# Department of Justice

"RESTORING THE FINALITY OF JUSTICE"

AN ADDRESS BY

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BEFORE THE

ALABAMA STATE BAR ASSOCIATION

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The story is told that many years ago a bishop and a judge were arguing with one another as to who was the more powerful. The bishop said to the judge, "All you can say to a man is 'You be hanged,' whereas I can say to him 'You be damned.'"

To this the judge responded, "Yes, but when I say 'You be hanged,' you are hanged."

Certainly this tale proclaims its own antiquity. Fortunately, the day is long past when a single sentencing judge had unreviewable discretion in determining the fate of a convicted criminal.

But today, both in the Federal and state criminal court systems, we have gone to the other extreme. In Federal courts alone, petitions for appeal in criminal cases more than quadrupled during the 1960s. It is not unusual for cases to drag through the courts for years. Frank Hogan of New York, the dean of American district attorneys, has said, "there is virtually no such thing as finality in a judgment of conviction."

In my opinion this is a serious misdirection of justice. The process of rehabilitating offenders is seriously impeded when they never reach the point of recognizing their own guilt. Justice must be fair, impartial, and protective of human rights, but it should also have another attribute--finality.

As you know, President Nixon has been very concerned about the effectiveness of the American judicial system. Last March, at the National

Conference on the Judiciary in Williamsburg, Virginia, he delivered a major address calling for court reform. The United States Department of Justice is dedicated to this cause, and is doing what it can within its jurisdiction. It drafted and promoted the passage of the District of Columbia Court Reform and Criminal Procedure Act of 1970, which is an important example of reform. Through the Department's Law Enforcement Assistance Administration, we are providing funds to states and localities for improvement of their court systems. One of the most important of such projects has been proposed to LEAA by the 23rd Judicial Circuit, covering Madison County in which we meet tonight. It would study the causes of court congestion and delay, and recommend solutions. I am pleased to announce tonight that this project has been approved, and LEAA is granting nearly $57,000 for this purpose. The 23rd Circuit is contributing the time of the four circuit judges and courtroom staff, of County Bar Association personnel, and other operating expenses. It is hoped that the proposals from this project will be a model for other circuits.

So as you can see, court reform is in the air, and there are a number of us here tonight who are already involved in the process. In my regards I would like to deal with one aspect I have already introduced--the question of finality. And I would like to concentrate on one factor which in recent years has done more than any other to compound the problem.

Today, final judgments of conviction are subject not merely to direct attack on appeal, but to collateral attack through post-conviction remedies seemingly derived from the writ of habeas corpus. This means that when a criminal defendant has been convicted and sentenced in the state courts, and has exhausted his right of direct appeal to higher courts, he may nonetheless relitigate the case all over again in Federal courts on claims of constitutional violations, using the theory of habeas corpus.

The writ of habeas corpus became of importance in England during the fight against the prerogative of the King to commit persons without disclosing the cause of the arrest. Without the cause of the arrest made known, the prisoner could neither be bailed nor tried. The writ of habeas corpus was used by the courts to force the jailer to bring the person arrested before the court so that the court could determine the legality of the detention. It was only a pre-trial device to force the disclosure of the cause of detention. It could never be used after conviction.

In the United States the present form of the writ bears little resemblance to its early counterpart. The Federal writ was made available as a post-trial remedy for Federal prisoners as early as 1789, and for state prisoners in 1867. Since then its use in this manner has been greatly expanded by court decisions, especially since 1953.

Today in the post-conviction proceedings derived from habeas corpus, a single Federal district judge is called upon to redetermine questions of Federal constitutional law which may well have already been passed upon by the trial courts and the highest court of the state. Sometimes these involve new interpretations which change the legal concept on which the trial had been based years earlier. If he determines that a Federal constitutional violation has occurred and that it prejudiced the defendant's trial, he will order the conviction overturned. His decision is appealable by the losing party to the appropriate Federal court of appeals, and thereafter review may be sought in the Supreme Court.

Under existing law there is no limit to the habeas corpus-type petitions that can be filed by a prisoner. As the Supreme Court has construed the habeas corpus statute passed by Congress in 1867, a prisoner may raise a new claim at any time regardless of the number of petitions he may have filed earlier. The only limitation--and one very difficult to enforce--is that he must not have consciously and deliberately withheld the claim from his earlier petitions. Thus there are instances substantiated by Federal court records in which prisoners have filed as many as forty or fifty petitions, and there is one case with 57 petitions.

It is entirely permissible under existing law for a prisoner to file a Federal petition claiming that a confession given by him was coerced. Much later he may file another contending that evidence seized in his

home was the product of an unreasonable search and seizure. Still later he may challenge the composition of his jury, or claim that adverse publicity prior to the trial prejudiced the result.

The Federal court must consider the merits of each of these claims, notwithstanding full prior adjudication of these same issues. In short, prisoners are almost entirely free under present law to have their convictions relitigated again and again on the basis of alleged constitutional infirmities, many of which are new interpretations suggested by an imaginative defense attorney.

This, in my judgment, is an exploitation of the court system. I think that today's notions of habeas corpus are not only inconsistent with the writ's historic tradition, but serves more often than not to frustrate justice rather than to promote it. I do not mean that we should deny the right of the prisoner to challenge the constitutionality of the proceedings that led to his conviction. I do feel strongly that the use of collateral attack, which was intended only as an extraordinary remedy, must be brought under manageable control in order to restore some balance to the judicial process.

