

ALABAMA'S PROCEDURAL REFORM AND THE NATIONAL MOVEMENT

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The Alabama Rules of Civil Procedure, prepared by the Commission for Judicial Reform for legislative approval this spring, represent at once a highly competent professional achievement and a splendid augury for sound procedural advance in this important state. I do not recall anywhere a smoother adaptation of the popular federal practice to local needs than is found here. I count it a privilege to express my warm approval of the measure and my conviction that its passage will put Alabama in the forefront of procedural progress in this country. As it happens, this will fulfill a hope and a prophecy I expressed many years ago. When the federal rules were first formulated, I spoke to lawyers in many cities explaining as Reporter to the Supreme Court's Advisory Committee the details of the reform and my own expectation and belief that the same reform would shortly be adopted in the states I visited. So I came to Birmingham in the fall of 1938 after visits to Louisville and Knoxville and prior to visits to Atlanta and New Orleans.¹ It has taken almost two decades to realize the objective I visualized, but I am confident that it will now prove just as durable a move here as it has elsewhere. Not a jurisdiction adopting the modern procedure has ever wanted to return to the past; indeed, nowhere has there been a demand of even sizable character to that end.

Since your proposed plan is so identically the procedure which I have long endorsed, I do not find occasion to discuss it here in detail. Your skilled draftsmen have shown so

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¹ This followed after "institutes" held at Cleveland, Washington, and New York. See PROCEEDINGS OF INSTITUTE, CLEVELAND, 194-277 (1938); PROCEEDINGS OF INSTITUTES, WASHINGTON AND NEW YORK, 39-80, 235-248 (1938); Clark, *Federal Rules of Civil Procedure*, 86 PITTSB. LEG. J. 4-8, 27-68 (1938); Clark, *Fundamental Changes Effected by the New Federal Rules*, 15 TENN. L. REV. 551-569, 579-585 (1939).

thorough a knowledge that further instruction would be carrying coals to Newcastle. Rather I prefer, as your proposed symposium indicates, to relate this proposal to the general movement for procedural reform with which it is so intimately connected. In so doing I shall, I believe, give added basis for the professional satisfaction you all must feel as Alabama assumes leadership in this great cause, the most important affecting our courts today.

It is now a matter of history that the movement which culminated in the federal rules was a long time in getting off the ground. As early as 1886, David Dudley Field, the father of Code Pleading, was calling for federal reform. The American Bar Association got into the program actively in 1912 with a committee appointed to strive for Uniform Judicial Procedure, and the union of law and equity was added as a goal in 1922. It gave up the struggle in 1932 and 1933 only to see Attorney General Cummings obtain the passage of the rule-making act by sound and tried political methods on June 19, 1934. The Supreme Court appointed its Advisory Committee in May 1935 and the Committee made its final report and recommendations in the fall of 1937. The Court then adopted the rules and reported them to Congress, as required by the governing statute, so that they became effective throughout the far-flung federal court system on September 16, 1938.² That so complete and carefully supported a system could have been thus so quickly prepared, executed, and put into effect is due in large measure to the executive skill and driving force of the Committee's Chairman, former Attorney General William D. Mitchell, whose services to American procedural reform have been too little appreciated.³ The fact that the system went into operation so smoothly I attribute in part to Mr. Mitchell's original conception, rigorously carried out, that rules should be adopted only

² The history of this background with references to the voluminous literature is given in CLARK, CODE PLEADING 31-41 (2d ed. 1947).

³ There is no adequate statement anywhere of the debt owed by the profession to this one man. I have a slight reference in Clark, *Objectives of Pre-Trial Procedure*, 17 OHIO ST. L. J. 163 (1936), and in Clark, *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROB. 144, 148 (1948), and did speak (all too summarily) in an unpublished letter to the Chief Justice announcing his death in August 1955. A measure of his initial contribution is shown in his persuasive letter to the Court in 1935 which ensured the union of law and equity, at length published, on my urging, in Mitchell, *The Federal Rules of Civil Procedure*. DAVID DUDLEY FIELD CENTENARY ESSAYS 73, 76-78 (1949). I hope that sometime adequate honor may be done to this unique contribution to the administration of justice in this country.

after the fullest examination of them by the bench and bar, with careful consideration by the Advisory Committee given to all criticisms and suggestions. That the federal procedure has likewise proved so successful in two decades of operation is due, in my humble judgment, to the wisdom of its underlying plan.

