THE OLD ORDER CHANGETH: THE DEPARTMENT OF JUSTICE UNDER JOHN MITCHELL*

WILLIAM H. REHNQUIST**

Dean Ares suggested that I relate my speech in some way to the Department of Justice—perhaps because he thought that since I had been employed by the Department for the past year, this was one subject about which I might know something. I suppose that his invitation was sufficiently broad to leave open the possibility of reading to you a transcript of my timesheets for the past year, or to give a rather antiseptic dissertation on what a change it is to go from private practice in a small firm in Phoenix, Arizona, to the largest law firm in the United States—the United States Department of Justice. Modesty and charity have combined to rule out both of these approaches. I have instead decided to take the bull by the horns and discuss the role of the Justice Department under Attorney General John Mitchell, as contrasted with the role of the Department under former Attorney General Ramsey Clark.

I believe that if one were to examine and to compare the actions taken by the Justice Department under these two administrations, one would find that 95 percent of the business of the Department is being handled today precisely the way it was two years ago. But it is not this 95 percent that makes news, or makes even reasonably interesting speeches, so I shall address myself to the very small percentage of things which are now being done differently.

The basic charge made by the "outs," as I understand it, is that the "ins"—the Republicans under Attorney General Mitchell—have "politicized" the Department of Justice. Whatever one may think of this awkward combination of Greek and Latin in a word, its meaning is certainly clear. The bill of particulars would run something like this:

> Count 1: Presidential appointees in the Department of Justice have been recruited on the basis of their being politically active lawyers;
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> Count 2: The Department of Justice has shifted its position in some areas of civil rights enforcement, particularly school desegregation;
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> Count 3: The Department of Justice has been less sympathetic to claims of "civil liberties," than it was under Ramsey Clark, in the following particulars:

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** Assistant Attorney General, Office of Legal Counsel, United States Department of Justice. B.A. Stanford, 1948; M.A. Harvard, 1949; LL.B. Stanford, 1952.

(a) It has taken advantage of the wiretapping authorization contained in the Omnibus Crime Act of 1968;

(b) It has utilized the provisions of the same act dealing with the admissibility of confessions;

(c) It initiated prosecution of the everchanging number of defendants in the Chicago trial for crossing of state lines with intent to incite a riot.

Before touching on these specifics, let me summarize at the outset my reply to these charges. Each of them has a substantial amount of truth in it, and I would suggest that if this were not the case it would be a serious reflection on the American political process and on the two-party system. There have indeed been changes in the Department of Justice, changes which are entirely defensible to any objective observer of the situation, and entirely consistent with the expressed will of the electorate. I now turn to the suggested differences in detail.

As to the politicization of the Department of Justice by naming politically active lawyers as Deputy Attorney General and as Assistant Attorney General, this heinous offense is one of which at least every recent administration of the Department of Justice has been guilty, including the present one. Politically active lawyers have always been a significant source of supply for sub-Cabinet positions in the Department, both under Republican and Democratic administrations.

The bench of our highest Court is presently adorned with two such political types from the Department of Justice. The Chief Justice, Warren E. Burger, came to the Department in 1953 as an Assistant Attorney General in charge of the Civil Division. He had combined with his private practice a substantial amount of political activity on behalf of the Republican Party prior to his appointment. Associate Justice Byron R. White came to the Department of Justice in 1961, having been appointed Deputy Attorney General by President John F. Kennedy. Justice White had taken an active part in the 1960 presidential election as a leader in the "Citizens for Kennedy" forces. He served under Attorney General Robert F. Kennedy, who, it may be recalled, was likewise active in the 1960 presidential campaign.

So we do not lack precedent, either for the proposition that politically active lawyers can be appointed to sub-Cabinet posts in the Department of Justice, or that they can go on from there to make good in the outside world.

The plain fact of the matter is that any President, and any Attorney General, wants his immediate underlings to be not only competent attorneys, but to be politically and philosophically attuned to the policies of the administration. This is not peculiar to the Department of Justice, but is a common feature in the staffing of virtually all of the Cabinet departments in the executive branch of the Government. The courts them-

selves have spoken on this issue, in connection with an effort by George Leonard, an attorney who held the position of First Assistant to the Assistant Attorney General in charge of the Civil Division at the close of the Eisenhower administration, to retain that position under the Democratic administration which took over in 1961. Mr. Leonard contended that since no one had suggested any lack of competence on his part, he was entitled to stay on in the position which he had held under the previous Republican administration. The United States Court of Appeals for the District of Columbia ruled otherwise in *Leonard v. Douglas*,[1] saying:

> The [Attorney General] is not only the chief law officer of the Government of the United States for law enforcement purposes; he is a member of the Cabinet and must be available to advise the President as counsellor on matters involving policy as well as law. The present times bear witness that methods of law enforcement may appropriately be influenced by a choice available among several possible courses of action, all of which may be deemed to be within the law. Legal competence, which it is not denied appellant possessed, is not the only qualification for one holding high legal office with policymaking responsibility. . . . [I]n his own responsibility also the Assistant Attorney General needs as his First Assistant someone in whom he can confide, and to whom he can turn with trust in his judgment as well as in his legal ability.[2]

In 1969, then, the incoming Republican administration of the Department of Justice had a sound precedent established by the preceding Democratic administration eight years earlier that sympathy in matters of policymaking was an entirely legitimate criterion, not only for presidential appointees, but for their immediate assistants.

