6-1-1978

Introduction—Equal Justice and the Problem of Access

Senator Edward M. Kennedy

INTRODUCTION

EQUAL JUSTICE AND THE PROBLEM OF ACCESS

*by Senator Edward M. Kennedy**

This is the Court of Chancery, which has its decaying houses and its blighted lands in every shire, which has its worn-out lunatic in every madhouse and its dead in every churchyard, which has its ruined suitor with his slipshod heels and threadbare dress borrowing and begging through the round of every man's acquaintance, which gives to monied might the means abundantly of wearying out the right, which so exhausts finances, patience, courage, hope, so overthrows the brain and breaks the heart, that there is not an honourable man among its practitioners who would not give—who does not often give—the warning, "Suffer any wrong that can be done you rather than come here!"

C. DICKENS, BLEAK HOUSE (1853).

"Equal justice under law" is a motto which we proclaim as a fundamental principle of our legal system. If that phrase means anything, it must mean that all citizens should have access to a forum for the just resolution of disputes, a forum which is available without undue delay or expense. Without such access, statutory and constitutional rights are illusory. No citizen should be denied justice because the remedy is too slow or too expensive.

We have not reached the depths of Dickens' nineteenth century Court of Chancery. Throughout the country there has been an increasing awareness that we must improve the operation of our judicial system. Despite this awareness, however, the efforts to date have been sporadic and uncoordinated. We must begin a systematic effort to provide effective methods for dispute resolution through both traditional and experimental methods.

According to a recent American Bar Association survey two-thirds of Americans lack easy access to courts.[1] Complex procedures, exhorbitant

* A.B., 1954 (Harvard College); L.L.B., 1959 (University of Virginia); United States Senator; Ranking Member, Senate Committee on the Judiciary; Chairman, Subcommittee on Antitrust and Monopoly; past Chairman, Subcommittee on Administrative Practice and Procedure.

1. *See* ABA, REPORT OF POUND CONFERENCE FOLLOW-UP TASK FORCE (August, 1976), *reprinted in*, 74 F.R.D. 165 (1977).

legal fees, and long delays make courts inaccessible to a large proportion of our citizens. Although an individual's complaint may not involve thousands or millions of dollars, it may involve a significant portion of his income. Our society must have a fair and inexpensive method for the resolution of such complaints.

Roscoe Pound, former dean of the Harvard Law School said, "[I]t is a denial of justice in small causes to drive litigants to employ lawyers, and it is a shame to drive them to legal aid societies to get as a charity what the state should give them as a right."[2] Dean Pound's statement is as true today as it was in 1913. The complexity and expense of even the simplest legal proceeding causes many citizens to forego the rights they may have.

Institutions which were designed to resolve minor disputes, such as small claims courts, have not generally fulfilled their function. Too often they have compounded the frustration felt by citizens because jurisdictional limits, procedural requirements, inaccessible locations, and inconvenient hours have limited their usefulness. In some instances these institutions have become nothing more than alternative debt collection devices for large creditors. The enormous potential of these courts remains unrealized.

The effects of the lack of a forum for the resolution of minor grievances should not be underestimated. Those who feel they have a legitimate complaint against a merchant, a business, or an individual, and no means of redress, quickly lose faith in the judicial system.

DISPUTE RESOLUTION ACT

A more efficient operation of present court systems alone will not resolve the problem of access to justice. We must explore alternative methods for resolving citizen disputes. There are alternatives available, but local jurisdictions, along with the federal government, must experiment further with the procedures presently being used and design new procedures to insure effective and efficient methods for resolving citizen disputes. The federal government should aid states and localities in coordinating and funding effective and innovative methods of dispute resolution.

There is presently before the Congress a bill, S. 957,[3] which would provide funds to states for experimentation in setting up dispute resolution mechanisms. The bill demonstrates what the federal government can do in a responsible fashion to aid states and others to establish methods to

2. Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302, 318 (1913).

3. S. 957, 95th Cong., 1st Sess. (1977).

resolve grievances. The bill was originally introduced by Senator Wendell Ford. I was a co-sponsor and have since offered an amendment which I think improves the bill.[4]

The bill as amended would encourage the creation of mechanisms which would provide all persons convenient access to dispute resolution mechanisms that are effective, fair, inexpensive and expeditious. It attempts this through two devices: the creation of a Dispute Resolution Resource Center within the Department of Justice and the provision of fifteen million dollars to states and others for the establishment of new and innovative methods for dispute resolution.