The success of the procedure has been attested both within federal courts and without. Federal practice formerly was so strange and ill assimilated a combination of state, legal, equity, and mixed principles that it became the most feared and involved of all procedures—a matter entirely for specialists.⁴ Practically overnight a new system took effect with which lawyers felt at home and yet one where mistakes were not subject to dire penalties. Both lawyers and judges took to the new rules with surprisingly little resistance from a profession so traditionally rooted in the past. Many judges have remarked on the new aroused interest in simple law administration, which took hold of both lawyers and judges. Indeed, I count it one of the most satisfying consequences that many judges and lawyers wanted to be and did become procedural experts, not as mere technicians, but as regular protagonists of simplified procedure. It was literally true that everyone wanted to and was able to get into the act!⁵

Nor has that spirit worn off after the span of two decades. That is shown by the strength of the movement and its hold upon state reform. Roughly a dozen important jurisdictions have followed the federal example and adopted all of the federal rules; another dozen states have adopted substantial areas of the new procedure; somewhat lesser segments of the rules appear in half a dozen more states; while occasional rules, such as that on pre-trial, have found a home in nearly all the states. Even more important, no new proposition for reform appears now but

⁴ Clark & Moore, *A New Federal Civil Procedure—I. The Background*, 44 YALE L.J. 387 (1935); Jaffin, *Federal Procedural Revision*, 21 VA. L. REV. 504 (1935); Tolman, *The Origin of the Conformity Idea, Its Development, the Failure of the Experiment, etc.*, 23 A.B.A.J. 971 (1937).

⁵ This is discussed with citations in, e.g., Clark, *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROB. 144 (1948); Clark, *The Federal Rules in State Practice*, 23 ROCKY MT. L. REV. 520 (1951). See Chesnut, *Improvements in Judicial Procedure*, 17 CONN. B. J. 238, 243 (1943): "I have yet to note an instance in which they [the rules] have been found lacking." And see VANDERBILT, *THE CHALLENGE OF LAW REFORM* 55-67 (1955) and several articles by Judge Holtzoff, of which the latest is Holtzoff, *Judicial Procedure Reform: The Leadership of the Supreme Court*, 43 A.B.A.J. 215 (1957); and see Holtzoff, *Origin and Sources of Federal Rules of Civil Procedure*, 30 N.Y.U.L. REV. 1057, 1058 (1955).

that the federal system is at least its point of departure. Moreover, in states with piecemeal reforms the failure to take over the system in its entirety is usually a matter of regret on the part of the profession, which later seeks steadily to repair the gaps. The adoption of the modern rules now proposed for Alabama is the fundamental step in court reform in this country, comparable to the early spread of code pleading after the adoption of the original David Dudley Field Code in New York in 1848. Indeed, in view of the adoption of the modern rules in the entire federal court system and so many leading states, the success of the movement seems at least as complete and pervasive as that of the earlier movement to adopt code pleading, although it may be less heralded, since in the majority of states the most spectacular step of uniting law and equity was already accomplished under the codes.⁶

Two of the less obvious reasons for this professional acceptance of the new system are, I think, worthy of careful note: first, a selective retention of the best in all existing procedures, instead of an attempt at complete innovation; and second, careful exploitation of the principle that the purpose of procedure was knowledge or disclosure to all—with no bonus for tricks of concealment and no horror of “fishing expeditions” so denounced of old. What is really new about the system is the whole, not the parts. Your Professor Morgan well describes this as “pouring old wine into fewer bottles.”⁷ Practically all the new rules were already in successful use in some states or in the federal equity practice or in the English procedure. That is why lawyers have such a sense of pleasant surprise in recognizing so much of what they are accustomed to in the new system. (True, they happily overlook the demise of local technicalities now gone and forgotten.) I find I was stressing this feature when I went on tour back in 1938;⁸ but I think it cannot

⁶ The success in the states to date is ably documented in the excellent and informative *Report* by Chairman Skinner, FINAL DRAFT ALA. RULES CIV. PROC. 1-20 (1957). A late addition is N. D. RULES CIV. PROC. (1957), effective July 1, 1957. On the other hand, there seem to be definite signs of retrogression in the tentative practice code recommended for New York in 1957 REPORT OF THE TEMPORARY COMMISSION ON THE COURTS, III, *First Preliminary Report of the Advisory Committee on Practice and Procedure*, McKinney's 1957 Session Laws of New York, pp. A-335—A-461.

