dams in streams and rivers. Was that money wasted? Did we get nothing for such expenditures? On the contrary it was a wise

investment and we would no more think of wiping it out than we would think of destroying the Post Office in Greenwich.

Moreover these and similar investments have undoubtedly contributed to the upward climb of business and the increase in the aggregate national wealth.

In short, we have rescued a people in despair by investing in the future of America. And as a final answer to those who affect to believe that our credit has been impaired let me remind you that our national credit never stood higher than it does today, and the American dollar is the soundest monetary unit on the face of the earth.

And now, one more word. We should thank God that we live in a country which is at peace with the rest of the world. How pitifully mean and small appear our political bickerings when we consider the plight of people in other lands. Innocent noncombatants are slaughtered by the thousands, victims of the unspeakable horrors of modern warfare. Progress is halted and civilization falters, in the face of war or the threat of war. In many countries millions of men and women are denied the natural freedom which is the craving of all human hearts. The right to think, to speak, to criticize, to move about, and to breathe the air of freedom - ponder what it means to live without these priceless things. Sheer brute force is loose in the world. Millions of people are persecuted because they are of a particular race or a particular religious belief. Today the United States stands out among the countries of the world as the testing place, the proving ground, the ultimate hope of democracy. Every rumbling of war should be a warning to the people of this country to bring democracy to its highest working efficiency. We have come a long way in these past five and a half years but much remains to

be done. The time in which we will be permitted to do it is all too short. Let us bend ourselves to the task of putting our house in order and making our civilization so strong, so fair, so just, so powerful, so prosperous, so happy, that the waters of discontent and the floods of alien propaganda will beat against it in vain.

A few short weeks ago the President addressed to certain of the world powers a message which will go down in history not only as a great state document but also as a great human document. The peace-loving people of the world took heart again. The American people realized more than ever that there is in the White House a man who loves peace and is the foremost advocate of friendliness and fair dealing among the nations of the earth. They know too that that man is a realist, that he is not blind to the fact that we live in an armed world. Our country is the richest galleon that ever sailed the seven seas. It carries not only untold wealth, which is the envy of the buccaneer nations of the world, but it carries a far more precious cargo - the rights of a free people and the hopes and ideals of Democracy. That ship and its cargo must be protected at all costs. No more heartening message could go forth to the friends of democracy, at home and abroad, than a verdict in November that the American people propose to uphold the hands of their beloved leader, the foremost citizen of the civilized world, President Franklin Delano Roosevelt.

PSF
Justice
Cummings

THE WHITE HOUSE
WASHINGTON

[redacted]

November 15, 1938.

MEMORANDUM FOR

THE ATTORNEY GENERAL

FOR PREPARATION OF REPLY
FOR MY SIGNATURE.

F. D. R.

Mr. Justice Ewalt
High Court of Australia

[illegible] San Antonio Av.
Alameda. Cal.

HIGH COURT OF AUSTRALIA.

JUDGES' CHAMBERS.

Personal Confidential

as from
2141 San Antonio Ave
Alameda
Cal.
Nov 11.

Dear Mr President

En route back to my home in Australia, I have written down a few notes about the present position in the Supreme Court of the United States: they are the result of my mere glance of affairs "from the inside" at Washington & elsewhere. They are intended, merely by way of suggestion, for your confidential

permit at a time when you are beset by many other problems, but none perhaps of great importance.

I feel it my duty to make the observations before I leave this country, after a three months stay, during which I have endeavoured to make some study of social political economic & legal tendencies and have come to the realization that, but for your genius of leadership & inspiration, the country would be in a desperate plight indeed.

Please don't bother to acknowledge this letter. If it is of value, that will be my thanks. If it is not, the intention is still the same.

Yours very sincerely
H. V. Evatt

[Enclos

Confidential: for the President alone

HIGH COURT OF AUSTRALIA.

JUDGES' CHAMBERS.

The Supreme Court at Washington is at one of the most critical stages in its amazing history. It is generally assumed that what is usually called the 'Liberal' group, but which is, perhaps, more accurately described as the group which favours a progressive interpretation of the Constitution, will predominate from now onwards. I believe this is a profound mistake.

A careful examination of the recent decisions will reveal that several of the most important 'progressive' decisions of the Court were reached through a temporary and accidental combination of judges who differed (and still differ) sharply in their method

of approach to constitutional problems. For instance no one could fairly assert that Hughes, Roberts, Brandeis and Stone are to be grouped as convinced progressives, although one of them, perhaps two of them, favor a progressive interpretation. The addition of Black and Reed is already causing further complications. There may be as much danger in an Hughesish radical interpretation as in an Hughesish reactionary interpretation.

What the Court and the country needs now is that the new appointee vice Cardozo will have sufficient powers of leadership, of persuasion, of imagination, and of learning to restore unity, if not to cause union, among the loose group of progressives now on the Court. The appointee must have

a social outlook which is in accordance with the general aims and ideals of the supreme executive of the nation. He should have a very close knowledge of the Court's history and of its practice. He should have, if possible, the general confidence of the legal profession by the law schools: so much confirmation by the Senate will be certain.

After a pretty thorough discussion with very many of the Bar & the law teachers, and with some knowledge of the affairs of the Court itself, I would say that Frankfurter fulfils all the prescriptions: that I know of no one else who does: and that his leadership is vitally necessary if some of the important trends of recent years are not

to be whittled away by
reactionary construction aided by
super subtle distinctions from
one fraudulent and open defiance
of previous decisions from
another.

A.L.

file personal

PSF
Justice
Cummings

THE ATTORNEY GENERAL
WASHINGTON

November 22, 1938.

PERSONAL ~~AND CONFIDENTIAL.~~

My dear Mr. President:

Today Congressman Marvin Jones called to see me. He is very desirous of being appointed to the United States Court of Appeals for the District of Columbia. He is largely relying upon what he asserts are assurances given him by you some considerable time ago.

I gather from his conversation that he might seek an interview with you at Warm Springs. I thought I would drop you this note so that you might have in mind what his purpose is likely to be if he asks for an appointment.