The abuse of habeas corpus not only distorts the function of the courts, but gives an undue legal advantage to the offender who can afford to retain an attorney on a continuing basis to think up new modes

of attack . The indigent prisoner must, without legal training, think up his own grounds for attack, and the court determines whether the merit of his petition warrants assigning him a paid lawyer. In my opinion this represents an unequal application of justice.

There is another serious reason for such reform. The lack of finality has an effect on the rehabilitation of convicted persons. Writing in the Harvard Law Review, Professor Paul M. Bator of Harvard Law School has argued persuasively for more finality, and has pointed out its impact on the rehabilitation process. He observed that the first step in rehabilitating offenders is a "realization by the convict that he is justly subject to sanction, that he stands in need of rehabilitation..."

Lack of finality may well have similar negative effects on the respect for law generally. Do we not demonstrate a certain lack of confidence in our legal processes if we must keep avenues open for endless redetermination of questions long ago passed upon by competent judicial tribunals? As Judge Henry Friendly, Chief Judge of the Court of Appeals for the Second Circuit, recently observed, "It is difficult to urge public respect for the judgments of criminal courts in one breath and to countenance free reopening of them in the next." In the same vein,

Mr. Justice John M. Harlan, concurring in a recent Supreme Court opinion, observed:

> No one, not criminal defendants, not the judicial system, not society as a whole, is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.

If some substantial percentage of the petitions filed were determined to be meritorious, perhaps there might be a basis for concluding that the expanded writ is necessary and that, on balance, it should be retained as it is. However, the statistics indicate that less than one percent of the petitions filed in the Federal courts are found to be meritorious. For every sound petition, there are scores of patently frivolous ones. As Mr. Justice Robert H. Jackson noted nearly twenty years ago, "It must prejudice the occasional meritorious application to be buried in a flood of worthless ones."

The manpower burden which the abuse of habeas corpus imposes on the courts, defense attorneys, and both local and Federal prosecutors is intolerable. It even contributes to the significant delays that exist in certain jurisdictions between arrest and trial. The number of petitions filed by state prisoners in the Federal courts each year is staggering, and the increases in that number over the past two decades are equally staggering.

Twenty years ago, for example, the number of petitions filed annually was less than 500. By 1960 the number had risen to 900, and since then the filings have multiplied more than eightfold to more than 7,500 in 1969.

The petitions could be disposed of in only one of two ways--either by consuming a substantial amount of time of lawyers and judges, or by being relegated to a sort of second-class type of Federal action, to which all parties concerned would give short shrift. Neither of these methods of disposition is a sound basis for administering criminal justice, in my view. Justice is not served when the litigation of frequently frivolous habeas corpus petitions diverts the energy and resources of the legal community from criminal cases, thus further undermining the Constitutional guarantee of speedy trial.

Now, if this is a fair statement of the finality problem, what can be done about it? Let me discuss three alternatives under consideration.

In his address on the subject of Federal habeas corpus, Judge Friendly has proposed that certain constitutional claims be open to review only if the petitioner makes what the judge terms a "colorable showing of innocence." Since the prisoner has already had a chance to challenge constitutionality at his trial and on direct appeal, there may be something to be said for limiting habeas corpus to claims which may demonstrate the petitioner's innocence.

Another alternative would be to limit the habeas corpus claims to those concerning the reliability of the fact-finding process. For example, where the constitutional claim does not affect the reliability of the evidence adduced--as in the case of unlawful searches and seizures, or the failure to warn of the right to counsel--such a claim could be made on direct appeal, but not on the use of the so-called Federal habeas corpus appeal. This is the same principle applied by the Supreme Court in determining whether certain of its constitutional decisions will or will not be retroactive.

Still another response could be to establish a Federal forum, other than the Supreme Court, to provide direct review of state and Federal convictions. This review could be a substitute for the present-day application of Federal habeas corpus. It could provide more opportunity for review than the Supreme Court now has time for, and there could still be the possibility of appeal from its rulings to the highest court. This could tighten up the review process and hasten finality.

You will note that none of these proposals contemplates revoking the Federal habeas corpus statute, but only providing some modification. And in identifying these various alternatives, I do not mean that we should adopt them all simultaneously or that we should choose only one. A combination of two or more, in varying degrees, might be desirable. Each has its own merits and its problems.

I have catalogued them, not to endorse any or all, but to further expand the dialogue that must occur within the legal profession if we are to restore the element of finality to the justice process. We in the Department of Justice are examining these various alternatives so as to make recommendations. I urge other interested organizations to do the same. The Judicial Conference of the United States, too, should play an instrumental role in developing any remedy. Views should also come from the Conference of State Chief Justices, the National Association of State Attorneys General, and appropriate representatives of the criminal defense bar. Since the present-day use of habeas corpus as a post-trial remedy stems from a Federal statute, I would hope that Congress will join in this review, looking toward meaningful amendment of the law.

Above all, I feel that some consensus must be reached without too much delay. As matters now stand, the unrestricted application of habeas corpus is robbing the judicial process of whatever finality it had a few years ago. Partly because of this abuse, our courts are fast moving toward a state of, to borrow Milton's words, "confusion worse confounded." There is no doubt in my mind that collateral attack using the writ of habeas corpus must be brought within reasonable bounds. If so, we can restore to American justice that moment of truth in which the guilty may begin rehabilitation, and the innocent may go free.