



Department of Justice

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REMARKS OF

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I'm privileged to represent here tonight the former Attorney General, John N. Mitchell, a man whom I thoroughly admire, and to receive on his behalf, and on behalf of the Justice Department, this treasured award from such a distinguished organization.

It's fitting that on the 25th Anniversary of the Federal Trial Examiners Conference, this award should be given to the office of Attorney General of the United States and the Department of Justice.

As many of you know, the Department of Justice was instrumental in the development and enactment of the Administrative Procedure Act in 1946. The Attorney General's Manual on that act, published in 1947, is still considered the most valid commentary on its meaning. We in the Department are proud that it played such a key role in establishing this important milestone in the history of administrative law.

It's also fitting that this award should have been offered to a man of John Mitchell's accomplishments.

When he began his term as Attorney General he gave to me and to the Assistant Attorneys General only one instruction and one policy: "Enforce the law."

I wish to say that, despite any contrary inference that is made and may be expected in this election year, this instruction from

John Mitchell has been implemented without fear or favor. And throughout, John Mitchell backed up his subordinates in their programs of law enforcement. As a result he will, in my opinion, be highly regarded by historians as a key figure in restoring a respect for the rule of law in the United States of America.

For myself, I like to think I have a special awareness of the work of Federal Trial Examiners. When I began practicing law in Phoenix, Arizona, 22 years ago, a substantial portion of my practice was before the National Labor Relations Board. My introduction to the world of trial examiners was especially memorable; my first case before the NLRB in 1951 was heard by the late Wallace E. Royster, whom you will recognize as one of the most respected members of the administrative judiciary. I tried many other cases before him, including one of my last cases before I entered the Government. Wally Royster was my idea of the fairminded and discerning examiner, who fully lived up to the purpose of the administrative judiciary. I wish to add two more points about our association.

First, we became very close personal friends and remained so until he died.

Second, he never recommended a decision in my favor.

In addition to this personal sidelight, there is another area in which I have something in common with the others in this room tonight. Every day each of us is in the forefront of the governmental process. We are in the thick of the business of Government--considering opposing view-

points, giving a fair hearing to grievances, caring for individual rights, upholding the public law.

In short, we are where the action is. Our individual integrity, our sense of justice, our human understanding, our firm adherence to the law, are on the line every day. Depending on how we discharge our duties, the people will strengthen their confidence in Government, or they will lose it.

So it's useful--even imperative--for us to reexamine from time to time the purpose of the governmental system we represent, and ask whether we are still faithful to that purpose.

At the outset, we find that it's not easy to agree on the purpose of Government. One observer has told us that the object of Government is "the happiness of the common man." But another has said, "the object of Government is not to confer happiness, but to give men opportunity to work out happiness for themselves."

Man's basic problem in organizing his relations with other men is illustrated by the German philosopher, Schopenhauer.

"A number of porcupines," he wrote, "huddled together for warmth on a cold day in winter; but, as they began to prick one another with their quills, they were obliged to disperse. However, the cold drove them together again..." At last, he explained, they

discovered just the right distance at which they could keep reasonably warm without getting pricked.

In the same manner, man has to find a middle ground between a society that is oppressive and no society at all. "By this arrangement," wrote Schopenhauer, "the mutual need for warmth is only very moderately satisfied; but then people do not get pricked."

The point here is that we don't have to choose between the extremes of tyranny or anarchy. The task of the science of government is to continue developing the legal mechanisms by which mankind can advance its interests without losing its rights. "To be free," said a great English jurist, "is to live under a government by law." In terms of our porcupine friends, that's the same as getting close enough to be reasonably warm but not too close to get stabbed.

Yet what I would call the porcupine principle has sometimes been ignored. In economics, for example, much of the world assumed for more than a century that it had to choose between socialism and laissez-faire--between a planned and controlled economy, on the one hand, and the free and unrestricted competition of the marketplace, on the other.

But in the United States we decided that Government should be neither the manager of the economy nor a disinterested bystander. It should be an umpire or referee between the various conflicting interests.

--Hence the introduction of regulatory bodies as the need for them arose--first, the Interstate Commerce Commission, then the Federal Trade Commission, and the other agencies with which many in this audience are associated.

--Hence the protection of the consumer through the Food and Drug Administration, of the investor by the Securities and Exchange Commission, of new channels of information through the Federal Communications Commission.

--Hence the protection of the public against excesses or abuses through the antitrust laws, the civil rights laws, and pollution control-- which are among many concerns of the Justice Department.

Describing this system in his book, The Good Society, Walter Lippmann wrote many years ago: "In a free society the state does not administer the affairs of men. It administers justice among men who conduct their own affairs."

So in this system man is not embraced by the warmth of unlimited paternalism, but neither is he stabbed by the prickles of tyranny.

Being Americans, we are pragmatists, and we want to know how this porcupine principle has worked out in practice.

In the field of antitrust laws, as an example, the United States has developed one of the world's few economies in which the public has the benefit of competition. In many other countries where there were

no antitrust laws and no Federal Trade Commission, private enterprise was allowed to be diverted into the path of monopoly and cartel. And, in turn, these abuses played into the hands of those advocating socialism.