Sincerely yours,

Homer Cummings

The President,
The White House.

file PSF Justice Cummings

Homer Cummings Leaves Record of Getting Big Things Done Well

RETIRES IN JANUARY AFTER SIX YEARS AS ATTORNEY GENERAL

His Accomplishments as U. S. Legal Chief are Mainly Technical.

ALL CITIZENS AFFECTED

Justice Department Recognized as One of Most Efficient U. S. Bureaus.

By STEPHENS RIPPEY
(Sunday Post Washington Correspondent)

WASHINGTON, Nov. 27.—Homer S. Cummings, of Stamford, who retires in January as attorney general of the United States, may or may not go down in history as one of the country's great attorneys general, but one thing is certain—he will leave his mark.

The question of relative greatness, which is largely academic anyhow, can well be left to future historians. For the present, it may be referred to the "So What?" department. If there are some who wish to cavil at the record of the tall, genial and usually smiling attorney general, let them do so. But no observer who tries to be objective can deny that Homer Cummings will leave behind him in the Department of Justice a record of great things accomplished.

Accomplishments Are Technical

It isn't easy to get over to the general public the great things which have been accomplished in the department since Stamford's leading citizen has been at its helm, for the accomplishments are largely of a technical nature and are difficult for the man in the street to understand. Yet almost every one of these accomplishments bears directly on the lives of the everyday citizen; for the most part they were designed for his protection and happiness, even though he may never have heard of them.

No one would contend that Mr. Cummings' record is perfect. Mr. Cummings least of all. He has made mistakes, as have all attorneys general. But even what now looks like his greatest mistake—the Supreme court reform bill—has economic

S. 1938, forbidding the hoarding of gold; the executive order of April 20, 1933, prohibiting export of gold except under license of the secretary of the treasury; the act of May 12, 1933, conferring on the President the power to reduce the gold content of the dollar, and others. On the merits of these measures, there probably will be debates for years, but they all entailed a tremendous amount of work.

Appeared Before High Court

When the four test cases involving the validity of the gold statutes were reached, Mr. Cummings personally appeared before the Supreme court. These cases were of the utmost importance to the government. It was generally agreed that an adverse decision would cause a panic. Mr. Cummings put everything he had into the argument. Reporters who listened to it were greatly impressed, and he won his decision, by one vote.

When Mr. Cummings came into the Department of Justice he found it had been allowed to deteriorate as an administrative agency. It needed an overhauling. This was done and the department is generally recognized in Washington as one of the more efficient governmental agencies.

To Mr. Cummings' everlasting credit will stand his uncompromising refusal to allow the Federal Bureau of Investigation and the Bureau of Prisons to be taken over by the patronage-starved Democrats, who swarmed to Washington with the new administration. The jobs of John Edgar Hoover, director of the FBI and Sanford Bates, director of the Bureau of Prisons, were much sought after by county sheriffs, town constables, chiefs of police and those with no experience in the law enforcement and prison administration fields. Not only would these particular jobs have been wonderful things for those who had been without patronage for so many years, but the entire bureaus would have furnished more jobs for the faithful.

Stood Firm Against Pleas

But Mr. Cummings stood in the doorway and turned down all and sundry who wanted to interfere with the working of these two bureaus, the heads of which were acknowledged leaders in their fields. Despite threats, pleas and raillery he stood firm, with the result that today the FBI stands out as probably the most efficient law enforcement agency in the world and the Federal penal system is a model of efficiency and humanitarianism.

Not only did Mr. Cummings refuse to permit anyone to interfere with Mr. Hoover and Mr. Bates (the latter has been succeeded by James V. Bennett, who was Mr. Bates' assistant when Mr. Cummings took charge and who has continued the

Leaving Top U. S. Legal Post

HOMER S. CUMMINGS

have been made available to the Department of Justice.

Parole System Improved

Still interested in crime, Mr. Cummings, in December, 1934, called the first national conference on crime. At this conference plans were evolved for a general program of crime control throughout the United States. In 1935, he turned his attention to the problems of parole, probation and pardon, meanwhile getting additional money from Congress to strengthen the Federal parole system by increasing the number of officers to watch over the parolees.

When Mr. Cummings completes his

attitude of the Supreme court toward what the administration regards as progressive legislation. That sincerely can be denied, for the court obviously "got religion" as a result of the court fight. Two of its conservative members left, two remained, but the administration won over the remainder, to all external appearances, at least.

Some Good Points Seen

The court fight, while devastating to the Democratic party, at the time at least, had its good points, some of which were not expected by Mr. Cummings when he brought it forth. It almost did away for time entirely

mind, Mr. Cummings, in 1935, intervened to prevent a gross miscarriage of justice involving Edward J. Parisio, son of Dr. A. M. Parisio, was known Derby physician. The boy was a student at National University Law school here when he and a companion, both of whom were living in a fraternity house, were arrested, indicted, tried and convicted on a charge of arson, arising out of a fire which occurred in the house. They were sentenced to serve two to nine years in Federal penitentiary, but their cases were appealed to the U. S. Circuit Court of Appeals here.

Got to Bottom of Case

The boys had been convicted on circumstantial evidence and insisted they were innocent; in fact, that they had been out of the city at the time of the fire. While the appeal was pending before the court of appeals, young Parisio obtained an interview with Ugo Carusi, executive assistant to Mr. Cummings. For two hours he told Carusi his story. Impressed, Mr. Carusi mentioned it to Cummings, who designated Alexander Holtzoff, one of his special assistants, to get to the bottom of it.

Then followed interview after interview between the youths, Holtzoff and other Department of Justice officers. The FBI was called in and made a thorough check of the evidence. Young Parisio was grilled for hours at a time in an effort to shake his story. Finally he convinced the department skeptics that he was telling the truth. What actually had happened was that the District of Columbia police, anxious to get a conviction, had mishandled the evidence in such a way that Parisio and his companion appeared guilty. Added to this was the fact that his case was poorly presented to the trial court.

Mr. Cummings kept in personal touch with his subordinates, but did not interview Parisio. He read the transcript of testimony at the trial and personally interviewed some of the witnesses who had testified against the Derby youth. He became convinced that Parisio and his companion had been wrongfully convicted and prepared a confession of error which was filed with the Circuit court. This brief declared that the attorney general was "satisfied that the defendants are innocent of the crime for which they were convicted." the court accepted the confession and the stigma was removed from the youths.