⁷ Morgan, *Simplifying Present Alabama Procedure by Pouring Old Wine into Fewer Bottles*, 9 ALA. L. REV. 1 (1956).

⁸ See, e.g., PROCEEDINGS AT WASHINGTON AND NEW YORK INSTITUTE, *op. cit. supra* note 1, at 39-46; PROCEEDINGS AT CLEVELAND INSTITUTE, *op. cit. supra* note 1, at 221-224.

be too often emphasized. This is no attempt to reject the wisdom and experience that lawyers have acquired over the centuries. Rather it is a plan to build and make use of it. As I point out below, some of the best of common law pleading is preserved and utilized. The result is that the lawyers utilize the principle of the popular song, "Doing What Comes Naturally."

I would illustrate this important and sometimes overlooked feature of the rules by an example from the heart of the system, the requirement in the complaint of "a short and plain statement of the claim showing that the pleader is entitled to relief," used instead of the older code expression of "a plain and concise statement of the facts constituting each cause of action without unnecessary repetition."⁹ Although case after case has now demonstrated the smooth and natural working of this new rule, yet its purpose and effect were for a time rather surprisingly overlooked. Thus it was not too well noted that the idea behind both the code and modern expressions, illustrated by the emphasis on the short, the plain, and the concise, was essentially the same. It was to get the story of the occasion for the action before the court quickly and simply. Some lawyers became fearful when they thought they saw no emphasis on "facts"—a term actually of great complexity, although often thought to be simple. Their fears were accentuated by the banners carried by enthusiasts for "notice pleading," so called—a concept even more indefinite than "facts" and never employed in the rules or notes of the Federal Advisory Committee. The obvious concern of lawyers lest the development of all issues prior to trial was to be foregone, and no case no matter how worthless could be exposed without complete and expensive trial, was such that the Advisory Committee took note of it. In the somewhat unusual step—in its recent proposed Amendments—of a Committee Note to a Rule to which it proposed no amendment, it carefully defined the present objective and pointed out its dissimilarity from any system of mere notice and its similarity to the code principles. This clear statement seems to have been completely satisfactory; and the anxiety, it is believed, has now been dispelled.¹⁰

⁹ Compare F.R. 8(a) and Ala. Rule 8(a) with, *e.g.*, N.Y. CODE CIV. PROC. § 481 and N.Y. CIV. PRAC. ACT § 255; CLARK, CODE PLEADING 210-215, 225-245 (2d ed. 1947).

¹⁰ Advisory Committee Note to F.R. 8(a), REPORT OF PROPOSED AMENDMENTS, Oc-

This brief contretemps does, however, indicate the possibility of misunderstanding when the reasons for rejection of an older principle, desirable in theory, but unsuccessful in practice, are not understood. If, as is clear, the need that the pleader tell the story of the legal dispute leading to the lawsuit is still accepted, why abandon the old verbal formula embodying the principle? The answer is that the old formula has acquired too many barnacles hiding the principle itself, so that the concise story is too often lost and elaboration of detail is made paramount. True, there were many enlightened decisions of old from great states like Minnesota and California where fact pleading did observe the code ideal of directness and conciseness. But unfortunately by a kind of Gresham's law in pleading,¹¹ the technical decision survives to drive out the flexible and useful; there is more to talk about in a harsh ruling and it makes more noise and for a longer time than does a permissive ruling. So the decisions requiring absurd details piled up and the shadowboxing of preliminary rulings on demurrers or motions proliferated. Particularly in the mother state of New York did confusion reign and technicality become exalted.¹² A sound remedy seemed to be to free the pleadings from all this outworn learning and pseudo legalism by (1) substituting a new general formula—the one above quoted—and (2) giving illustrations of the meaning by selected forms. This is what was done in the new rules.

The illustrative forms are thus of the utmost importance; they show "the simplicity and brevity of statement which the rules contemplate."¹³ It is interesting that these forms come in straight line of descent from the common law. Thus your proposed Forms 11-19, following Federal Forms 4-8, are from general assumpsit and the common counts. They well might seem

tober 1955, 18, 19. For the previous discussion see *Claim or Cause of Action*, 13 F.R.D. 253-279; McCaskill, *The Modern Philosophy of Pleading*, 38 A.B.A.J. 123 (1952); Tucker, *Proposal for Retention of the Louisiana System of Fact Pleading*, 13 LA. L. REV. 395 (1953); McMahon, *The Case Against Fact Pleading in Louisiana*, 13 LA. L. REV. 369 (1953).

