Department of Justice

ADDRESS

BY

HONORABLE JOHN N. MITCHELL

ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

the

BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

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1. INTRODUCTION.

I am very pleased to be honored by the Bar Association of the District of Columbia at its Law Day luncheon and to speak on the topic: "Law -- Bridge to Justice."

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

Permit me to remind you of some of these principles as enunciated by President Nixon in his inaugural address, and I quote:

> "The laws have caught up with our conscience. There remains for us 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."

The first prerequisite "to give life to what is the law" is respect and confidence in our system of law.

Central to our concepts is the Constitution. Its principles for the protection of liberty and property have endured since the founding of this Republic. They must continue to endure if we are to remain a nation of free men.

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But Constitutional rights in themselves are meaningless without legislation to implement them, an Executive to carry them out and courts to interprete them.

Thus, all three branches of government must have the confidence and respect of the nation if the law is to have the confidence and respect of the nation.

We can afford some popular cynicism about the Legislature and the Executive. They are subject to the mandate of the electorate. They are frequently involved in partisan politics and our citizens often have a healthy skepticism for the pronouncements and motivations of politicians.

What is disturbing me today is the amount of popular cynicism about the Supreme Court which seems to exist among substantial numbers of our citizens.

I find that at this time in our history the Court's detractors are legion and its defenders are few.

And, therefore, I have chosen this opportunity on Law Day to discuss some of the controversies involving the Court.

It may be suggested by some that an official of the Executive Branch is perhaps overstepping the bounds of propriety by commenting so directly on the activities of the Judiciary.

But I believe that recent events have imposed upon me the obligation as Attorney General to give my own defense of the Supreme Court and to call for an end to irresponsible and malicious criticism which will not only damage the Supreme Court but will undermine all of our courts and our respect for our system of laws.

In so doing, I beg the forgiveness of the Judiciary if my comments are interpreted in any adverse manner.

2. HISTORICAL.

The Supreme Court has been the center of bitter controversy ever since its inception and I think that free debate about the Court -- as about other institutions -- is a desirable element of our society.

Seventy-two years ago Mr. Justice Brewer said:

> "It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as being beyond criticism. On the contrary, the life and character of its Justices should be the object of constant watchfulness by all, and its judgments subjected to the freest criticism... True, many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all."

Justice Holmes welcomed criticism by noting:

> "... in these days no one can complain if any institution, system or belief is called on to justify its continuance in life. Of course, we are not excepted and have not escaped. Doubts are expressed that go to our very being ...

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"we must take such things philosophically and try to see what we can learn from hatred and distrust and whether behind them there may not be some germ of inarticulate truth."

The early leaders of our nation hardly waited for the ink to dry on the Constitution before they attacked.

The 1789 Judiciary Act, which as you know, stands today as the keystone for federal jurisdiction, was bitterly assailed by Attorney General Randolph less than a year after its passage.

And Patrick Henry listened sympathetically when one Congressman said that the bill was "monstrous" and another said the bill would make the Court "an awful tribunal."

The Court held, in 1793, that the State of Georgia could be sued on a contract in the federal courts. The outraged assembly of that State passed a bill declaring that any federal Marshal who tried to collect a judgment would be guilty of a felony and would suffer death, without benefit of clergy, by being hanged.

When the Court decided that State criminal convictions could be reviewed in the Supreme Court, Chief Justice Roaner of Virginia called it "a most monstrous and unexampled decision. It can only be accounted for by that love of power which history informs us infects and corrupts all who possess it and from which even the eminent and upright judges are not exempt."

When the slavery controversy reached its peak, the Massachusetts Legislature called for the disbarment of any lawyer appearing in the Supreme Court on behalf of a slave owner. Meanwhile at least ten bills were introduced in Congress to deprive the Court of its appellate jurisdiction, in whole or in part.

If one scans American history, it is the rule and not the exception that the Court has found itself in the center of almost every significant political and social debate --- the great debates over federalism, the slavery controversy, reconstruction and nineteenth century economic reform, the dissent and syndicalism controversies of the First World War period, the New Deal programs of President Roosevelt, and most recently, desegregation, crime, obscenity and reapportionment.

The Court's adversaries have been the states, the Congress, both political parties, and even the lower federal courts.