Summing up, it may be said that Mr. Cummings' great forte is administration as distinguished from brilliant legal work. Yet his legal knowledge and ability unquestionably are well above average. He has the faculty of collecting about him numerous

No one would contend that Mr. Cummings' record is perfect. Mr. Cummings least of all. He has made mistakes, as have all attorneys general. But even what now looks like his greatest mistake—the Supreme court reform bill—has elements which have resulted in constructive developments. These developments may have been a byproduct and unexpected, but they happened just the same.

On the credit side of the ledger can be placed such things as strengthening the Federal Bureau of Investigation, upholding and encouraging highly constructive work already begun in the Bureau of Prisons, a thorough reorganization of the whole Department of Justice, persuading Congress to enact most of a comprehensive crime control program and, finally, what he and his friends consider his real monument—and the most difficult for the laymen to understand—the job of reforming the rules of practice of the Federal courts throughout the country.

Long Grind for His Staff

In addition to these things, the Department of Justice staff under Mr. Cummings was engaged in defending an unprecedented number of suits against the government, brought about by the NRA, the AAA, and a multitude of other alphabetical agencies. The pressure on the government lawyers during the six years Mr. Cummings has been attorney general has been terrific. Long into the night the lights at the department burn for attorneys studying intricate legal problems. The grind has not yet let up. Mr. Cummings himself has taken a large personal part in defending these suits and has appeared before the U. S. Supreme court to argue some of them.

Despite the pressure of national affairs, Mr. Cummings never has lost touch with Fairfield county. He never has forgotten that his official connection with the Democratic party—as distinguished from the Democratic administration — has been as Democratic national committeeman from Connecticut and as state delegate. Mr. Cummings has found time to dabble in local politics, to become concerned about such things as recommending men for postmasterships at Greenwich and Stamford.

Derby Youth Freed

Likewise, he found time during the busy days of 1934 and 1935 to listen to the tale of a Derby youth who had been wrongfully convicted of a felony in this city and was about to be railroaded to prison, with the result that the Department of Justice, as prosecuting agency, withdrew from the case, filing a formal confession of error in court.

But, first let's take a look at some of the official doings of the attorney general, beginning with that dreary March 4, 1933, when the nation seemed at the crossroads, and perhaps a little beyond. On that day, sitting at a table in the Library of Congress, he wrote out in longhand his first formal opinion for the newly inaugurated President. It was a slip of paper expressing the opinion that a long forgotten war statute gave the President power to declare a bank holiday. There are many who didn't agree with the attorney general's opinion and still don't, but it was sufficient to give President Roosevelt a peg on which to hang his bank holiday proclamation.

Then followed a long string of emergency legislation, with most of which Mr. Cummings had a hand in formulating. These included the Emergency Banking act of March 9, 1933; the executive order of April [illegible]

[illegible] was why Mr. Cummings refuse to permit anyone to interfere with Mr. Hoover and Mr. Bates (the latter has been succeeded by James V. Bennett, who was Mr. Bates' assistant when Mr. Cummings took charge and who has continued the policies inaugurated under Bates) but he encouraged them to improve their bureaus and fought for increased appropriations to strengthen them.

The FBI was given additional needed legislation, chiefly through the efforts of Mr. Cummings, who personally "lobbied" on Capitol Hill. Altogether about 20 separate crime control laws were drafted and sent to Congress. Not all passed, but those which were adopted included the Federal kidnaping law, the fugitive felon law, the national firearms act, the national bank robbery act, the extortion act, the national stolen property act and the anti-racketeering act.

Anti-Criminal Drive

It was found that agents of the FBI had no power under the law to carry arms, although they did so. Neither did they have power to make arrests. These defects were remedied by additional legislation, with the result that the greatest anti-racketeering and anti-criminal drive the country has seen was started. The average citizen is familiar with this work, for it represents the only spectacular work of the department, the round-up of John Dillinger, Machine Gun Kelly, and a host of others.

Greatly increased appropriations were obtained for the FBI so it could take on additional men—the standards for whom are higher than any civil service standards. Modern guns and equipment were purchased so the G-men would have at least an equal chance with criminals and a thorough training program for FBI men was inaugurated.

Personal attention was given by Mr. Cummings to development and improvement of the Federal penal system. Mr. Bates and his successor, Mr. Bennett, took the position that men and women sent to jail should be returned to society in such shape that they would have a chance to go straight. A comprehensive system of prison employment was started. After long fights in Congress, larger appropriations were obtained so prison guards and officials—officially called custodial officers—could be better paid and would not have to work a seven-day week. Standards for custodial officers have been raised and the old-fashioned prison "screw" has no place in the Federal penal system.

Penitentiaries Improved

A series of Federal prison riots drew attention to the inadequacy of the physical plant and Congress appropriated more money. A new penitentiary was constructed near Lewisburg, Pa., and various other institutions were built, including a hospital for the criminal insane and various reformatories and jails. The program is still under way, the new jail now being constructed near Danbury being a part of it. The number of Federal penal and correctional institutions has doubled during the last six years.

It was realized, however, that not all criminals could be rehabilitated. Some place was needed to take care of the "tough guys", called recidivists by penologists. Again Mr. Cummings took a deep personal interest in this problem and intervened with the War department, pleading that this department give up its prison on Alcatraz Island, off San Francisco. The story of Alcatraz, the fireproof prison, has been told and retold, but it is safe to say that if Mr. Cummings had not gone to bat for his bureau chiefs it never would [illegible] the problems of parole and pardon, meanwhile getting additional money from Congress to strengthen the Federal parole system by increasing the number of officers to watch over the parolees.

What Mr. Cummings considers his supreme achievement, however, was in getting Congress to enact a law giving the justices of the Supreme court authority to prepare and promulgate uniform rules of practice in the Federal courts. This reform had been urged for 25 years by the American Bar association and many others. The Bar association had finally given up the fight as a hopeless task, when Mr. Cummings, making a speech in New York on March 14, 1934, revived it. He lobbied some more and within the incredibly short time of 90 days Congress had passed the law.

