Department of Justice

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ADDRESS

BY

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INTRODUCTION

Good Evening. I should like to thank President Gossett, President-elect Segal and the officers and members of the American Bar Association for the opportunity to speak to you this evening.

I have now been in office almost seven months. And I think that, perhaps, I have a professional obligation to describe to the American legal community the philosophy that has prevailed and will continue to prevail during my tenure as the 67th Attorney General.

As you know, the Attorney General is the President's lawyer and takes Presidential guidance as to the type of America -- the type of "ordered liberty under law" -- that this Administration wants for our citizens.

Thus, permit me to remind you of some of the principles enunciated by President Nixon in his Inaugural address, and I quote:

"The laws have caught up with our conscience. What remains is to give life to what is the law."

"For all of our people," the President added, "we will set as our goal the decent order that makes progress possible and our lives secure."

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I believe that the great majority of Americans want "to give life to what is the law" by having their laws reflect "decent order" with "progress."

"The life of the law," as Mr. Justice Holmes said, "has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuition of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal to do with the syllogism in determining the rules by which men should be governed."

The great developments in the law over the last decade have properly attempted to serve, as Mr. Justice Holmes said, "the felt necessities of the time." In general, we have attempted to equalize the public benefits available to all our citizens -- the poor defendant with the rich defendant, the minority group student with the majority group student, the minority political party member with the majority political party member, the city dweller with the rural dweller, and the presumably innocent accused with the prosecutorial powers of the state.

As lawyers, we all should be proud of these developments.

But having laid these great foundations, it is, perhaps, only historically natural that, at this time, we take the opportunity to reflect upon and evaluate our recent progress.

It is undeniable that some of our new concepts have areas of error which ought to be corrected. Minor adjustments do not imply an abandonment of a principle but rather a dedication to making that principle work.

But -- who is to make the decision as to which adjustments are necessary and how they will be implemented?

As the Attorney General, I have the burden of making many of these decisions and my guide is the ancient common law guide of the "reasonable man" whom our forefathers established as the enlightened compromiser in a pluralistic society.

The mark of the "reasonable man" is to balance the interests; to strike a bargain between the perfect and the possible; to adhere to a moral ideal where that adherence is compelling. But, in general, to negotiate a practical middle-of-the-road solution.

That is our over-all policy approach in the Justice Department.

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It is, I grant you, not very glamorous to be a "reasonable man." But it is the reasonable men of this world who have studied new concepts, who have adopted those which were compatible with progress, who have funded them and made them work.

One of the most difficult problems today is that the misrepresentation, the posturing and the extravagant rhetoric of the last few years have offered promises which cannot be delivered, and have set as immediate goals programs which will take a decade to complete.

For example, there are those who expect crime or racial discrimination to be eliminated tomorrow.

It has, for this reason, become fashionable to argue that many legal issues of the nation must be cast rigidly as a right of the individual or a right of society. I do not wish to argue semantics. But individuals make up society.

When a guilty man is acquitted, it is not a vague amorphous group called society which is damaged. It is you, individually, who is damaged, because that man may assault or mug you.

Conversely, when society convicts an innocent man, individual rights are again sacrificed -- not only the

individual right of the defendant but the individual right of each one of you who could some day be placed in the dock. And you have a right to condemn a society which fails to accept the task of insuring that, under our Constitution, the guilty are convicted and the innocent are acquitted.

It is a question of balance and moderation in order to solve problems and, perhaps just as importantly, to ward off more extreme solutions which may be demanded.

In this context, permit me to cite a few examples of some of the difficult decisions that have been made since January 20th and, in so doing, to explain to you how we attempted to balance the equities so that the best constitutional interests of as many individuals as possible would be served.

WIRETAPPING

The first example I would like to cite is the current controversy over wiretapping -- as it applies to organized crime and national security intelligence gathering and prosecutions.

The basic constitutional and moral controversy stems from the conflict between the individual citizen's right to privacy in his home and in his office versus the individual citizen's right to demand that his government properly

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investigate those persons whose criminal activities pose a substantial danger to the general welfare and thus to the personal security of each citizen.

The Fourth Amendment to the Constitution establishes the right to privacy by protecting each citizen "against unreasonable searches and seizures."

Because the right to privacy has never been viewed as absolute, the right of government officials to conduct searches and seizures in appropriate circumstances has never been questioned.

Thus, the Fourth Amendment ban against unreasonable searches must be read in the light of the purposes for which our Constitution was adopted: "to promote the general welfare and to secure the blessings of liberty" to this nation.

It is undeniable that organized crime presents a substantial threat to our "general welfare."

Operating over a long period of time with relative immunity from the judicial process, the nationwide syndicate of organized gangsters corrupts our political institutions, intimidates the legitimate businessman, subverts the ideals of the trade union movement, flourishes on the victims of poverty, and, in a very real sense, undermines the foundation

upon which our constitutional protections stand.

Most recognized law enforcement experts have repeatedly stated that wiretapping is our most useful tool in obtaining information about this organized criminal syndicate.

Because wiretapping is an invasion of privacy, a judgment must be made as to whether it is "reasonable" to wiretap in a particular case in order to obtain information that is necessary to combat organized crime.