¹¹ Discussed in Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 498 (1950), and see Clark, "Clarifying" Amendments to the Federal Rules? 14 OHIO ST. L. J. 241, 245 (1953); Wright, *Amendments to the Federal Rules: The Function of a Continuing Rules Committee*, 7 VAND. L. REV. 521, 522 (1954).

¹² Clark, *A Modern Procedure for New York*, 30 N.Y.U. L. REV. 1194 (1955); CLARK, *CODE PLEADING* 225-238 (2d ed. 1947); and see notes 6 *supra* and 36 *infra*.

¹³ F.R. 84; Ala. Rule 84.

strange to a layman or a lawyer lacking historical knowledge, but to the educated lawyer they are old friends.¹⁴ So Form 26, identical with Federal Form 9, a complaint for negligence in the operation of an automobile, is straight from Chitty and trespass on the case by way, incidentally, of a Massachusetts statute of model forms.¹⁵ I cannot too strongly emphasize again that the rules build on the knowledge of the past; there is no intent to burn the old legal books, only to use them as they constitute the heritage of all educated lawyers. And this illustrates what is sometimes overlooked; namely, that both common law and equity pleading had their simple features. Unfortunately this simplicity had been allowed to be overwhelmed by detail; now we have a return to the former ease. The dichotomy is more one between "general" and "special" pleading, with renewed emphasis on the former, than between the old and the new.¹⁶

In stressing this approach of the rules to pleading fundamentals I have a small bone to pick with one of the generally exemplary "Commission Notes" to your Rules. This desire to view a reform as a wholly new step has permeated even these notes so that in the discussion under the crucial Rule 8 of General Rules of Pleading¹⁷ there is some talk of "giving notice" and so on, which I find unenlightening, if not confusing, for the reasons stated above. Indeed, it almost seems that notes 2 and 3 war with each other. Thus note 3 properly deduces from the forms and the interrelated rules that Rule 8 "envisages the statement of circumstances, occurrences, and events in support of the claim presented"; and note 2 quotes from an opinion I wrote suggesting to the pleader that for clarity and safety he give a "simple statement in sequence of the events which have transpired, coupled with a direct claim by way of demand for judgment of what the plaintiff expects and hopes to recover."¹⁸ But then in going back to "fair notice" the Note says, "The common law concept of pleading to an

¹⁴ Cook, "Facts" and "Statements of Fact," 4 U. OF CHI. L. REV. 233, 245 (1937); CLARK, CODE PLEADING 287-296 (2d ed. 1947); 30 CALIF. L. REV. 585 (1942); 4 *id.* 352 (1916).

¹⁵ From MASS. GEN. LAWS c. 231, § 147, r. 2892 (1932), and see *Williams v. Holland*, 10 Bing. 112, 131 Eng. Rep. 848 (C.P. 1833); *Reichwein v. United Electric Sys.*, 68 R.I. 365, 27 A.2d 845 (1942), quoting the declaration in 2 CHITTY, PLEADING 574 (16th Am. ed.).

¹⁶ See discussions cited in note 8 *supra* and CLARK, CODE PLEADING 13 (2d ed. 1947).

¹⁷ Commission Notes, FINAL DRAFT ALA. RULES CIV. PROC. 52 (1957).

¹⁸ *Gins v. Mauser Plumbing Supply Co.*, 148 F.2d 974, 976 (2d Cir. 1945); see also *Siegelman v. Cunard White Star Ltd.*, 221 F.2d 189, 196 (2d Cir. 1955, per Harlan, J.).

issue is completely abandoned." How can this be when in the forms the issues are stated just as they were in trespass on the case and general assumpsit? Certainly issues are still framed, though they are now broad and general and the penalties for mistakes are not made severe under the policy of free amendment and trial of issues by implied consent. Moreover, I suspect we often forget how much information general pleading does give us. Consider the famous Form 9 cited above appearing as Form 26 of the Alabama Rules; it pins down the automobile accident to one occurrence of a described kind—there a street crossing accident between pedestrian and automobile; any more detail, if wrung from the parties in battles of motions or demurrers, would at best be superfluous at that stage and might unfairly restrict the proof as the evidence developed naturally at trial.