Neither the *Leonard* decision, nor the most fundamental notions of common sense, suggest that the top offices in the Department of Justice be filled with political hacks who are not competent as lawyers. President Nixon and Attorney General Mitchell have striven for the same goal that all other recent administrations have striven for—a combination of legal ability and sympathy with the goals of the administration in power. An objective analysis indicates, I believe, that they have been every bit as successful as their predecessors in this regard. While names such as Kleindienst, Ruckelshaus, and Rehnquist may be more apt to suggest a law partnership in a prosperous city in West Germany than they are a roll call of senior partners in *Martindale-Hubbell*, surely it cannot be seriously contended that Robert Kennedy, Attorney General; Fred Vinson, Jr., Assistant Attorney General in charge of the Criminal Division under Ramsey Clark; or, indeed, Ramsey Clark, himself, were simply names

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1 321 F. 2d 749 (D.C. Cir. 1963).
2 *Id.* at 751-52.

randomly happened upon in running through a list of members of the Order of the Coif.

I turn now to Count 2, respecting the enforcement of school desegregation. I will not burden you with the statistics which indicate that the Civil Rights Division in the Department of Justice under the new administration has taken truly giant steps towards the elimination of the dual school systems which it found still existing in many places throughout the South 15 years after the original decision of the Supreme Court of the United States in *Brown v. Board of Education.*[3] With respect to the penumbral areas in the developing law of school desegregation, and what the Constitution does and does not require under various circumstances, the Department has on several occasions taken positions in court which are not entirely at odds with those taken by local school boards, and it has been criticized for this fact. For example, in a brief recently filed in the Court of Appeals for the Fourth Circuit in connection with a sweeping order entered by a district judge in Charlotte, North Carolina, requiring extensive busing of students in order to achieve integration, the Civil Rights Division has expressed concern as to whether the order may not have gone further than the Constitution requires.[4]

The question of the extent to which mandatory transportation of pupils is required to achieve "integration" in school districts where de jure segregation at one time obtained is a largely open one under existing decisions of the Supreme Court. Certainly there is nothing in the language of the Constitution itself which can be said to impose such requirements. In this situation, the Department of Justice is in no sense legally required to support the imposition of desegregation plans containing massive busing requirements. Until the matter has finally been resolved in the appropriate forum, as a matter of policy and as a matter of public opinion there is certainly a great deal to be said in favor of a doctrine which refuses to make the achievement of a precise racial balance in every school the primary aim of pupil assignment.

Perhaps the most concentrated criticism of the present Department has been on the ground of its "insensitivity"—to use that much overworked word—to civil liberties. The Department has availed itself of the authority vested in it by the provisions of the Omnibus Crime Act of 1968 to engage in wiretapping under proper court authority.[5] Acting under the provisions of the same Act, the Department's Criminal Division

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[3] 347 U.S. 483 (1954).

[4] The district court's order was affirmed insofar as it concerned junior high and high school busing but was reversed and remanded on the issue of elementary school busing. The Fourth Circuit found the lower court's plan imposed an unreasonable burden on the school board and suggested the school board consider the alternative plans suggested in the brief filed by the United States. Swann v. Charlotte-Mecklenburg Bd. of Educ., 38 U.S.L.W. 2669 (4th Cir. May 26, 1970) (en banc).

[5] 18 U.S.C. §§ 2516-19 (Supp. IV 1965-68).

has issued guidelines to United States Attorneys indicating when it would be appropriate to rely on the provisions of the Act regarding the admissibility of confessions[6] which have been charged by its opponents to be in conflict with the Supreme Court's decision in *Miranda v. Arizona*.[7] Attorney General Clark is said to have refrained from taking either of these actions, which were authorized by statute during the last few months of his tenure in office, because of his opinion that the authority contained in the statute was probably unconstitutional.