Congress addressed itself to this issue in Title III of the Omnibus Crime bill of 1968. It authorized the Department of Justice to install electronic eavesdropping devices on organized racketeers by application to a court and upon a showing of probable cause.

We decided to use Title III to authorize wiretaps of organized gangsters because we believe that the statutory requirement of probable cause by warrant provides substantial assurance that the privacy of innocent persons will not be unreasonably invaded.

Furthermore, I also insisted -- and continue to insist -- that each application and full supporting papers be personally presented to me for my evaluation.

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The result to date has been satisfactory. There have been authorized, as required by the circumstances in each case, a limited number of electronic eavesdropping devices which have proved, so far, to be highly productive.

I have refused to authorize a number of applications which, upon inspection, posed more dangers to personal privacy than would be warranted, in my opinion, by the information which the tap was designed to collect.

As one could have predicted, the Department has been criticized by both sides -- by those who want massive wiretapping on the 5,000 known members of organized crime, and by over-sensitive civil libertarians who claim that any wiretapping is an invasion of privacy.

But as lawyers, I ask you to consider the problem and to make your own judgment as to whether our middle-of-the-road position -- although not compatible with either extreme -- is not "order with progress" in the area of organized criminal investigations.

The other aspect to the wiretap controversy is the non-court authorized electronic surveillance for national security purposes.

Here again, we were faced with constitutional polarities. There are those who believe that every search conducted by government under any circumstances must conform to the Fourth Amendment requirements of a warrant issued by a magistrate.

And there are others who believe that, on the slightest pretext of national security, the Executive should be able to conduct searches free from any court ordered showing of probable cause.

When I became Attorney General, I was informed that every Attorney General for the past 25 years has authorized electronic surveillance as a means of gathering foreign intelligence information and intelligence information concerning domestic organizations which pose a serious threat to the national security.

This power has been exercised under the constitutional prerogative of the President to protect the security of the nation upon the belief that the courts would accept the Attorney General's determination that the search was necessary.

Thus, I decided that, as the President's lawyer, it was right and proper for me to defend the actions of my

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predecessor Attorneys General who acted on behalf of their respective Presidents. We have submitted this matter to the courts for their decision and we will, of course, abide by their rulings.

As a safeguard against abuse, a complete review of every existing national security wiretap was instituted. Each application must be presented to me personally with full supporting documentation. The result has been a restricted use of non-court authorized electronic surveillance.

PRETRIAL DETENTION

We have used this approach of compromise and moderation in other areas of the criminal law where extremists argue for absolutes rather than policies carefully tailored to the problems to be solved.

For example, the nation is well on its way -- and rightfully so -- to eliminating money bail as a pre-condition for release in non-capital cases. The money bail system, as it was practiced until the early 1960's, made an accused's pretrial freedom depend upon his bank account.

The Eighth Amendment bars excessive bail. We had always assumed that reasonable bail was quantitative in relationship to the crime. But, as our social consciences

became more aware of poverty in America, we began to look at bail qualitatively, i.e., what is reasonable bail for the financial circumstances of each defendant. Using this approach, we first examined the goals which money bail was expected to achieve.

They are: First, to insure a man's appearance in court; and second, to insure that, being under the jurisdiction of the court, he will be law-abiding during the period of his release.

Initial studies showed that the best guarantors of a man's appearance were his ties to the community and his employment record. Initially, we took the view that the type of crime charged and his prior criminal record were of no consequence and that his good behavior, while out on pretrial release, would be assumed.

After four years of bail experiments and a careful reevaluation of the facts, we have concluded that a prior criminal record, and the type of crime charged, are very relevant as to whether an accused will be law-abiding when he is released.

The latest FBI statistics show that 82 percent of all persons arrested in 1968 had a previous arrest, that

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70 percent were previously convicted and that 46 percent had been imprisoned under a prior sentence.

In addition, the FBI report shows that 67 percent of accused burglars, 71 percent of accused auto thieves, and 60 percent of accused robbers had been arrested in the previous seven-year period.

In the District of Columbia, in 1968, of 557 persons indicted for robbery, 63.7 percent of those released prior to trial were rearrested for additional crimes while awaiting trial.

Thus, we decided that an adjustment was necessary in order to protect those innocent members of our society who might be the victim of an accused criminal whose character and background showed high recidivist tendencies.

The adjustment we have proposed to Congress is an amendment to the Federal Bail Act which would establish selected pretrial detention on a limited basis with strong safeguards against abuse.

Our bill would hold for pretrial detention only those persons who appear to be so "dangerous" that their release pending trial would probably result in a crime.

We have provided for a full hearing, permitting the accused to be represented by counsel, to present witnesses

on his own behalf and to cross-examine the witnesses against him. There is a right to appeal promptly and the right to be tried within sixty days or to demand release.

The main criticism against our bill is that it penalizes presumably innocent persons by imposing pretrial imprisonment and that it is impossible to predict, with complete accuracy, whether a particular arrested person will commit a crime.

The answer to this criticism is that, even under the money bail system, presumably innocent persons were denied their freedom, and that we are establishing a much more careful method of determining who should not be released.

