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Introduction of the Panel on the Jurisdiction of the Court

by Professor Sidney B. Jacoby*

WE NOW COME to the second part of the program which will cover a more mundane subject. This portion of the program does not concern itself with high level protections.

Before we begin the panel I would like to make one remark. Professor Russell has raised a very important point, is there a constitutional right of equal protection once a person gets to Court? The question was never answered. The Swiss Supreme Court ruled in 1931 that a provision requiring prepayment of fees in order to call a witness, violated a rule of the Swiss Constitution which provides that all Swiss are equal before the law. Prepayment, in this situation was thought to discriminate against the poor.¹ The holding was followed in other countries. For example, after World War II, the Germans reached the same conclusion. With that response to Professor Russell's question, we came to the subject matter of this panel, jurisdiction, a more mundane, but terribly important subject.

I have the great honor to introduce as the first speaker, Professor Eugene Gressman of the University of North Carolina at Chapel Hill. Professor Gressman is a graduate of the University of Michigan Law School and served as law clerk to Justice Murphy of the United States Supreme Court. He has written on Supreme Court practice and only last year the Supreme Court, in a letter signed by all nine Justices, singled out Professor Gressman and approved of his statement to the Senate Judiciary Committee concerning the elimination of the Supreme Court's obligatory jurisdiction.

Our second panelist, Professor Hogg, of Osgood Hall, York University in Toronto, is a very learned fellow. He has earned degrees in New Zealand, Australia and at Harvard. He is the author of a very important book on Australian administrative law and has recently published a widely used book on Canadian constitutional law. Professor Hogg served as counsel in two reference cases before the Canadian Supreme Court. I think the American audience will be particularly interested in his discussion of reference jurisdiction.

As you know advisory opinions are not part of the American system of jurisprudence. The rejection of reference jurisdiction originates with a statement by our first Chief Justice, John Jay, when Thomas Jefferson, then Secretary of State under President Washington, went to the Supreme Court asking for an interpretation of a treaty with France. Justice Jay refused to respond on the ground that this would be an advisory opinion prohibited by the case and controversy limitation of Article III. This inter-

¹ Jacoby, *Legal Aid to the Poor*, 53 HARV. L. REV. 940, 942-43 (1940).

pretation of Article III remains the accepted view on advisory opinions. In 1962, when the Supreme Court affirmed the Article III character of the United States Court of Claims, they said very clearly that if there are further so-called congressional references to the Court of Claims, the Court should refuse to take them the same way the Supreme Court 169 years ago refused to accept presidential references.

There is an amusing sequel to that decision. The Court of Claims no longer handles congressional references. Only Commissioners review such questions. Congress felt it necessary to write a provision into the law, 28 U.S.C. § 2509, that the law clerk's secretaries working for the Court of Claims be paid out of appropriations of the Congress since they perform services outside the scope of Article III for the Commissioners when the Commissioners decide congressional references. Congressional reference decisions go directly from the Commissioners to Congress. They do not go to the Court as such.

In view of our American experience it is very interesting to learn how the Canadian Court has handled these matters. A 1912 opinion of the Privy Council, affirming the right to decide reference cases in Canada, deviates from the American notion that these decisions are not judicial opinions. The contention of the persons attacking the use of reference cases was that the British North America Act of 1867 does not speak of reference cases. They argued that reference opinions prejudice the private litigant. It is thus interesting to know that our Canadian neighbors also debated the issue of advisory opinions.

Of course the major issue which will arise in our chapter on jurisdiction is the absence of a dual system of state courts and federal courts in Canada. The dual system which we have has created many problems which the Canadians have not had to deal with. The United States is probably the only federal system in the world which has a dual system. Canada does not have it; Australia does not have it; Mexico does not have it; Switzerland does not have it; West Germany does not have it. Yet, they are all federal systems.

I will now turn the panel over to Professor Gressman who will speak on the jurisdiction of the United States Court.