Dispute Resolution Resource Center

The establishment of the Dispute Resolution Resource Center is designed to provide a centralized administrative and research facility for the establishment of alternatives to traditional courtroom methods of resolving controversies. The Research Center will serve many functions, the most important of which will be to provide information and expertise to those who wish to experiment with dispute resolution mechanisms.

One of the difficulties faced by states and localities has been the lack of information about and evaluation of alternative methods of dispute resolution. Though there are many programs in different jurisdictions which are providing effective alternatives, it is difficult for other jurisdictions to learn of their existence or to obtain an honest evaluation of their performance. One of the functions of the Center would be to correct this deficiency by providing jurisdictions with information and evaluations of the projects in other areas. States would then be able to make intelligent decisions about the appropriate projects for their particular jurisdiction.

There has also been a lack of expertise and experimentation in this area. Too little effort has been expended nationwide in devising effective methods of dispute resolution. The Center will conduct research, operate demonstration projects, and assist states and others in setting up and carrying out dispute resolution mechanisms. It is time to begin devoting some of our research and support efforts to determine whether there are alternative programs that will provide access to citizens and whether they will do so more effectively and inexpensively than traditional courtroom procedures.

The Center will also undertake nationwide surveys of existing dispute resolution programs and evaluate the performance of the programs. Within a short time the Center should develop an extensive inventory of

4. S. 957, Calendar No. 405, Amend. No. 1623, 95th Cong., 1st Sess. (Nov. 4, 1977).

existing projects and their performance, which will provide a firm base for the Center's research and evaluation functions. One of the central roles of the Center will be to establish "National Priority Projects."[5] The Priority Projects are ones which, based on the results of the Center's research and evaluation, are particularly effective and can be duplicated around the country. After consultation with the Chairman of the Federal Trade Commission, the Center will designate projects appropriate for funding under the bill. States, localities and others would receive federal funding to replicate the priority projects in their own jurisdictions.

The Center will have the power to authorize and fund research by educational institutions, private organizations and public agencies.[6] The research may include demonstrations or special projects which will test new, innovative methods or emphasize the effectiveness of certain approaches. The Center will provide a focus for the work that must be done if we are to undertake the research and experimentation necessary to discover the best methods for dispute resolution. There will undoubtedly be projects and experiments that fail, but, by beginning the process of investigation and committing resources to it, we are on the way to creating effective and inexpensive methods of resolution.

State Allocations

The bill provides for fifteen million dollars for states, localities, and non-profit organizations to establish projects for dispute resolution.[7] One-half of the money available for distribution is to be allocated equally among the states.[8] The money would go to those who submit proposals to the Attorney General and would be awarded by the Attorney General for National Priority Projects only. The other half of the grant money would be awarded at the discretion of the Attorney General either for projects that implement National Priorities or for projects which are not priorities, but which the Attorney General determines are worth funding.[9] Financial assistance for approved projects would not be available until one year after the bill has passed. As a result, the Center would have a year to begin its research and develop some assistance capability before money would begin going out for projects.

The states or localities must also assume responsibility for funding projects. During the first year the federal government would provide one

5. *Id.* § 6(b)(5).
6. *Id.* § 7.
7. *Id.* § 9(b).
8. *Id.* § 7(f)(1).
9. *Id.* § 7(f)(2).

hundred percent of project costs. Each succeeding year the federal contribution would decline at rates of ninety, seventy-five and sixty percent of the project costs for programs funded in those years. In providing for decreased funding we are attempting to insure that states make rigorous evaluations of ongoing projects and assume responsibility for successful projects. The initial total funding by the federal government allows the states and others to experiment with methods for commencing or improving dispute resolution mechanisms. Where the programs prove unsuccessful the increased state funding will insure that they are discontinued.