A distinguished committee was appointed by the Supreme court to draw up the rules. This job took three years. When this had been done the court went over them and they finally were promulgated to become effective Sept. 16, 1938. Consequently, these new rules are only now being tried out in the Federal courts of the country.

Red Tape Eliminated

Solicitor General Robert H. Jackson recently said that in getting the new rules adopted Mr. Cummings had "helped the law to catch up with the times." Briefly, the purpose of the rules is to eliminate as much red tape and legal technicality as possible from the Federal judicial system. This system had grown into a hodge-podge because each court was permitted to follow the procedure of the courts of the state in which it was located. Under the new rules, the trial of cases should be speeded up and there should be far less trickery and advantage through technicalities than in the past.

There have been additional reform measures passed at Mr. Cummings' instigation. Some of these were offshoots of the Supreme court reform bill, which backfired. One of these reform laws permits the attorney general to intervene in any private suit which involves the constitutionality of a Federal law. Another limits the powers of lower Federal courts to issue injunctions declaring statutes unconstitutional. Another gives a right of appeal direct to the Supreme court from federal district courts in cases involving constitutionality of Federal laws. A large number of new Federal judges have been authorized by Congress and probably will be nominated by President Roosevelt shortly after the next session of Congress convenes.

It is said at the Department of Justice that taken together the reforms in the Federal judicial system constitute the most far-reaching reforms since its establishment in 1789.

Court Reform His Idea

The ill-fated Supreme court reform bill is regarded by many as a black mark against Mr. Cummings' record. It is generally contended that the idea was his, but the idea didn't turn out to be altogether happy. In the first place, the arguments Mr. Cummings furnished the President in support of the bill were knocked down almost as soon as they were unveiled. The primary argument was that the Supreme court was overworked and behind in its work. A letter from Chief Justice Hughes to the Senate Judiciary committee summoned this was not so.

At any rate, the court bill rocked the whole nation for several months before it finally was dismembered and buried. Mr. Cummings always has insisted that the bill accomplished its major purpose—a change in the [illegible]

The court fight, while devastating to the Democratic party, at the time at least, had its good points, some of which were not expected by Mr. Cummings when he brought it forth. It showed the need for some reform of the judiciary, and some of the legislation subsequently passed by Congress was aimed at this reform. It brought out a feeling of patriotism in Congress in which Connecticut's two senators, Francis T. Maloney and Augustine Lonergan, shared. They stood against the President in the court fight. It showed that members of Congress could be independent when confronted with a vital interest, and it showed the underlying good sense of the American people who resented an attempt to interfere with the court.

During his administration, Mr. Cummings found time to collaborate on a book—Federal Justice. His co-author was Assistant Attorney General Carl McFarland. The book was a history of the Department of Justice, a detail in which Mr. Cummings was much interested. He also caused to be published, "Liberty Under Law and Administration," a series of lectures delivered at the University of Virginia in 1934.

Urged Monopoly Study

The recommendation of President Roosevelt to the last session of Congress that it set up a committee to study monopoly and the anti-trust laws was almost completely the adoption of recommendations Mr. Cummings had made a year before to the President. During that year there had been surface indications that the President had tossed the Cummings recommendations out the window, but when his message went to Congress the attorney general was vindicated completely.

There have been many rumors that Mr. Cummings was in the "doghouse" so far as the President was concerned, but there is no evidence that any of these ever was true. Mr. Cummings, at his farewell press conference here, described his relationship with the President as "beautiful and perfect."

Mr. Cummings was in the middle of the fight of Connecticut Democrats over patronage in 1934 and 1935. He held many conferences with the two senators and Postmaster General James A. Farley in an effort to compose the difficulties between the old guard and the new, but the fight went on for some time. During this time the two senators accorded Mr. Cummings the privilege of naming postmasters at Greenwich and Stamford, but this was not an altogether happy experience, for he found himself in the midst of local fights and the Civil Service commission did not turn up the right man for one of the jobs.

Wan Fame in Israel Case

The famous Israel case, in which Mr. Cummings, as state's attorney in Fairfield county, prevented an innocent man from being convicted of the murder of the Rev. Hubert Dahms, a beloved Bridgeport priest, was given national attention during Mr. Cummings' incumbency. Brien McMahon, of Norwalk, now assistant attorney general in charge of the Criminal division, had a printed booklet made of Mr. Cummings' now famous charge to the jury in Fairfield county Superior court on May 27, 1934, in which Mr. Cummings detailed the faulty evidence on which Harold Israel had been indicted. The booklet was circulated throughout the country, to all United States attorneys and others, as "an outstanding example of the attitude that should be assumed by prosecuting officers."

Probably with the Israel case in Mr. Cummings' great forte is administration as distinguished from brilliant legal work. Yet his legal knowledge and ability unquestionably are well above average. He has the faculty of gathering about him competent men. Many attorneys on the Department of Justice staff, and many who have been chosen for special work have minds of great brilliance and ability far above the level of the salaries the government pays members of its legal staff.

If greatness consists of learning what needs to be done and doing it; gathering together a group of willing and capable assistants; of gearing a great governmental organization into top speed; of injecting a spirit of humanitarianism into law enforcement and its corollary, prison administration; of wiping out much of the delay and red tape involved in legal procedure; of encouraging subordinates in their efforts to do their jobs better, then Homer Cummings probably can be called great. At the very least, he will rank well above the average of attorneys general of the United States.

File personal

PSF
Justice
Cummings

THE ATTORNEY GENERAL
WASHINGTON

November 30, 1938.

My dear Mr. President:

In considering appointments to the United States District Court for the District of Columbia, it would be well I think to bear certain considerations in mind. This Court is very much behind in its work and needs rejuvenation. Practically all of the Judges on that Court, with the exception of your recent appointee Bolitha J. Laws, are men well along in years.