Such a system works well because it is natural to lawyers. It expects the lawyers to tell in advance what they are accustomed to disclose; thus it does not press for the impossible, contested, or feared disclosure; nor does it contemplate that the court will then spend time polishing or perfecting the results achieved in natural course. For it turns to another series of devices to fill in the gaps and provide that information necessary for a speedy trial or a negotiation for settlement. Foolish and unnecessary trials made possible by concealment should be avoided; the ancient demurrer sought a worthy objective, but could rarely succeed because true and lasting disclosure cannot be obtained from the formalized pleadings of shrewd lawyers. So the modern discovery devices are a necessary part of the workable scheme. This includes all the famous discovery provisions, including interrogatories, depositions, written admissions, and so on;¹⁹ it also includes the collateral steps of summary judgment on motion and of pre-trial to develop the issues, indeed the true case in advance of trial.²⁰ Gone is the bogey of concealment and the surprise attack. "Ye shall know the truth, and the truth shall make you free" is demonstrated over and over

¹⁹ F.R. 26-35; Ala. Rules 26-35. For a full statement of the actual operation of discovery in practice, see Speck, *The Use of Discovery in United States District Courts*, 60 YALE L. J. 1132 (1951); and see also Wright, Wegner & Richardson, *The Practicing Attorney's View of the Utility of Discovery*, 12 F.R.D. 97.

²⁰ F.R. and Ala. Rule 56; F.R. and Ala. Rule 16. See Clark, *The Summary Judgment*, 36 MINN. L. REV. 567 (1952), and Clark, *Objectives of Pre-Trial Procedure*, 17 OHIO ST. L. J. 163 (1956).

today in our courts under modern practice. Perhaps once in a while the delights of a surprise victory via sudden attack must be foregone; against this is a gain in the sure knowledge obtained in preparation and the resultant understanding of "how much a case is worth" to press forward. Naturally the wise attorneys reach agreement in most cases, except those which may require court settlement of purely novel points; and the court, the community, and the parties profit. So do the lawyers; the cases which otherwise would have lain long in the lawyers' "morgue" for lack of promise—while litigants worried and fumed—are now brought out, dusted over, and adjusted at true worth. No wonder the court administrators of crowded calendars are enthusiastic about the successes of pre-trial in elimination of calendar congestion.²¹ Here is not just a trick device. It is the final or next to the final step in a soundly reasoned and developed system of practice. That system you have prepared and at hand before you for your adoption; my only admonition is that you grasp it and reap its advantages.

There is one additional feature I should stress. I have emphasized the pragmatic qualities of the system and how it is at once keyed to the lawyers' habits and the needs of courts and litigants. But we all know that any practice tends to harden and become rigid.²² Even necessary red tape—the normal routine of business, industry, or government—becomes oppressive when it is too obtrusive. The remedy is to reassess it constantly, to lop off the unnecessary, and to sharpen the parts which are working. Some system of amending the rules is a vital necessity. And that the federal experience has demonstrated by a limited, though necessary, number of amendments.²³

²¹ Among the many able demonstrations of pre-trial in print, those of Mr. Justice Brennan with his former associates from New Jersey are particularly persuasive. See Brennan, *Pretrial Procedure in New Jersey—a Demonstration*, 28 N.Y. ST. B. BULL. 442 (1956); Brennan, *Remarks on Pre-Trial*, 17 F.R.D. 479 (1955); and Brennan, *New Jersey Tackles Court Congestion*, 40 J. AM. JUD. SOC'Y 45 (1956).

²² "One of the most difficult and one of the most permanent problems which a legal system must face is a combination of a due regard for the claims of substantial justice with a system of procedure rigid enough to be workable. It is easy to favour one quality at the expense of the other, with the result that either all system is lost, or there is so elaborate and technical a system that the decision of cases turns almost entirely upon the working of its rules and only occasionally and incidentally upon the merits of the cases themselves." 2 HOLDSWORTH, A HISTORY OF ENGLISH LAW 251 (4th ed. 1936).

²³ There have been amendments on four occasions, only once involving revisions of substantial extent. See Clark, "*Clarifying*" *Amendments to the Federal Rules?* 14 OHIO ST. L. J. 241, 242 (1953).