Purpose of the Act

For the first time we are providing federal money and resources for innovation in our judicial system. We are attempting to establish new methods for resolving the disputes of our citizens, methods which will be effective. We are not tied to the notion that our traditional court system alone is always the best or only forum for resolving disputes. As Chief Justice Burger has said, "The notion that ordinary people want black robed judges, well-dressed lawyers and fine panelled courtrooms as settings to resolve their disputes is not correct. People with problems, like people with pain, want relief, and they want it as quickly and as expeditiously as possible."[10]

We have had too little effort in this area. Scattered states and localities, and even private businesses or groups, have attempted alternatives to litigation.[11] In spite of the success of many of these programs, we have not directed our resources at the problem in a systematic fashion. For most of our citizens the problem of access to a forum for the resolution of disputes persists.

The programs and experiments which may be funded under the bill to resolve access problems could easily dovetail with or complement existing mechanisms, such as small claims courts. These courts might wish to experiment with a variety of innovative ideas to deal with the problem of access. The courts could extend their hours to include evenings and weekends.[12] They could set up "mini-courts" located in areas that are more accessible to those who need them. Forms and procedures might be

10. Address by Chief Justice Burger, ABA Conference on the Resolution of Minor Disputes (May 27, 1977).

11. *See* Green, Marks & Olson, *Settling Large Case Litigation: An Alternate Approach*, 11 LOY. L.A. L. REV. 493 (1978).

12. *See* Nebron & Ides, *Landlord Tenant Court in Los Angeles: Restructuring the Justice System*, 11 LOY. L.A.L. REV. 537 (1978), for a full discussion of a particular application of this concept in the Los Angeles Municipal Court system.

simplified so that individuals can use the courts without having to hire a lawyer. Qualified paralegal personnel could be made available to assist in the preparation, filing and handling of cases. The existence and availability of small claims courts should be widely publicized. In areas where appropriate, bilingual courts could be established, with bilingual assistance to those filing complaints.

Small claims courts may not be the only effective means of resolving minor disputes. Many states, localities, private businesses, neighborhood groups, and others have established innovative and very successful programs for resolving disputes without resort to the courts. Although we must be careful not to ignore the fundamental rights of our citizens, these methods can be effective in providing access where there is now none. They provide a quick, inexpensive solution to disputes, solutions which in most cases satisfy the parties. Some private industries have established arbitration proceedings for customers dissatisfied with their products or procedures. A large percentage of the customers using these arbitration procedures has been satisfied with the outcome, even some of those who have not prevailed. They have the opportunity to voice their complaint and the opportunity to have a neutral party decide the issue in a fair and expeditious manner.

Some jurisdictions have established arbitration procedures for civil suits. Primarily voluntary, although mandatory in some jurisdictions, arbitration provides a quick resolution while freeing the courts to handle other cases. Such procedures can be used in small claims or general courts or can be offered as an independent option. Again the results demonstrate that the parties are satisfied with the fair and expeditious resolution of their dispute.

Still other localities have established mediation procedures for dealing with many types of complaints. Courts are available, but mediation opens another avenue to them and is often the best solution. For example, family disputes are sometimes best resolved by mediation. Without any restriction on the rights of the individuals, such a procedure provides an effective, fair, and expeditious settlement of the problem. Additionally it allows courts to focus on other problems which by their nature must be settled by a court.

Recently the Department of Justice has set up three Neighborhood Justice Centers as pilot projects in Los Angeles, Kansas City and Atlanta. These centers have offices located in residential neighborhoods, and are available to individuals with a wide variety of problems. They provide mediation and arbitration services and can refer parties to agencies or courts. A panel of trained community residents is available to resolve

disputes with the agreement of both parties. The centers provide a local, decentralized forum for the resolution of disputes, a forum which would not otherwise be available, and are designed to divert many from formal court adjudication.

CONCLUSION

Fair and expeditious access to justice is not merely a problem; it is a challenge which the federal and state governments, working together, must accept. The scope of the problem and the lack of easy answers and solutions should not diminish our efforts or resolve. It is a multifaceted challenge, the resolution of which will involve the most effective utilization of all our dispute resolution forums, especially in the area of complex litigation. The articles in this issue emphasize this necessary integration and point up the complexity of the challenge. The goal of providing meaningful justice in a fair, efficient, inexpensive and expeditious manner is so central and so critical that it requires an absolute commitment on our part. The American people deserve no less.