The Chief Justice, Alfred A. Wheat, was born June 13, 1867. He was, therefore, 71 years of age on his last birthday. Judge Wheat is not at all well. His health has been failing for sometime. He slipped down hill very rapidly after the death of his wife a year or two ago. It was a great shock to him. It has been asserted with apparent authority that he intends to retire as soon as he is eligible for retirement. You will observe that he has passed his 71st birthday, but he has not been upon the bench ten years as yet. His appointment was originally that of Associate Justice and dates from May 3, 1929. He will not, therefore, be eligible for retirement until the third of next May. Should he retire it would create a vacancy that should be filled with great care. The Chief Justice is the administrative officer of the Court, and the Court cannot move much faster than the Chief Justice's leadership permits. Someone should be appointed who is vigorous, active, a good administrator, and inspired with the necessity of pushing forward the work of the Court.

There are, as you know, two vacancies to be filled on this Court already. Should Chief Justice Wheat retire it would make a third vacancy. It is my hope that we may be able to fill these vacancies with a younger group of men than those occupying places on the bench.

Sincerely yours,

Homer Cummings

The President,
The White House.

PSF
Justice
Cummings

THE ATTORNEY GENERAL
WASHINGTON

THE WHITE HOUSE
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November 30, 1938.

My dear Mr. President:

When I was talking to you about Judge Denman I was in error about his age. He was born November 7, 1872, and has, therefore, passed his 66th birthday. He went on the Circuit Court bench February 1, 1935. If appointed to the Supreme Court he would be entitled to retire on February 1, 1945, at which time his age would be 72 years and about 3 months.

Judge Harold M. Stephens was born March 6, 1886, and was, therefore, 52 years of age last March.

Maurice E. Harrison was born August 1, 1888, and was, therefore, 50 years of age on his last birthday.

The last two mentioned are Catholics. I am not sure of Judge Denman's church affiliations.

Sincerely yours,

Homer Cummings

The President,
The White House.

file personal correspondence

PSF
Justice

Norman Thomas
206 EAST 18th STREET
NEW YORK CITY
309

December 2, 1938.

Franklin D. Roosevelt, President,
White House,
Washington,
D.C.

Dear Mr. President:

Thank you for your letter of November 28th.

From what I have heard, I think you are quite right in doubting the qualifications of the man suggested for the Federal District judgship of South Jersey. I also believe Mr. Walker to be an able man and probably fair in matters which do not involve his allegiance to Mr. Hague, but that latter qualification destroys his usefulness, especially at this juncture, and the inevitable suspicion that his usefulness is thus destroyed because of his relations to Mr. Hague is about as bad in the public mind as the truth itself; even assuming that the suspicion is not the truth, as I think it is.

Again may I urge that you would do an enormous service by bolding cutting away, - if necessary both from Mr. Hague and Senator Smathers, and seeking a judge of whose independence there can be no doubt. Wouldn't Senator Smathers, in the last analysis, favor such a judge?

Sincerely yours,

Norman Thomas

Norman Thomas

NT:L

Warm Springs, Ga.,
December 3, 1938.

Dear Homer:-

That is a mighty nice letter of yours and I greatly appreciate it. My only and continuing objection is that you are leaving, for, as I need not tell you, I shall miss you much and the Nation will too.

The only other worry I have is as to the time of your leaving. I know you want me to talk things over with you perfectly frankly. If you retire the fifteenth of January the new Attorney General cannot act until he is confirmed - and there is always the possibility that some bloc, possibly the old bloc in the Senate, will delay and delay, perhaps holding hearings, etc., just to make things disagreeable for me, even though they may know all the time that they will eventually confirm.

On the other hand, if you were to retire on January second, I could fill the place and the incumbent would be holding office until his name was acted on by the Senate. It is harder for the Senate to turn down an existing Attorney General than a mere nominee.

I wish you would let me have your thought on this phase of the matter. Frankly, I have not made up my mind as to who will succeed you.

I am sorry about Cecilia and I do hope she will take care of herself extra well until you can get her South.

Give her my love. I will see you next week.

As ever yours,

Honorable Homer S. Cummings,
Department of Justice,
Washington, D. C.

THE ATTORNEY GENERAL
WASHINGTON

Personal

Nov. 30, 1938.

My dear Mr President and
My dear Friend!

I shall never cease to be grateful to you for the way you dealt with my forthcoming retirement from the Cabinet, at your Press Conference on Nov. 18th...

But then I am so deeply in your debt already that nothing but a general amnesty will ever set me right.

It is my hope that you will let me send in my formal resignation as of January 15th or thereabouts. Will you do this for me?

I want to take Cecilia South. She is not at all well and I am disturbed about her.

The Doctor who is looking after her strongly urges that we go as soon as convenient arrangements can be made.

This is a factor in the situation that Johnson not Lewis for stressed, but it is a very real & vital one.

With affectionate greetings from us both,

Sincerely Yours.

Norman Thomas

To
The President,
White House.

file personal

THE ATTORNEY GENERAL
WASHINGTON

December 9, 1938.

My dear Mr. President:

I thank you most sincerely for your letter of December third, written from Warm Springs.

The arrangement you suggest would be a great personal accommodation to me and, from my standpoint, is a happy solution. I shall be glad to talk over the details with you at your convenience.

As always,

Faithfully yours,

Homer Cummings

The President,

The White House.

December 15, 1938.

Dear Homer:-

That is a very charming and a very true address in memory of Cardozo. And I am glad that on Pages 12, 13 and 14 you step so heavily on the toes of a few of the gentlemen whom you will address.

As ever yours,

The Honorable
The Attorney General,
Washington, D. C.

THE ATTORNEY GENERAL
WASHINGTON

December 15, 1938.

My dear Mr. President:

I wanted you to have the first available advance copy of the speech I expect to deliver in the Supreme Court next Monday in memory of Associate Justice Benjamin N. Cardozo. You will find an autographed copy enclosed herewith. I think you will be especially interested in what appears on pages 5, 8, 10, 11 and from page 12 to the end.

Sincerely yours,

Homer Cummings

The President,

The White House.