Opposition to the Court has also involved Presidents. Jefferson complained:

> "The instrument (the Constitution) meant that it's coordinate branches should be checks on each other. But the opinion which gives the

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> "judges the right to decide what laws are Constitutional, and what not, not only for themselves in their sphere of action, but for the Legislative and Executive also in their spheres, would make the Judiciary a despotic branch."

Lincoln, obviously referring to the Dred Scott decision, said at his inaugural:

> "If the policy of government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, ... the people will have ceased to be their own rulers."

President Roosevelt complained:

> "The Court has been acting not as a judicial body but as a policy making body ... The Court has improperly set itself up as a Third House of Congress -- a super legislature -- reading into the Constitution words and implications which are not and which were not intended to be there."

Inevitably, controversies over the Court and its role have been reflected in debates about nominations to the Court, 20 percent of whom were rejected.

Within our recent memory, Justice Brandeis was said to be "not a fit person" to sit on the Court by seven former Presidents of the American Bar Association, including former President Taft.

Chief Justice Hughes was assailed in the Senate for representing a "powerful combination in the political and financial world."

Judge Parker's nomination was defeated by a liberal coalition and Justice Roberts was named in his place.

At least one historian has commented that "on the basis of the comparative careers of the two men," the anti-Parker Senators "would have been better off if they had supported" Parker.

Justice Frankfurter, who argued powerfully in favor of judicial restraint, was criticized as a "radical."

The rhetoric, the invective and the passion of prior critics may appear slightly ridiculous to us today. In virtually every controversial case or nomination fight, the Court has been accused of endangering the Republic, of arrogating powers reserved to other branches of government and of substituting partisan political bias for neutrality and fairness.

It or its Justices have been called incompetent and venal and Godless and conspiratorial.

The lesson we should draw from history is that extremist critics of the Court have vastly over-reacted and that most of the basic principles enunciated by the Court have proved to be the best course for the nation to follow.

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3. THE COURT TODAY

Why then, if history has justified the Supreme Court should I be particularly concerned about the popular dissatisfactions today.

In the first place, I do not think that I should decline to speak on the Court's behalf merely because history gives me some assurance that my voice may not be needed.

In the second place, I am not entirely convinced that the criticism against the Court today has a historic parallel.

In the past, the controversies appeared to be narrowed to a single issue, such as interstate commerce or freedom of speech or economic reform; or to a particular precept, such as the supremacy clause or the commerce clause;or to a particular institution, such as the Congress or a state government.

But today, the criticism appears to be spread to many sections of the country, to many governmental institutions, and to many different segments of the population.

There is regional criticism stemming from the civil rights cases. There is rural criticism from the reapportionment cases. There is urban criticism in our crime ridden cities from the criminal justice cases. There is religious criticism from the school prayer cases and there is broad

disagreement over the obscenity cases. There is talk, as there has been in the past, of severely limiting the jurisdiction of the Court and of tampering with the Bill of Rights.

I do not think we have seen, certainly in recent years, so much controversy involving the Court, its decisions and its Justices, and from so many different sources. Nor do I think the vehemence of the criticism appears to be subsiding.

It seems to me that much of the popular dissatisfaction is ill-founded or maliciously motivated and that more people, especially lawyers, should point this out.

We lawyers should emphasize that all our institutions -- including constitutional law -- must change to meet the challenges of our society.

As Jefferson said:

> "Some men look at Constitutions with sanctimonious reverence and deem them like the Ark of the Covenant, too sacred to be touched. They ascribe to the men of the preceding age, a wisdom more than human ... laws and institutions must go hand in hand with the progress of the human mind. We might as well require a man to wear a coat that fitted him as a boy, as civilized society to remain ever under the regime of their ancestors."

In order to tailor this coat to each succeeding generation, Supreme Court Justices must make subjective decisions in the loneliness of their own consciences.

As Mr. Justice Holmes said:

> "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a great deal to do with syllogism in determining the rules by which men should be governed."

The developments in Constitutional law over the recent decades have properly attempted to serve, as Mr. Justice Holmes said, "the felt necessities of the time."