But here we must face a problem made immediate by the Supreme Court's recent discharge of its Advisory Committee on the civil rules,²⁴ accompanied by the Court's failure to take action on pending amendments.²⁵ This is something of a paradox. When the success of the federal rules—actually enacted by the Supreme Court, even though prepared by its Committee—is at its very summit, when the Court is receiving plaudits for its accomplishment, the Court in effect abandons its success and discards its role of leadership.²⁶ I would be wanting in frankness did I not express my shock and regret, shared, I believe, by all protagonists of court reform, at this heavy loss—one which may cause the federal system to be henceforth somewhat of a blanket to state reforms.²⁷ But I think we should seek to understand the Court's problem and to take heed for a wise future course in federal and state practice both, rather than yield to unconstructive criticism. Since the Court does not explain its reasons, we cannot speak with definitive knowledge. Nevertheless natural deductions do not seem hard to make. Starting with Justice Brandeis' original objections, based on the proper function of the Court, rather than objections to the rules themselves,²⁸ we know that certain justices have felt rule-making an undesirable, if not impracticable, job for the Court.²⁹ Recent developments, high regard for the existing rules, doubt of the present need for change,³⁰ and a recoiling from the sharp

²⁴ 352 U.S. 803 (1956), terminating the appointment of the Committee made in 295 U.S. 774 (1935) and revoking the order for its continuance in 314 U.S. 720 (1942).

²⁵ The REPORT OF PROPOSED AMENDMENTS cited in note 10 *supra* was submitted to the Court on October 1, 1955, but no action with regard to it has been announced.

²⁶ There seems a touch of irony, obviously unintended, in the encomia of Holtzoff, *Judicial Procedure Reform: The Leadership of the Supreme Court*, 43 A.B.A.J. 215 (1957), and the editorial, *Brilliant Leadership*, 43 A.B.A.J. 240, 241 (1957).

²⁷ The Supreme Court is doubtless unaware of the movements in the states, such as Alabama, for reform along federal lines; but at any rate its present membership obviously does not desire the role of leadership as described in the articles cited in note 26 *supra*.

²⁸ In correspondence after his retirement, Mr. Justice Brandeis stated that his objections to the adoption of the rules, 302 U.S. 783 (1937), did not imply disapproval of their adoption in the states. CLARK, *CODE PLEADING* 37 (2d ed. 1947).

²⁹ See dissent on the exercise of the rule-making power by Mr. Justice Black, 307 U.S. 652 (1939), 308 U.S. 642, 643 (1939), 323 U.S. 821 (1944), and dissent or qualified concurrence by Mr. Justice Frankfurter, 323 U.S. 821 (1944) and 329 U.S. 843 (1946). Compare critical comments in 31 A.B.A.J. 136, 163 (1945) and by Cummings, 31 A.B.A.J. 236, 238 (1945), and Dession, 55 YALE L. J. 694, 698 (1946); and see also Clark, *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROB. 144, 148-149 (1948); Clark, *The Proper Function of the Supreme Court's Federal Rules Committee*, 28 A.B.A.J. 521 (1942); and the resolution of the American Bar Association, 28 A.B.A.J. 711, 67 A.B.A. REP. 131 (1942).

³⁰ Here, too, it is to be feared that the Court will lack knowledge of particular defects in the general success of the system; thus the rule for substitution of parties,

division of view between lawyers favoring and lawyers opposed to narrowing the reach of discovery³¹—all these have undoubtedly led it to retreat as far as it feels it can from the heat of debate and controversy. We can surely sympathize, but we can hardly promise more quietude. For the discovery controversy was obviously a sign of the strong, vital, and challenging interest of lawyers active in litigation. We should not stop or lessen this if we would. Perhaps then we need to consider other ways and means; the suggestion that the Judicial Conference of the United States succeed to the Court's rule-making function as least merits debate and discussion.³² All of us will regret the loss of the prestige and persuasive effect of the Court's leadership; but we can hardly expect results worthy of the cause if the Court itself does not believe in its own function as defined by Congress.

This problem must be faced in a state; it must be faced in Alabama. The usual solution has been to leave the final authority with the highest court of the state, but with a rules committee or commission permanently in action.³³ This I think desirable. The Federal Advisory Committee was not recognized in any law; it was only a creature of the Court serving at will as adviser merely. This had some disadvantages; thus it had no authority to protect in any way what it had done.³⁴ It was at the mercy of any case which might bring in question the meaning and even validity of any of its rules. The Attorney General

Rule 25, was left without adequate support of legislation by an unfortunate, if complimentary, turn of events, see note 37 *infra*, and the correcting amendments of REPORT, October 1955, 28-33, not having been adopted, see notes 10, 25 *supra*, the rule has been held invalid as a limitation, leaving a serious gap. *Perry v. Allen*, 239 F.2d 107 (5th Cir. 1956).