IN MEMORY OF

BENJAMIN N. CARDOZO

HOMER CUMMINGS

PSF
Justice

To
The President
from
Norman Rowings

Dec 15/38

AN ADDRESS OF ATTORNEY GENERAL HOMER CUMMINGS, BEFORE THE SUPREME COURT OF THE UNITED STATES, IN MEMORY OF ASSOCIATE JUSTICE BENJAMIN N. CARDOZO

DECEMBER 19, 1938

United States Government Printing Office
Washington : 1938

May it please the Court:

The members of the Bar of this Court on November 26, 1938, met in this room to express their sorrow at the death of Mr. Justice Cardozo. At that meeting moving tributes were paid to his memory; and the following resolutions were adopted:

> The members of the Bar of the Supreme Court of the United States, meeting in the Court Building Saturday, November 26, 1938, on the call of the Solicitor General, speak for the bar of the Nation in expressing their sorrow at the untimely death of Mr. Justice Cardozo. No formal memorial can give an adequate sense of his mental powers or his spiritual qualities. Only the barest outline of his career and an indication of its significance can be attempted.
>
> Benjamin Nathan Cardozo was born in New York City May 24, 1870, and died at the house of his intimate friend, Judge Irving Lehman, in Portchester, New York, July 9, 1938. He was the younger son of Albert and Rebecca Nathan Cardozo, both of whom were descended from Sephardic Jews who had been connected with the Spanish and Portuguese Synagogue in New York from before the Revolution. He graduated from Columbia College at the age of nineteen and re-

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ceived his master's degree the following year while attending the Columbia Law School. He did not stay for a degree in law, and was admitted to the Bar in 1891. For twenty-two years he pursued what was essentially the calling of a barrister, unknown to the general public but quickly gaining the esteem of the Bar and the Bench of New York. His devotion to the law as a learned profession he proved in his daily practice and by his illuminating book on the Jurisdiction of the Court of Appeals of the State of New York published in 1903.

In 1913 he was elected a Justice of the Supreme Court. A month later, on the request of the Court of Appeals, Governor Glynn designated him to serve temporarily as an Associate Judge of that Court. In January, 1917, he was appointed a regular member by Governor Whitman, and in the autumn was elected for a term of fourteen years on the joint nomination of both major parties. In 1927 he was elected without opposition Chief Judge.

As he was a lawyers' lawyer, so he was a judges' judge. For eighteen years by his learning and the felicity of his style he added distinction to the New York Court of Appeals, and his dominant influence helped to make that court the second tribunal in the land. During this period his philosophic temper expressed itself more systematically than legal opinions permit in four volumes, slender in

size but full of imaginative insight, upon the relations of law to life. These are: The Nature of the Judicial Process, The Growth of the Law, The Paradoxes of Legal Science, and Law and Literature.

The New York Court of Appeals, with its wide range of predominantly common law litigation, was a natural field for Judge Cardozo. No judge in our time was more deeply versed in the history of the common law or more resourceful in applying the living principles by which it has unfolded; and his mastery of the common law was matched by his love of it. It was, therefore, a severe wrench for him to be taken from Albany to Washington. Probably no man ever took a seat on the Supreme Bench so reluctantly. But when Mr. Justice Holmes resigned in 1932 President Hoover's nomination of Chief Judge Cardozo was universally acclaimed. In selecting him the President reflected the informed sentiment of the country that of all lawyers and judges Cardozo was most worthy to succeed Holmes.

It was a grievous loss to the Court and the Nation that fate should have granted him less than six full terms on the Supreme Bench. That in so short a time he was able to make such an enduring impress on the constitutional history of the United States is a measure of his greatness. To say that Mr. Justice Cardozo has joined the Court's roll

of great men is only to anticipate the assured verdict of history. His juridical immortality is due not to the great causes that came before the Court during his time, but to his own genius. With astonishing rapidity he made the adjustment from preoccupation with the comparatively restricted problems of private litigation to the most exacting demands of judicial statesmanship. Massive learning, wide culture, critical detachment, intellectual courage, and exquisite disinterestedness combined to reinforce imagination and native humility, and gave him in rare measure the qualities which are the special requisites for the work of the Court in whose keeping lies the destiny of the Nation.

Accordingly it is resolved that we express our profound sorrow at the death of Mr. Justice Cardozo, and our gratitude for the contributions of his life and work, the significance of which will endure so long as the record of a consecrated spirit has power to move the lives of men, and the Law shall be the ruling authority of our Nation.

Be it further resolved that the Attorney General be asked to present these resolutions to the Court and to request that they be entered in its permanent records.

It is my privilege to present these resolutions and to ask that they be entered in the permanent records of this Court.

In discussing the judicial work of Mr. Justice

Cardozo, I speak, however haltingly, for the bar of the nation; I feel that in a measure I speak also for the nation itself. A great judge leaves his mark not only on the law which he serves but also on the life of the people. Not until future generations of scholars have traced the course of the law in its constant search for justice will the full scope of his great service be revealed. But we can today with all certainty say that he opened ways along which a free people may confidently tread.

For eighteen years Judge Cardozo sat on the Court of Appeals of New York State. It was an eminent court when he came to it; when he left it was the greatest common law court in the land. Throughout this long period, as its members have been quick to say, the court drew heavily upon the inexhaustible learning, the clarity of analysis, and the boldness of thought of their gentle brother. The peculiar influence of Cardozo, however, spread far beyond the conference room. To lawyers and to courts his opinions were more than a record of the judgment. They spoke with the majestic authority of an analysis which reached to the bed rock of the learning of the past and yet was attuned to the needs of the living. And always the opinions spoke in tones of rare beauty. They might deal with things prosaic, but the language, lambent and rich, was that of a poet.

Opinions in the New York court are assigned by rotation, yet during the years of his service there an

exceptionally large number of its great opinions were those of Judge Cardozo. There were few branches of the law that did not become enriched by his touch. Significantly, his most notable contributions to the common law are found in fields which had long before settled into fixed forms. No other judge of his time was so deft in weaving the precedents of centuries into a new shape to govern a new society. This is the heart of the common law process, but only a master can fashion a new rule and yet preserve the essential truth of the older decisions.

