



Department of Justice

"PROSECUTORS AND THE PRESS IN THE SEARCH FOR
'THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH'"

REMARKS

BY

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TO THE

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It is my great pleasure to meet with you today, so that we might examine together some of the different perspectives we may have on Press and Prosecution.

At the outset, I want to make clear -- and be sure you understand -- how much we share with you an abiding commitment to Freedom of the Press, no matter how uncomfortable your copy may make us from time to time. Perhaps it might be useful to remind each other how, under our system, we in the Department of Justice protect that freedom by what we are not empowered, or inclined, to do.

First, you enjoy all but absolute protection against prior restraint, a right often -- indeed, without present exception -- upheld in the courts.

Second, there is almost absolute protection for whatever appears in print -- and on radio or television -- subject only to libel actions, which, if brought by public figures, must prove reckless disregard of the truth and/or deliberate malice.

Third, there is an ever enlarging protection for whatever you do to gather the news, including broad recognition of a reporter's privilege to protect his or her sources, except in highly unusual circumstances.

I will add that my year-long dialogue with our counterparts in the Soviet Ministry of Justice and with other Eastern European governments -- a dialogue directed toward reinforcing the rule of law and human rights in these countries -- has provided a vivid reminder of what our First Amendment guarantees and our Free Press mean in creating and preserving the quality of life we enjoy in our society.

But I want to talk today about the necessarily differing perspectives we each bring to bear upon the subject of criminal investigations and prosecutions -- perhaps our major responsibility at the Department of Justice.

One of the most perplexing problems that prosecutors face is the nearly insatiable -- though understandable -- appetite of the American public, often expressed through their news media, for assurance that they have gotten "the truth, the whole truth, and nothing but the truth" about every investigation into criminal wrongdoing.

This appetite has given rise to a considerable temptation for a prosecutor to exceed the proper role he must play in our criminal justice system, a temptation heightened by a small but vocal chorus which shouts "Cover-up!" or "Whitewash!" every time a prosecutor refuses comment on a pending investigation, or

declines to prosecute without a full public exposition of the evidence gathered, weighed, and found wanting in legal sufficiency.

It is time, I feel strongly, to remind all concerned of the true role of the prosecutor. His duties do not encompass the exposure of suspected criminal activities for exposure's sake. It is confined to the presentation of legally admissible evidence to a judge and jury in open court. This he does through proceedings that identify specific defendants indicted for specific criminal acts. And that is his only charge. Much as the defendant has the right to remain silent before the court, the prosecutor has the obligation to remain silent outside the court.

I

Prosecutors are key figures, sometimes folk heroes, in the American community. Their duties embrace two of our Constitution's most reassuring promises to the people: to establish justice and to insure domestic tranquility.

Because of today's increasing crime rate and the public focus on white-collar crimes -- "crime in the suites" -- law enforcement has become a highly personal concern to everyone.

Americans feel their persons and resources to be in jeopardy, and they want vigorous action from their prosecutors in particular.

But with this focus, there is a hovering danger, of which every prosecutor must be extremely wary -- especially at a time of great public outcry against crime and agitated calls for vigorous prosecution. In the words of Professor Herbert Wechsler, the "penal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy." So the prosecutor has the legal, as well as the professional, obligation to pursue criminals only within the restraints that protect the rights of the defendant and the integrity of the process.

That approach requires that we, as prosecutors, never hesitate to follow the evidence wherever it leads -- no matter to whom it may point, whatever their power or influence, their politics or station in life. But we must never seek to carry investigation or prosecution beyond the point where the evidence ends -- either out of personal motives or for political, ideological, economic, or other purposes.

The courage to prosecute when the evidence is there must always been tempered by the courage not to prosecute when the

evidence is lacking. Wrongdoing that does not rise above the threshold of provable violations of specific laws is not the prosecutor's to expose -- regardless of pressures exerted in the name of some dubious, ill-defined right to know.

If there is need for official condemnation of activity not provably criminal, but still threatening to the domestic tranquility, that need must be satisfied by legislative inquiry, appointed executive commissions, such as the Warren and Tower Commissions, or, in limited instances, the grand jury power to issue presentments. But it is not the prosecutor's job.

Moreover, since Sheppard v. Maxwell in 1966, there has been little doubt that the courts may appropriately prohibit both the prosecutor and, more recently, it would appear, defense counsel from releasing information designed to influence the outcome of trials, even after indictment. Our own Department of Justice guidelines on release of information are direct and firm. A prosecutor should never "furnish any statement for the purpose of influencing the outcome of a defendant's trial" nor any information "which may reasonably be expected to influence the outcome of a pending or future trial."

II

In spite of all the foregoing, there is a significant, even well-informed, sector of the public which roundly calls for prosecutors to bring formal charges against persons involved in this or that "scandal" -- simply because of a vague belief that the matter needs public airing. Or we hear clarion calls for prosecutors to release evidence concerning a suspect person caught in a political embroglio but not breaking any law. And I am chagrined to say there are prosecutors, within and without the Department of Justice, who, from time to time, respond to these demands in derogation of due process of law and outside of the settled course of justice.

