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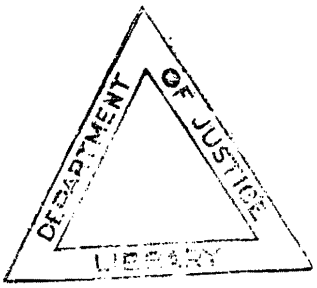

ADDRESS

BY

HONORABLE J. HOWARD McGRATH

ATTORNEY GENERAL OF THE UNITED STATES

Prepared for Delivery

at

Annual Banquet

MARYLAND STATE BAR ASSOCIATION

Traymore Hotel

Atlantic City, New Jersey

Saturday, June 23, 1951

Members of the Maryland State Bar Association, distinguished guests:

It was with particular pleasure that I accepted your invitation to speak on this occasion. I welcome the opportunity to address the bar association of which my friend and your friend, Philip B. Perlman, is a member. I share your pride in his distinguished career and in the splendid record which he has made as Solicitor General of the United States.

During the four terms of the Supreme Court since he took office Mr. Perlman has made a record never equalled by any Solicitor General in history. Having been honored with the office of Solicitor General myself, I have tremendous appreciation of the importance of his achievement and of how much his accomplishment has meant to the Government and to the people of the United States.

It is now a year - almost to the day - since President Truman wrote me in response to my letter to him in which I commented on the remarkable record made by the Solicitor General. I may say that in the year just past, Mr. Perlman has further enhanced that record.

In his letter to me the President said, "Mr. Perlman's work brings great credit to himself, the Justice Department, and the United States Government. I honor him for it and I want you to tell him so." You may be sure that it was a real privilege and a pleasure for me to convey that message from the President of the United States to our friend Phil Perlman.

This is the season when many bar association meetings take place, - a time conveniently between the closing of the courts and

the beginning of vacations. It is a good old American custom which we lawyers have of congregating annually with the members of our state judiciary and with our associates and colleagues for education and good fellowship. We get a chance to do a lot of talking and a lot of listening. This is the American way. When a suggestion or an idea can get itself accepted in the market place of a bar association meeting, you can be sure that progress is being made.

It is well at times like these that we give thought to the responsibilities which are inseparable from the influence that is held by the organized bar of this country. I would like to discuss with you this evening certain aspects of those responsibilities in their relation to the improvement of the administration of justice.

These are critical times. We dare not permit ourselves to relax even momentarily, in our efforts to protect our democratic way of life. Each day we are called upon to defend our democracy. Let me remind you that in so doing it is essential that we keep strong the basic institutions which form the foundation of our democracy. The ultimate survival of our democratic ideal depends upon the strength of those basic institutions and the confidence which our citizens have in them.

No institution is more fundamental to our way of life than are the courts. The courts, both State and Federal, which make up our whole judicial system must be kept strong, and high in public esteem. The States and the Federal Government together share the responsibility

to see that that judicial system enables every litigant, without exception, to enforce his rights as quickly and as economically as possible. We are aware that there is criticism, - all too often justified - that the judicial process is inefficient, slow, cumbersome, or costly. The problem is to eliminate the basis for criticism without damaging the prestige of the courts in so doing.

My observations, since becoming Attorney General, have fully persuaded me that our substantive rights have little meaning in the absence of effective judicial procedures. There must be an increased use, throughout our courts, of procedures designed to simplify and shorten litigation and to make it less expensive.

It is regrettable that many of our courts in this country today are operating under procedural systems adapted to meet the needs of a much earlier day.

As lawyers and members of the bench and bar, we have a responsibility to correct that situation. Those who have legal training have the requisite knowledge and experience for appraising practical reforms.

In January of 1950 there was published by the National Conference of Judicial Councils a book which is perhaps familiar to you. Edited by Chief Justice Arthur T. Vanderbilt of New Jersey, it is entitled "Minimum Standards of Judicial Administration." It is a comprehensive survey and an arsenal of facts concerning the procedural systems of the courts of this country.

The survey reveals that excellent reforms in procedural law have been accomplished in many States. We learn, for instance, that

in your State the legislature in 1939 conferred upon the Maryland Court of Appeals the authority to prescribe general rules of practice and procedure in civil actions throughout all courts of record in the State. And pursuant to that authority procedural rules were promulgated in 1941.

But the nation-wide reforms that are needed to meet present-day requirements are slow in coming. There is still much to be accomplished in order to eliminate classic defects in the administration of justice. A number of courts are still handicapped by legislative occupation of the rule-making field. The principle of judicial responsibility for rule-making in civil proceedings prevails in only 23 jurisdictions, and as to criminal proceedings in only fourteen. In the remaining jurisdictions it appears that the courts are handicapped by lack of authority in any effort to replace time-consuming and technical procedures with expeditious and easily applicable rules which would facilitate the disposition of court business.