To Judge Cardozo the law was meant to serve and not to rule the institutions which it sheltered. No one saw more clearly than he that the imperfect rules of today may stir equities that become the law of tomorrow. In the law of torts, one need only mention on the one side *MacPherson* v. *The Buick Company*,[1] where the law as to negligent manufacture was at last brought abreast of modern methods of distribution, and, on the other side, the *Palsgraf* case,[2] where the notion of "negligence in the air" received its classic castigation. The impact of Judge Cardozo on contract law is typified by the *Duff-Gordon* case,[3] where a contract was enforced because the obligations although not express were fairly to be implied. "The law," he said, "has outgrown its primitive stage of formalism

[1] *MacPherson* v. *The Buick Motor Co.*, 217 N. Y. 382.
[2] *Palsgraf* v. *Long Island Railroad Co.*, 248 N. Y. 339.
[3] *Wood* v. *Duff-Gordon*, 222 N. Y. 88, 91.

when the precise word was the sovereign talisman, and every slip was fatal." Minor and unintentional defaults in a complicated construction contract, Judge Cardozo held in another case,[4] are not to be subjected to a syllogistic rule whose premises are found in the far simpler contracts of another age. There must be no sacrifice of justice, the opinion reads, whatever may be the doubts of "those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result * * *."

Throughout these opinions one traces their animating current, the one passion of this gentle and retiring man, that the courts should never fail to use the law to promote justice. While few judges have been so ready to adapt the law to the changing organization of the business world, he steadfastly refused to sanction any relaxation in the morals of the market place. It is likely that most real estate operators would not consider that their duty to their joint-venturers extended so far as to share the opportunity to start anew at the conclusion of the venture. But, in the case of *Meinhard*,[5] Chief Judge Cardozo refused to sanction even so slight a deviation from "an honor the most sensitive." As he writes, the ease of the philosopher changes into the inner fire of the prophet. "Uncompromising rigidity has been the attitude of courts of equity when petitioned to

[4] *Jacob & Youngs* v. *Kent*, 230 N. Y. 239, 242.
[5] *Meinhard* v. *Salmon*, 249 N. Y. 458, 464.

undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions * * *. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."

In 1932 Chief Judge Cardozo was at the head of the foremost common law court of the land. His court was but rarely forced to plunge into the elusive statesmanship of constitutional law; it was a court of legal craftsmen. He was warmed by the deep friendship of his colleagues. Neither he nor any student of the common law could have wanted more than that he fill out his days in such a fruitful serenity.

But in that year Justice Holmes resigned. For thirty years, he had enriched the work of this great Court and, by the same token, the legal thought of the Nation. To succeed Justice Holmes there could be but one man. President Hoover spoke for the whole people when he offered the nomination to Chief Judge Cardozo. With reluctance, and through a selfless obedience to the higher duty, Judge Cardozo accepted the call and took his seat on this Court on March 14, 1932.

His first opinion for the Court appears in the 286th volume and his last opinion in the 302nd volume of the reports.[6] The span is tragically short. But in

[6] In these six years, Mr. Justice Cardozo wrote 128 majority opinions, 2 concurring opinions and 24 dissenting opinions; in addition, he collaborated in 7 concurring and 10 dissenting opinions.

these brief years Justice Cardozo has notably enriched the history of jurisprudence. To this Court he brought his deep learning in the law and to the solution of its vexing problems he lent a tolerance and a generous understanding which have rarely been equalled.

He made the transition from New York to this Court with an ease which seemed effortless. The large questions of constitutional law, the unexplored vistas of administrative law, and the complexities of federal taxation, were each beyond the ordinary range of litigation in the Court of Appeals. Yet, from the very beginning, his touch was as sure and his vision as far-ranging as it had been in the familiar rooms at Albany.

To the specialized fields which provide much of the work of this Court, Mr. Justice Cardozo brought rare skill with the technical tools of the lawyer and an insistent belief that the law failed when it offered reward to chicanery or greed. A complicated question of tax limitation [7] was solved by "the principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong." He differed with the majority of this Court in the *Securities and Exchange Commission* case,[8] perhaps less because of his analysis of the statute than for fear that it would "become the sport of clever knaves." If the registration procedure is not to "invite the cunning and unscrupulous to gamble with detection," he continued,

[7] *Stearns Co.* v. *United States*, 291 U. S. 54, 61–62.

[8] *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1, 32.

"when wrongs such as these have been committed or attempted, they must be dragged to light and pilloried."

But it is in the larger reaches of public law that the broad vision of Mr. Justice Cardozo found full scope. The commentators may dispute as to whether the judge who decides these questions must be more the statesman or the lawyer. But none has doubted that Mr. Justice Cardozo was rarely gifted with both qualities.

The novel problems presented by administrative law received from him a sympathetic and discerning treatment. He never forgot that administrative agencies were born of a need for developing a technique which differed from judicial litigation. He has written, for the Court, that "the structure of a rate schedule calls in peculiar measure for the use of that enlightened judgment which the Commission by training and experience is qualified to form. * * * It is not the province of a court to absorb this function to itself." [9] He saw, too, that these agencies act in a field where substantial accuracy is immeasurably preferable to the complete frustration which would result were an absolute precision sought. The Interstate Commerce Commission, faced with the task of valuing railroads, he said, may recognize that "in any work so vast and intricate, what is to be looked for is not absolute accuracy, but an accuracy that will mark an advance upon

[9] *Miss. Valley Barge Co. v. United States*, 292 U. S. 282, 286.

previous uncertainty." [10] For him the respect to be paid the findings of the administrative tribunal was an imperative rule of decision, not to be satisfied by a verbal recognition. He has placed a decision of the Court on the ground that the lower court, "though professing adherence to this mandate, honored it, we think, with lip service only." [11]

The same quality appears when he considers the validity of state legislation. There could be no tolerance for state regulation which, as he said in the *Seelig* case,[12] by setting "a barrier to traffic between one state and another," "would neutralize the economic consequences of free trade among the states." But, so long as the state action contained no threat to national solidarity, it could not properly, Mr. Justice Cardozo felt, be nullified by this Court unless the Constitution spoke to the contrary with unmistakable clarity. When this Court held invalid a state sales tax, graduated according to volume, in the *Stewart Dry Goods* case,[13] Mr. Justice Cardozo entered eloquent protest. The legislation, he said, was "a pursuit of legitimate ends by methods honestly conceived and rationally chosen. More will not be asked by those who have learned from experience and history that government is at best a makeshift, that the attainment of one good may involve the sacrifice of others, and that compromise will be inevitable until the coming of Utopia."