Here we do encounter a basic difference in policy and in philosophical approach between the present Attorney General and his predecessor. Attorney General Clark's point of view, as indicated in Richard Harris' recent book entitled *Justice*, appears to have been that the role of the Department of Justice was analogous to a European "Ministry of Justice," where in effect the Department or Ministry is itself responsible for the end product that emerges from the administration of the system of criminal justice.[8]

Attorney General Mitchell, on the other hand, has felt that the Department of Justice is but one of the several instrumentalities engaged in the process of administering criminal justice, and that under our adversary system the role of the Department is basically that of advocate for the prosecution. The advocacy must be a legitimate advocacy and a restrained advocacy—to paraphrase Justice Sutherland in *Berger v. United States*,[9] the prosecution is at liberty to strike hard blows, but it may not strike foul ones—but it is nonetheless an advocacy. Opposed to it, in the system as a whole, are the numerous retained private defense counsel, and state and local public defender's offices, which are likewise advocates for their clients in the law enforcement process. The referee between this set of advocates is the federal court system—the district courts in which the defendants are tried, the federal courts of appeals in which most of their appeals are heard and finally determined, and, ultimately, the Supreme Court of the United States, which has the final say in the decision as to constitutional issues.

I think a very strong case can be made for the fact that a serious and crippling imbalance in the system of dispensing criminal justice would result if the Department of Justice assumed for itself not only the role of prosecutor, but of neutral referee and ultimate supervisor as to the type of product that is to emerge from the judicial mill. Whatever may be the merits of the European system of a highly bureaucratized Ministry with its own system of internal checks, balances, and responsibilities, the desirability of bodily transposing such an entity into the midst of our adversary system of law enforcement is open to the most serious doubt.

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[6] 18 U.S.C. § 3501 (Supp. IV 1965-68).
[7] 384 U.S. 436 (1966).
[8] R. HARRIS, JUSTICE 57 (1970).
[9] 295 U.S. 78 (1935).

In addition to the justification for the present position of the Department in these areas based upon the adversary system of criminal law enforcement, the present position of the Department is in part responsive to the expressed will of the electorate in the area of criminal law enforcement. Not only was this an important issue in the national election of 1968, but in the case of the Omnibus Crime Bill a large majority of both Houses of Congress evidenced the view that wiretapping under certain circumstances ought to be used as a tool in the enforcement of the criminal law. These same bodies likewise evidenced the view that an effort should be made on behalf of the United States in prosecutions to seek admission of certain confessions which, under at least one view of the case, would be excluded by the rule adopted by the Supreme Court in *Miranda.*

It would be a sufficient justification for the present policies of the Department under this thesis that a reasonable, plausible argument can be made in defense of the constitutionality of such provisions, and that therefore the Executive, charged with the obligation to faithfully execute the laws, should do just that. But I submit it is not at all unreasonable to suggest that the Government, if it felt the occasion warranted such action and especially if it were acting under a mandate from Congress, would be entirely within the role allocated to it under the adversary system if it were to ask the Supreme Court of the United States to overrule *Miranda.* Certainly the Supreme Court has responded sympathetically to other requests made in the past 15 years that it overrule prior decisions; there is no reason whatever why the United States as a party litigant is not entitled to make a similar request. I say this not to indicate that such a request should be made or will be made, but simply to point out that under our system, the United States is not required, any more than any other litigant, to accept without argument any particular decision of the Supreme Court in the field of constitutional law as stare decisis.

The ingenuity and resources of defense attorneys and of public defenders will be available to defendants prosecuted on the basis of evidence obtained pursuant to the provisions of the Omnibus Crime Act to make arguments against the constitutionality of convictions based on such evidence. The responsibility for deciding whether or not the particular provisions of this law are constitutional will remain exactly where the Constitution intended that it be placed—with the courts.

Let me return for a moment to the second theme which I believe justifies present Department of Justice policies which have been the subject of attack by critics of the Department. If the two-party system in this country is to offer the voters any real choice between programs, it is surely not unreasonable to expect that there will be some changes in administration policy when a President of one party succeeds a President of another. Such changes are invariably less dramatic and less marked

than one would anticipate from following the oratory of the political campaigns which give rise to the change of administration. But changes there are. And with the increasing concern of the public at large over the enforcement of the criminal law, is it unreasonable to suppose that when one administration is succeeded by another there would be changes in the stance of that department of the executive branch primarily charged with the enforcement of federal criminal law? To answer this question in the negative is to say in effect that the people, in the long run, shall have little or no control over the manner in which the criminal law is enforced. If, under the administration of a President publicly committed to a tougher policy on law enforcement, it is somehow improper to enforce, or to seek to enforce, a law passed by the representatives of the people in Congress, serious questions are raised as to the responsiveness of the Government to the people in this area. We are not talking about changing the Constitution by majority vote, but only about presenting to the courts constitutional issues which the majority has indicated that it wishes to be so presented. Surely if there is to be any responsiveness at all to public opinion in this area, the present position of the Department is not only permissible, but desirable.