The definitive response by prosecutors to such public pressures has already been emphatically set down. It came from those who carried out the investigation into the most celebrated political-criminal scandal of our nation's history. The Watergate Special Prosecution Force, upon conclusion of its charge, stated:

"This report contains no facts about alleged criminal activity not previously disclosed in a public forum. Many public officials saw the Special Prosecutor as one with special privileges to lay bare what witnesses had said to

offer his own personal conclusions as to what really happened. . . .However, for [this office] to make public the evidence it gathered concerning [those] who were not charged with criminal offenses would add another abuse of power to those that led to creation of a Special Prosecutor's office. . . .Where no such charges are brought, it would be irresponsible and unethical for a prosecutor to issue a report suggesting criminal conduct on the part of an individual who has no effective means of challenging allegations against him or requiring the prosecutor to establish such charges beyond a reasonable doubt."

Every prosecutor faces this dilemma at one time or another, and in doing so, I believe he must stand squarely for the constitutional protection of the defendant's rights.

It may be unstylish today to suggest that any governmental process be kept hidden, in whole or in part, from public view. But that is precisely what I am compelled to conclude is appropriate for the continued impartiality and integrity of our criminal justice system.

To be sure, the prosecutor's duty is to produce "the truth, the whole truth, and nothing but the truth" through legally admissible evidence in court. But outside the courtroom, his

findings should rest, forever, in a closed file. My great hope is that no cry of "Whitewash!" or "Cover-Up!" will ever tempt a prosecutor to open up what it is no longer his business to remember to those who never had a right to know.

III

Before I close, in line with these thoughts, let me turn to the problem of "leaks." I have been subject to a good deal of criticism for my determination to shut down unauthorized disclosures by Department of Justice employees from the Department's criminal investigative files.

It is important to recognize that I am not talking here about disclosures from "whistleblowers" -- who are often of great assistance in our own criminal investigations -- nor about gossip about "who's up or who's down" in the Department of Justice, or about discussions concerning policy or personnel within the Department. All are fair game for enterprising reporters and, indeed, on some days seem to constitute the major news fare from "inside the beltway" about the far-flung enterprises of government in general.

But the Department of Justice, as I have tried to suggest in the foregoing, is different from other departments, agencies and

bureaus in the government. Disclosures from our files on ongoing criminal investigations can compromise the very integrity of cases that may be prosecuted in the future. More important, such disclosures can adversely affect the very rights and reputations of those under investigation -- many, if not most, of whom may never be charged with any criminal offense. And even those who do become so-called "targets" are placed in unconstitutional jeopardy by such prior disclosure.

At bottom, our determination to prevent disclosures from our criminal investigative files derives from a constitutional imperative: to observe the stipulations of rights set forth variously by the Fourth, Fifth, Sixth, Seventh, and Eighth Amendments in the very Bill of Rights from which you derive your just claims, under the First Amendment, to access other departments, agencies and bureaus in the government.

But as Justice Potter Stewart once wrote: "There is no constitutional right to have access to particular governmental information, or to require openness from the bureaucracy . . . The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act."

Such contradictions do not invite easy answers. Just as "hard cases make bad laws," so do difficult dilemmas produce

unsatisfactory resolutions. Better understanding, however, requires that these dilemmas at least be honestly viewed by both Press and Prosecution from the vantage point of the other.

Taking our point of view, you must understand our strong determination to see that our investigators adhere to self-discipline -- or, if necessary, the discipline of the Department of Justice -- so that both the fairness and the integrity of public prosecutions and the interests of the potential accused are preserved.

Taking your point of view, perhaps we must try harder to distinguish what constitutional interests are at stake, to demonstrate we are not trying to "gag" legitimate discussion of public interest, but to preserve a judicial process and protect important rights.

This, then, creates a series of dilemmas for both Prosecution and Press. How do we assure anybody under investigation that he or she will not "be deprived of life, liberty, or property, without due process of law" when the secret proceedings of a grand jury are revealed by the press? How do we maintain a proper judicial climate in the midst of a media circus, such as we have witnessed too often in recent headline cases? How do we hold the porous line against "leaks" that name

the target of an investigation before any indictment is brought? Or even sought? In short, how do we reconcile a Free Press with all the constitutional guarantees of the balance of the Bill of Rights?

If I suggest that we seek together to better understand these dilemmas, it is once again because I respect that autonomy which you have acquired since 1791. After two hundred years, our respective responsibilities continue to grow. We might meet these responsibilities by forthrightly admitting Press and Prosecution are caught in a delicate balancing act.

We must both abide by the Bill of Rights, yet recognize when a First Amendment freedom conflicts with a Fifth Amendment protection. We can do this through the work that journalistic foundations are undertaking on law and journalism, and through national discussions between Prosecution and Press, such as this one.

But we might also well remember that the House version of the original First Amendment read: "[N]o State shall infringe the equal rights of conscience, nor the freedom of speech or of the press, nor the right of trial by jury in criminal cases." James Madison considered this "the most valuable amendment in the whole list." Since it did not pass the Senate, Madison never had to

say how all those elements were to be reconciled. That, to this very day, is up to us.

Thank you.