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[10] *I. C. C.* v. *New York, N. H. & H. R. Co.*, 287 U. S. 178, 205.
[11] *Fed. Trade Com'n* v. *Algoma Co.*, 291 U. S. 67, 73.
[12] *Baldwin* v. *G. A. F. Seelig*, 294 U. S. 511, 521, 526.
[13] *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550, 577.

Few men have, with such whole-hearted humility, practiced that tolerance for human experimentation which many feel must be the hall-mark of a great constitutional jurist. But none knew better than Mr. Justice Cardozo that, when the question was one of personal liberty rather than the economic judgment of the legislature, vigilance rather than obeisance must be the order of decision. Of freedom of thought and speech, he wrote in one of his last opinions for the Court,[14] "one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom." He has elsewhere said: [15] "Only in one field is compromise to be excluded, or kept within the narrowest limits. There shall be no compromise of the freedom to think one's thoughts and speak them, except at those extreme borders where thought merges into action." And then follow these majestic words: "We may not squander the thought that will be the inheritance of the ages."

Perhaps the most nearly ultimate field upon which a Justice of this Court must venture is that of measuring the Acts of the Congress against the requirements of the Constitution. Mr. Justice Cardozo sat during six of the most momentous years in the history of this Court. Throughout these years the familiar rules which forbid the Court from passing judgment on the wisdom of the Congress were to him not aphorisms

[14] *Palko* v. *Connecticut*, 302 U. S. 319, 327.
[15] *Mr. Justice Holmes*, 44 Harv. Law Rev. 682, 688.

but burning truths. He found, in his own words,[16] a "salutary rule of caution" in that "wise and ancient doctrine that a court will not adjudge the invalidity of a statute except for manifest necessity. Every reasonable doubt must have been explored and extinguished before moving to that grave conclusion." Mr. Justice Cardozo viewed the Constitution as directed to the great end of preserving a democratic government for a free people. This high purpose is defeated if the courts view the Constitution as dictating choice, as he has stated it, in "a situation where thoughtful and honest men might see their duty differently." [17] His consistent deference to the judgment of the legislature came not merely from the humility of his nature. It arose also from his profound conviction that, as he put it,[18] "one kind of liberty may cancel and destroy another," and that "many an appeal to freedom is the masquerade of privilege or inequality seeking to entrench itself behind the catchword of a principle." Thus, where an industry was so glutted by ruthless overproduction that its survival was threatened, Mr. Justice Cardozo saw nothing in the Constitution which forbade the Congress to act, for, as he said in the *Carter* case,[19] "The liberty protected by the Fifth Amendment does not include the right to persist in * * * anarchic riot."

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[16] Dissenting in *United States* v. *Constantine*, 296 U. S. 287, 299.
[17] *Mayflower Farms, Inc.*, v. *Ten Eyck*, 297 U. S. 266, 276.
[18] *Mr. Justice Holmes*, 44 Harv. Law Rev. 682, 687–688.
[19] Dissenting in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 331.

Mr. Justice Cardozo found no constitutional barrier to prevent the enactment of legislation which was compelled by the urgent needs of an ever changing society. "The Constitution of the United States," he wrote in his dissent in the *Panama Refining* case,[20] "is not a code of civil practice." The commerce power, he has said, "is as broad as the need that evokes it." [21] The basic constitutional doctrine of separation of powers was for him not "a doctrinaire concept to be made use of with pedantic rigor. There must be sensible approximation, there must be elasticity of adjustment, in response to the practical necessities of government, which cannot foresee today the developments of tomorrow in their nearly infinite variety." [22]

Thus far I have spoken of our friend as a lawyer and a judge. This imperfect tribute leaves untouched the far reaches of his mind and character. I have not trusted myself to speak of these things. They are so intimate and so beautiful that they quite transcend the limits of our common speech. It is better, I think, to rest upon the words of Justice Holmes who, in tenderness and affection, said that Judge Cardozo was "a great and beautiful spirit." [23]

It was eminently fitting that Mr. Justice Cardozo should have been chosen to deliver the opinion of the Court in the Social Security cases. The governmental

[20] *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 447.
[21] Dissenting in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 328.
[22] *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 440.
[23] Letter to Dr. John C. H. Wu, printed in Holmes, *Book Notices, Uncollected Papers, Letters* (Shriver), p. 202.

process must have seemed noblest to him when it was directed to the relief of the aged, the infirm, and the destitute. His words seem to have sprung from the heart of one who felt with intensity that government succeeds only as it serves the needs of its people: "Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation. What is critical or urgent changes with the times. * * * The hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near." [24]

Mr. Justice Cardozo has reached the end of his journey. It has been a journey of loving service to the law and to those who live under the law. I venture to predict that, so long as our common law and our Constitution persist, men will pay tribute to the memory of this shy and gentle scholar, whose heart was so pure and whose mind was so bold.

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[24] *Helvering* v. *Davis*, 301 U. S. 619, 641.

○

— [Feb '39?] Retrospect

PSF
Justice
Cummings

1.

Six years our life was pleasurous —
No one would dare deny it;
And so we planned to sneak away
To find a place of quiet.

2.

The "daily crisis" we forgot,
The teas and banquets, too —
We longed to hear the ocean roar
And see the sky of blue.

3.

It was a task to pack the bags
And fill one travelling trunk;
It is a pesky thing to know
What things to take — or junk.

4

At last the heavy work was done
Our friends waved us adieu
For we were off for Florida
To see the sky of blue.

5.

We wanted rest — oh, yes, we did
Beside the foaming brine
We wanted sleep — oh, yes, we did —
With time out just to dine.

6.

We wanted peace beneath a palm
With gently blowing breezes
We gladly said goodbye to sleet
And snow & colds & sneezes.

7.

In fact, we sought to find a place
Of reasonable gentility –
Without a thing to do, and no
Responsibility.

8.

An economic royalist
We knew might find it too;
But he would never say a word
To folks fresh from the Zoo.

9.

And now, O' Gosh, we've found the place
The fairest in the land –
Away down South in Dixie
A spot called Boca Grande.