³¹ The debate over discovery, sparked by NACCA on the one hand and the International Association of Insurance Counsel on the other, concerned the extension of Rules 33 and 34, dealing with written interrogatories and documents for inspection, *i.e.*, details in the broad picture of the general system.

³² The suggestion for authority in a body such as the Judicial Conference of the United States, made from time to time in the past, Louisell, Book Review, 66 *YALE L. J.* 164, 166 (1956); Shaw, *Procedural Reform and the Rule Making Power in New York*, 24 *FORD. L. REV.* 328 (1955), has been given increased momentum by the resolution authorizing the appointment of a Study Committee to explore the whole subject of rule-making, adopted by the Conference at its session March 14, 15, 1957.

³³ VANDERBILT, *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION* 128-131 (1949), and see note 32 *supra*.

³⁴ Examples of need to redirect or clarify existing rules appear as described in the notes to the REPORT OF PROPOSED AMENDMENTS, October 1955, cited notes 10, 25 *supra*, and in Clark, "Clarifying" Amendments to the Federal Rules? 14 *OHIO ST. L. J.* 241 (1953); see also Wright, *Rule 56(e): A Case Study on the Need for Amending the Federal Rules*, 69 *HARV. L. REV.* 839 (1956); Wright, *Amendments to the Federal Rules: The Function of a Continuing Rules Committee*, 7 *VAND. L. REV.* 521 (1954).

of the United States is by law required to watch over and defend the validity of any Act of Congress;³⁵ but no one defends the products of the Court itself, though studied, developed, and advanced by its presumably expert advisers. This should be changed. There should be a permanent body somewhere, charged with continuous supervision of the practice and provided with counsel or other defenders of its basic principles.

Even as it was, the record achieved in the federal practice of a rule-making system not subject to legislative whim was remarkable. Before the federal rules legislative tinkering with court procedure was a byword. It still is in states such as New York.³⁶ But since 1937 it has been the steady habit of Congress and its Committees to refer all requests or demands for change to the Court or its committee and to refrain from interfering itself.³⁷ That is an outstanding show of confidence; its benefits in keeping the procedure uniform and workable are immeasurable. The legal profession in Alabama should consider this record and the utility of such a body. I hope then you will consider the creation of a permanent commission—responsible to your highest court if that court will willingly assume the heavy responsibilities of leadership in practice reforms—to keep the tools of law administration ever sharp and bright.

Although I have been in the midst of law reforms practically all my adult life I yet thrill at each new birth of spirit, interest, and accomplishment as lawyers turn the keen minds they have trained for the purpose to their highest objective—"the just, speedy, and inexpensive determination of every action" in our courts.³⁸ I count it a privilege that you have invited me to share even in a small way in this glorious movement.

³⁵ Act of Aug. 24, 1937, c. 754, § 1, 50 Stat. 751, now 28 U.S.C. § 2403.

³⁶ See note 12 *supra*; also Clark & Wright, *The Judicial Council and the Rule-Making Power: A Dissent and a Protest*, 1 SYRACUSE L. REV. 346 (1950); Mitchell, *The Federal Rules of Civil Procedure*, in DAVID DUDLEY FIELD CENTENARY ESSAYS 73 (1949); *Memorandum*, 2 THE RECORD 12, 18 (1947); Keefe, Brooks & Greer, *New York. Rule-Making Power. 86 or 1100*, 32 CORNELL L. Q. 253 (1946).

³⁷ It is noteworthy, indeed memorable, that in the two decades since the rules have been in effect Congress has refrained from interfering with federal civil procedure in all but two instances, both comparatively minor and one obviously inadvertent. In the Patent Act of 1952, there is a provision requiring special pleading of certain defenses to a patent infringement suit, 35 U.S.C. § 282, and in the Code Revision Act of 1948, it repealed the statutes for substitution of parties, the former 28 U.S.C. §§ 778 and 780, for the stated, but erroneous, reasons that they were superseded by Rules 25 and 81 of the Federal Rules of Civil Procedure. See note 30 *supra* and REPORT OF PROPOSED AMENDMENTS, October 1955, 29-31.

³⁸ F.R. and Ala. Rule 1.