I think it is fair to say that what is accomplished in each State in the improvement of the administration of justice, will depend in large measure upon lawyers of a pioneering spirit. It cannot be emphasized too often that the chief need is one of leadership. The opposition of those who are used to old procedures is to be expected. What was once believed by many to be unachievable in the Federal procedure field became a reality through the efforts of my illustrious predecessor, former Attorney Attorney General Homer S. Cummings. It was his persistence and enthusiasm which finally made possible the legislation that authorized the promulgation of new rules of federal

procedure by the Supreme Court. And it is interesting to note, I think, that a number of States have found it practical to adapt the practice in their State courts to the Federal civil rules.

I do not intend to go into detail concerning the operation of the new federal system of civil procedure. Its success is thoroughly conceded. But I think it may be of interest to you to know something of what it has meant to us in the Department of Justice, as the chief litigant for the Government before the Federal courts, to operate under the new civil as well as the new criminal rules of procedure.

We in the Department of Justice have consistently advocated the increased use of the pre-trial procedures permitted by the civil rules. We believe that a more effective use of pre-trial procedures in all courts would assist in expediting the disposition of cases and in effecting a speedier clearance of court dockets, thus resulting in economies to the courts, the litigants, and the public.

Our experience in antitrust litigation presents an exceptionally clear illustration of the efficacy of pre-trial procedures, particularly when used in combination with Civil Rule 34 which authorizes the court to order discovery and production of documents for inspection.

In cases charging restraint of trade or monopoly, affecting an entire national industry, the issues often grow out of commercial activities which have been in existence for long periods of time. This may make it necessary, in order to disclose conflict with the antitrust laws, to prove what has transpired over a period of years. Moreover, the commercial arrangements in existence at the beginning of

the period of alleged monopoly or restraint of trade are frequently the successors to earlier arrangements.

The duPont case recently tried before Federal District Judge Ryan in New York is an excellent example of what I mean. In that case, charges of conspiracy and restraint of trade involved practically every product manufactured by the duPont Company and Imperial Chemical Industries, Ltd., the great British chemical company. A number of broad contracts between them, commencing in 1920, were involved in the charges. The Court found it desirable to have proofs showing the prior dealings of the parties. These extended back to 1897.

Government counsel and defense counsel cooperated, in advance of the trial, to work out the terms of discovery for the examination of records both here and in England, and there was a pre-trial order to expedite the presentation of the proofs. That order provided that in advance of trial each party should supply to the other parties copies of its documentary proofs. The whole of the documentary case of both sides was thus disclosed several months in advance of trial. Indeed, this disclosure comprised the whole of the Government's case because its case consisted entirely of documentary proof. At the opening of the trial the Government's 1,400 documents were received in evidence, subject to motions relating to their relevancy and materiality, to be argued only after the Court had heard a review of all the documents by counsel for each of the parties.

Government and defense counsel discussed freely and informally the documents offered by the Government; some were discussed individually, others in groups, depending on the circumstances. As the

discussion proceeded the documents were integrated.

The 2,200 documents of the defendants were reviewed in the same way. Then the Court heard argument on objections to the documents followed by the presentation of testimony by the defendants. While the trial took approximately two and one-half months, this was a very short period in which to canvass the vast activities of two of the leading chemical companies of the world. The Government's case was completed in just three weeks.

The mutual confidence which was generated between defense counsel and counsel for the Government through preliminary consultations made it possible for both sides to select and organize, in advance of trial, comprehensive proofs to be put in evidence immediately upon the opening of trial. Thus the relevancy and materiality of proof submitted could, in the ancient tradition of equity courts, be judged at the close of the case in the light of the whole body of proofs.

Last year's trial before Federal District Judge Knox in the case against the Aluminum Company of America furnishes a good example of contrast between present day proceedings and those in the same litigation which antedated the Federal rules. The recent trial was conducted pursuant to a pre-trial order worked out in advance by counsel. Here again the issues made it necessary for the Court to scrutinize in great detail the workings of an entire industry. Both sides secured documentary materials from many sources, exchanged them, and, as a result, their receipt in evidence was practically without objection.

While the case was vigorously contested by Government and defense counsel, all counsel were in complete agreement on one thing. When Judge Knox asked them, at the close of the case, to state what the pretrial procedures had accomplished, counsel for both sides answered categorically that they believed the trial time had been cut in half.

The salutary results obtained by the procedures I have described commend them for use in all civil courts in cases involving extensive documentary proof and complicated issues.

The objectives of simplicity, fairness, and the elimination of expense and delay which are characteristic of the civil rules are also carried forward to the Federal rules of criminal procedure. Under the old procedures, arrest, bail, commitment, and removal, for offenses against the United States, conformed to the procedure in any State in which the offender might be found. Owing to the widely different State procedures, no uniformity in these was possible in Federal practice. The task of the defending lawyer in a criminal case before the Federal Courts was no less burdensome than that of the Government. The new Rules of Criminal Procedure have provided a uniform system for all the Federal Courts in the United States.

Rule 7(c) has been one of the most effective in the interest of simplified procedure. In conformity with that rule, the contents of the indictment or information may now be couched in plain and concise language, eliminating the useless common law verbiage that had so long been characteristic of the Federal forms of indictment.