I'm proud that in the United States we developed the legal and administrative means to preserve and enhance competition, so that the system benefited all the people.

I'm proud that during the time I have been associated with the Department of Justice, that Department has made new antitrust history.

By 1969 mergers and acquisitions had increased to alarming proportions, and the new trend to conglomerate-type mergers seemed to be a Pandora's Box that could not be closed by existing legal means. One-third of the manufacturing capacity of the United States was in the hands of 50 corporations. Two-thirds were in the hands of 500 corporations. The concentration was accelerating, and there was a general fear that unless the movement were checked, most of the production in the United States would be controlled by a relatively few people.

As this threat was building up in the 1960's, those heading the Antitrust Division believed that they could not move against conglomerate mergers without new legislation.

But beginning in 1969 a courageous new Assistant Attorney General, Richard McLaren, mounted an assault against the conglomerate threat, using existing law. He had the complete backing of Attorney

General Mitchell and President Nixon. The Justice Department brought a number of antitrust suits against large conglomerate mergers. In every case that has been disposed of so far, whether by settlement or through litigation, it forced divestitures that effectively preserved competition. As a result, Mr. McLaren's counterattack stopped the conglomerate merger threat in its tracks. It was another historic vindication of the Government's role, not as a manager of the economy, but as an umpire to enforce the rules of the game.

Let's turn to some other examples. How has this umpire role been applied by the regulatory agencies and by their administrative judiciary?

Again, we find that they have played a crucial role in making the system work--making it work for the benefit of all the people.

They have maintained public confidence in our competitive system, in the strength of our banking system, in the safety of our public transportation, in the operation of our securities market, in the truth of merchandizing and advertising, in the purity of products, in the honesty of lending agencies, in collective bargaining between labor and management, and in many other areas.

Many of those who had originally opposed the creation of these regulatory bodies, on the ground that they would destroy private enterprise, now are among their most confirmed supporters, on

the ground that these agencies are the best guarantors of that same private enterprise system.

In 1934 many thought that the Securities Exchange Act would paralyze the stock market. Today even its former opponents would agree that it has probably been the salvation of the stock market.

The spadework for all these regulatory agencies, including not only the taking of evidence but also the issuance of initial decisions, has fallen to that body of public servants known as trial or hearing examiners, or as President Nixon has rightly characterized them, the administrative judiciary.

Together with the exemplary work of the commission or board members and other responsible officials of these agencies, the trial examiners have made some distinct contributions to the art of government.

First, they have vindicated the regulatory or administrative system--that is, they have confirmed that unforeseen situations or conditions which cannot possibly be covered by any general law can be fairly and reasonably resolved if Congress delegates appropriate authority for this purpose. In other words, a new dimension has been added to our form of government. In effect, it is a kind of Fourth Branch of the government, related to each of the other three, but unforeseen by the Founding Fathers and their Constitution. Yet it

is far more consistent with their principles than some of the arbitrary means to carry out the same functions in some other countries. This so-called Fourth Branch has rightly been called the outstanding legal development of the 20th Century.

Second, the administrative judiciary has proven that while ours is a "government of laws and not of men," in the end we are shielded from tyranny not only by the rule of law but also by the character of men. One of the objectives of Constitutional government is to reduce discretionary power to a minimum, but some discretionary power there must be. You, the men and women of the Federal Trial Examiners Conference, exercise this power with the fairness and the objectivity that should be expected of highly qualified and responsible officials in a mature society.

In short, you have fortified man's confidence, not only in his institutions, but in himself. In this troubled world, not many groups of people can make that statement.

One might reasonably think that my remarks on government's role as umpire, and not as manager, sound rather hollow at a time when the Administration has clamped on the tightest economic controls in peacetime history. And this might seem especially curious coming from a representative of the Justice Department, which is charged with bringing civil suits to enforce the Economic Stabilization Program.

Actually, my remarks are intended to underscore something that the President declared when he established this historic program. In his August 15 speech announcing the price-wage freeze he emphasized that it was temporary. "To put the strong, vigorous American economy into a permanent straightjacket would lock in unfairness," he said; "it would stifle the expansion of our free enterprise system." Three weeks later he told Congress, "Regimentation and Government coercion must never become a way of life in the United States of America. That means that price and wage stabilization, in whatever form it takes, must be only a way-station on the road to free markets and free collective bargaining in a new prosperity without war."

I would add that nothing would be worse than for us all to forget this self-imposed restriction. We must keep reminding ourselves, as I am doing tonight, that such controls will be removed as soon as they accomplish their purpose. And conversely, the sooner all Americans, working together, can stabilize the economy, the sooner we can throw off the controls. If we fail, if we resign ourselves to such controls, then we have a government which, instead of administering justice between men, administers their affairs. But if we succeed, we can maintain that condition of semi-warmth that you have helped us achieve -- somewhere between the cold of winter and the quills of the porcupine.