Ramsey Clark was an outspoken advocate of the civil liberties of the individual, and the rights of the criminal defendant. Many agreed with him, many disagreed with him. John Mitchell, from his position as Attorney General, chooses to place more emphasis on the right of society to apprehend and punish those guilty of crime. Many agree with him, and many disagree with him. These points of view are basically two sides of the same coin, and just as Ramsey Clark would not have advocated the wholesale freeing of criminal defendants on technicalities, neither would John Mitchell advocate the wholesale incarceration of criminal defendants regardless of violations of their constitutional rights. The matter is one of emphasis and degree, not of black and white. But to the extent there has been a shift of emphasis, it is both rationally defensible as a matter of government, and entirely consonant with the expressed will of the electorate.

The final count in the bill of particulars is the decision of the present Department of Justice to seek indictment of the so-called Chicago defendants—Messrs. Hoffman, Rubin, et al.—after the preceding administration had not sought any such indictment. The Chicago defendants were indicted under an act of Congress passed in 1968 making it a crime to travel in interstate commerce with the intent to incite a riot.[10] The charge has been made that prosecutions under this act will tend to curb free speech, that the act is of doubtful constitutionality, and that all in all such prosecutions amount to "repression." So far as I can see, repression

[10] 18 U.S.C. §§ 2101-02 (Supp. IV 1965-68).

is the code word that the liberals developed as a counterpart to that redoubtable code word of the conservatives—"law and order."

Insofar as the constitutionality of this act of Congress is concerned, it surely cannot be said that there is no reasonable basis on which its constitutionality can be sustained. Very recent decisions in the Supreme Court make it clear that inciting to riot is not a type of speech protected under the first amendment. Congress is surely entitled to exercise its commerce power to prevent travel for a substantive purpose which is not constitutionally protected and which it desires to outlaw. Surely it is possible to separate, for purposes of applying this statute, speech and actions which amount only to legitimate protest against government policy, from speech and actions which are intended to arouse their hearers and viewers to take violent action, to destroy property, and to injure or kill people. Thousands and thousands of people have marched in protest against one policy or another in the past year, and hundreds of people have spoken at meetings of such protesters. These people have obviously not been deterred from so doing by the prosecution of the handful of people charged with violating this statute. I suspect the man in the street would have little trouble distinguishing between vigorous and forceful criticism of governmental policy, on the one hand, and the urging of violent, forceful action on the other. Like any other criminal statute involving prosecutorial discretion, this statute is subject to possible abuse; but that is no reason for refusing to employ it at all. In my opinion there is not the slightest evidence of any prosecutorial abuse in the handful of cases prosecuted thus far.

It has been suggested that the Chicago Trial was basically a "political trial," whatever that means. If it is meant to suggest that the defendants in Chicago were tried for their political beliefs, that simply is not so. If it is meant to suggest that the defendants at that trial all appear to have had much the same view of our existing American society, very likely it is true; but this is a commentary on the definition of the term "political trial" rather than an indictment of the Department of Justice. Just as one's beliefs cannot and should not afford the basis of any criminal prosecution, one's beliefs cannot and should not guarantee immunity from criminal prosecution for acts which have been made criminal by law. No one may be put in jail for his beliefs, but no one is protected against a jail sentence solely because of his beliefs. The test in every case is whether the defendant has performed acts which are criminally punishable. In the case of the Chicago defendants, the act of which they were convicted was the incitation to riot. The fact that the incitation occurred in a political context is not a ground for singling them out for prosecution, but neither is it a ground for refusing to prosecute if the evidence otherwise warrants. Unless we are to entirely repudiate Justice Holmes' famous observation that the Constitution offers no protec-

tion to the man who falsely shouts "Fire!" in a crowded theater, there is certainly a moral, as well as a constitutional, basis for concluding that this particular law ought to be enforced.

In Tennyson's *Morte d'Arthur*, Sir Bedivere, the last of the knights of the Round Table, bitterly complains to the dying King Arthur that "the true old times are dead." Arthur replies in a philosophical vein:

> 'The old order changeth, yielding place to new,
> And God fulfils Himself in many ways,
> Lest one good custom should corrupt the world.'

In short, one need not damn Ramsey Clark—one need only refrain from canonizing him—in order to conclude that the changes which have taken place since he was succeeded by John Mitchell are a thoroughly sound and defensible alternative to his program. That there should not have been changes in the Department of Justice would have been unthinkable under any meaningful system of two-party government. I am sure that policies of law enforcement, just as other types of governmental policies, are generally cyclical in nature, and your generation, if not mine, will undoubtedly live to witness departures from the policies of the present administration of the Department of Justice, and doubtless departures from those departures. Each of us retains his right to freely criticize, oppose, and vote at every opportunity against policies or changes of policy of which he does not approve. But it is a denial of the fundamental assumptions of representative government to suggest that John Mitchell ought not to have been a different kind of Attorney General than was Ramsey Clark.