Another outstanding innovation has resulted from Rule 7(b). That rule has worked to the advantage of both the defendant and the Government in the saving of time ans expense. It authorizes the waiver of indictment and permits prosecution by information for a non-capital offense. And the integration of Rule 7(b), with the novel procedure authorized under Rule 20 which permits a defendant to waive trial in the district in which the indictment or information is pending and to plead guilty or nolo contendere in the district in which he was arrested, has proved extremely interesting. These two rules are perhaps the most important innovations contained in the new criminal rules, and they are considered by many to be the most beneficial reforms in the history of Federal criminal jurisprudence. By utilizing Rule 7(b) and Rule 20 together, both grand jury and removal proceedings can be eliminated. The constitutionality of Rule 20 has been upheld in two appellate courts and I have no doubt that it will eventually be upheld elsewhere. These are merely a few examples to give you an idea of the ways in which the new rules have helped to speed up and simplify the administration of criminal justice.

Before leaving matters of Federal criminal law, I would like to mention briefly a matter in the field of enforcement which has been the source of considerable preoccupation in my Department. The problem arises out of the constitutional safeguard against self-incrimination. The Fifth Amendment to the Federal Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." This provision has been construed to

mean that a person may remain silent if it appears that a criminal charge, no matter how remote, may be made against him on account of any matters concerning which he is questioned.

Criminals, engaged in rackets and prohibited transactions of all kinds, have been learning to take advantage of this provision, which was written into our Constitution to protect law-abiding citizens against governmental excesses. I have been giving considerable study to the problem and have concluded that the law-abiding people of this Nation are as much entitled to protection against criminals and those who would destroy the institutions of freedom as they are to protection against abuse of authority. In the light of the history of the constitutional provision it seems clear that the granting of immunity from prosecution would present a means of obtaining needed testimony from one who might otherwise hide behind the constitutional protection against self-incrimination. If any witness, so benefited by immunity, refused to testify, he could then be punished for contempt; or if he committed perjury in his testimony he could be convicted and punished.

I have recommended the enactment of a law which would give the Attorney General of the United States authority to grant immunity from prosecution to witnesses whose testimony may be essential to an inquiry conducted by a Federal grand jury, in the course of Federal criminal trials, or in congressional investigations. I think the authority to grant immunity, or to authorize such grant, should be centered in the Attorney General because he is the official charged

with the responsibility for all prosecutions under the Federal laws. The problem in each case would require a decision as to whether the information is more valuable than possible prosecution of the particular witness. The responsibility would be a heavy one. Nevertheless, it might be worth undertaking if it would aid in restoring vitality to needed investigations of criminal activities, without at the same time risking an indiscriminate grant of immunity from prosecution.

The solution of such issues is greatly aided by the exchange of ideas resulting from such meetings as this.

In the enforcement of the law, which is my everyday task, we are constantly beset with problems of a delicate and complex nature. Among our most pressing problems is the squaring of individual rights with the fearful dangers involved in breaches of national security. Our labors must be supported by a strong and wise judiciary. If the guarantees of civil liberty in our Federal and State Constitutions are to have any meaning, that meaning must be given great significance in these days. As Justice Sutherland once put it, "If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned." (dissenting opinion) Home Building Ass'n. v. Blaisdell, 290 U.S. 398 (1934).

The recent Supreme Court opinions which upheld the constitutionality of the conspiracy provisions of the Smith Act, as applied to the top leaders of the Communist party, are the source of great satisfaction to us. The court's decision has given us a magnificent victory.

It establishes that our Government is not helpless to take action in the face of a communist attempt to organize a conspiracy to overthrow it. And equally as important, the decision establishes that the courts will make certain that the Smith Act is not used to undermine the rights of free speech which are so important a part of our fundamental rights.

The Supreme Court applied Judge Learned Hand's test which, paraphrased, directs that when the courts examine into the validity of a statute which attempts to limit free speech they must decide whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger. That, I submit, is a fair test.

Our civil liberties have survived strong attack. There may be other and perhaps stronger assaults yet to come. Come what may - we may rest assured that in any case which we take to the courts your Government will proceed as always - upon proof of the intent of the particular defendants - proof of the nature of their activities - and proof of their concerted power to culminate the evil of their conspiracy.

The eleven communist conspirators, in the case of United States v. Eugene Dennis, et al, were given the advantage of every safeguard under our Constitution. Theirs was a full and free trial before a jury of their fellow citizens. Theirs was the opportunity to exhaust to the utmost every type of appeal, right to the highest court of the land. That is the American way.

Contrast, if you will, their experience with that of the defendants in recent trials which have taken place in the courts of Iron Curtain countries. We shudder to learn the few details which have come to us. It is all too evident that those courts are courts in name only, completely subservient to their political masters. In our American system, we have no place for such subservience. Let us preserve, by effective judicial processes, by every means at our command, the independence of our courts - the bulwark of our liberties and of our freedom.