I do not believe that any lawyer here, or any responsible citizen in this country, does not agree with the fundamental principles of Brown -- that all citizens should be treated equally regardless of their race; or with the basic principles of Gideon and Miranda -- that all criminal defendants must be treated equally regardless of their financial status; or with the precepts of Baker -- that all voters' ballots should be counted equally; or with the precepts of Roth -- that obscenity is not protected by the First Amendment; or with the precepts of Engel -- that the state may not involve itself in supporting religious activities.

These cases stand for principles of our society -- principles of equal protection, of the right to counsel and of freedom of speech and religion.

The disagreements arise over the application of these principles to particular cases. I think that critics should make it very clear that a disagreement over the application of a principle in a particular case only means a dedication to making the underlying idea work -- it does not imply an abandonment of the principle itself.

It seems to me that the public should understand a little more precisely what the Court said and did not say.

In Brown, and succeeding cases, it said that state officials may not discriminate against persons because of their race and that private citizens may not offer goods and services freely to the white public at large but not to the black public.

It did not say that private persons may not discriminate within the circle of their family, friends or social activities.

In Miranda, the Supreme Court did not say that the only way to insure a voluntary confession is to insist that a lawyer be present while a suspect is being questioned. The opinion permits the suspect to reject legal advice. It also said that perhaps Congress could find another method and it left the door open to experimentation in this field.

In the obscenity cases, the Court has established a tough standard on publications that might be approved for adults but that

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would be harmful to children. The dispute in this area centers on the difficult problem of whether a particular publication transgresses the very personal standards of adult sexual mores.

In the school prayer cases, the Court implied that religious activities may be held in public schools if they are completely voluntary and if there is no direct or indirect coercion of the students to attend. Furthermore, the Court said that the study of religions should be encouraged as a valuable part of education.

The CBS show "60 Minutes" recently did a poll of 1138 adults at random. It shows that perhaps many people really disagree with the Constitution and not with the Court.

Seventy-six percent of the people interviewed said citizens should not be allowed to organize protests against the government, even if there appears to be no danger of violence.

Fifty-five percent of the people interviewed said that in peacetime newspapers, radio and television should not have the right to report any story that the government feels is harmful to our national interest.

Fifty-eight percent of the people interviewed said that they thought a criminal suspect should be tried a second

time for the same crime if new evidence is uncovered after the first trial.

Fifty-eight percent said they thought the police should have the right to hold a criminal suspect in jail until they can accumulate enough evidence to support a charge of probable cause.

Forty-two percent said criminal defendants should be required to take the stand and testify against themselves.

Forty percent felt that the government should be permitted to keep the identity of witnesses secret from the defendant.

If this poll is an accurate sampling of our nation, I believe that we as lawyers have failed the Court. It is our responsibility to make sure that the Constitution and the courts are understood. It is our responsibility to point out that the Bill of Rights exists for the minority as well as for the majority.

I think the organized bar must make even more efforts today than it has in the past to bring to the attention of the public accurate and complete information about Supreme Court opinions and the Constitutional issues involved.

I think that the press and particularly television should expand its coverage and that secondary school and adult education programs should be broadened.

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I do not believe it is necessary for any of us to agree with all of the Court's decisions all of the time. We are entitled to our opinions, pro and con.

But I think it is necessary to emphasize that the Justices of the Supreme Court live alone with their consciences, that their sincerity, scholarship, and devotion to this generation and to future generations is beyond reproach.

We as lawyers have a responsibility to insure that a free and vigorous public debate concerning the Supreme Court is conducted in a responsible and restrained manner, and that the debate is always calculated to increase public respect for the Court rather than to undermine it.

Now may I close with a further quotation from President Nixon:

> "Respect for law in a nation is the most priceless asset a free people can have, and the Chief Justice and his Associates are the ultimate custodians and guardians of that priceless asset."
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> "As we look over the history of this nation, we find that what has brought us where we are is continuity with change. No institution of the three instituions of our government has been more responsible for that continuity with change than the Supreme Court of the United States.

"Over the last 16 years there have been great debates in this country. There have been some disagreements even within this Court. But standing above these debates has been the symbolism of the Court as represented by the Chief Justice of the United States: fairness, integrity, dignity. These great and simple attributes are, without question, more important than all of the controversy and the necessary debate that goes on when there is change..."