We believe that in the limited number of cases where pretrial detention will be used, the right of the individual member of society to be protected from a crime will be carefully balanced against the right of a presumably innocent accused to be given his freedom pending trial -- a freedom that will only be limited if there is the most overwhelming evidence that he may commit a crime while released.

I know that there are those who argue that no arrested man should be denied his freedom until he is convicted, and I know that there are those who argue for more extensive pretrial detention on the grounds that society needs even more protection than we have proposed.

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But we have selected a moderate course -- a course that is constitutionally consistent and is adjusted to the realities of the crime problems of the day.

CIVIL RIGHTS

Perhaps no area of Justice Department jurisdiction has caused more controversy than our school desegregation policies.

They have been misinterpreted, misunderstood, attacked and supported, many times by the wrong people for the wrong reasons.

Let me make one thing absolutely clear. Racial discrimination is wrong. It is morally wrong. It is legally wrong. It is socially wrong. It must be substantially eliminated if we are to survive as a nation of free and independent people.

When we came into office we were faced with a most confused situation. About 3,700 out of the 4,500 southern and border state school districts had desegregated voluntarily, or were in the process of completing desegregation under the auspices of the Department of Health, Education and Welfare.

Three hundred-sixty-nine school districts were being sued by the Department of Justice or private litigants. There were 263 school districts which faced the prospect, during the coming year, of a fund cut-off by the Department of Health, Education and Welfare because they had refused to submit acceptable desegregation plans. And there were 121 school districts which had refused to desegregate, which had been cut-off from all federal funds and had never been sued because they refused to desegregate.

Now, desegregation is more than a theory. It deals in human lives and aspirations and in the education of children.

By the time we came into office, 15 years after Brown v. Board of Education, it had become quite clear that those school districts which had not desegregated voluntarily would put up a vigorous battle before they would capitulate to the law. This vigorous battle, in many cases, would have entailed a fund cut-off and a period of financial starvation.

In most school districts, the children who have suffered the most from a cut-off of federal funds, as our evidence has shown us, are the Negro school children.

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When a school district lacks money and is controlled by segregationist school board members, the first schools to suffer in the money squeeze are the black schools.

It is their teachers and principals who are fired first. It is their libraries which are not replenished. It is their buildings which are not maintained. It is their school bus transportation systems which are denied funds, and it is in the Negro schools that the federal school lunch program is frequently most necessary.

Federal fund cut-offs also hurt white students. And here it should be remembered that it is not the children -- either black or white -- who have refused to obey the law. It is adults blinded by prejudice.

The second problem is that we know that in many recalcitrant districts there are responsible school officials who wish to achieve integration, but find it difficult to overcome massive community hostility. These school officials have told us repeatedly that their communities will not voluntarily end discrimination, even under the threat of a federal fund cut-off.

These same school officials have told us that their school board members will obey court orders. Indeed, some

responsible school officials believe that their job is made easier if they are under an involuntary court order than if they are involved in a voluntary negotiation.

Third, the practical defect with court order school cases has been, in the past, that judges and lawyers are not educators. Our lawyers are experienced advocates who argue whether or not the precepts of Brown and Greene are being followed. But they do not have the technical qualifications to decide, for example, how many students should be assigned to an individual classroom if some schools are closed and others are overcrowded, or how students from different tract systems can be integrated when there are student transfers or what type of new school should be planned when a new school is required.

As a result, a great many school districts under court orders have found themselves involved in impossible plans, put together by well-meaning lawyers and judges without the benefit of an educator's experience.

In view of these three problems, a revised joint program for school desegregation was announced last month by the Department of Justice and the Department of Health, Education and Welfare. It was calculated to achieve lawful

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school desegregation as quickly and as effectively as possible.

It emphasized swift court action when voluntary negotiations failed. It emphasized keeping federal funds rather than starving school districts. It emphasized using educators from the Department of Health, Education and Welfare to plan school desegregation rather than using lawyers from the Department of Justice.

This new program is, I believe, a totally responsible, moderate and practical way to achieve great progress in an extremely difficult problem area. And yet it has been loudly criticized from all sides.

Some civil rights leaders have insisted that we pursue the harshest action in order to achieve integration at all costs -- that we cut off funds, that we close down new schools, that we rearrange whole school systems without regard to the damage to black and white children.

Persons interested in maintaining segregation, such as the Governor of Georgia, have condemned us and have vowed resistance to our new policy at all costs.

CONCLUSION

And so you see that in three critical decision-making areas -- wiretapping, pretrial detention, and school desegregation, as in other areas -- this Administration has tried, and will continue to try, for the decent order with progress that all reasonable men must want for our nation.

We will continue to resist extremism and over-reaction, and I suppose we will continue to receive the most virulent criticism from both ends of the spectrum.

We live in difficult times where moderation is frequently rejected -- where the practical and progressive reasonable man, seeking a common-sense solution, is drowned out by the cries of extremism.

But if the reasonable men of this nation do not come together now in a sincere attempt to heal our differences and improve our institutions -- both in the law and in other areas -- I feel that we may be headed for even more tragic times.