Speech by:

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COURT PROCEDURES - A DILEMMA

Let me thank you for allowing me to come here today and address this distinguished Council of Superior Court Judges. You honor me by your invitation and I hope that my remarks will in some small way contribute to the effectiveness of this workshop.

During the last few weeks,I have made several speeches in North Carolina concerning court procedures there in an effort to focus attention on some of our problems, prompt public discussion, and perhaps find some answers. As you might suspect, at this point there are some court officials in North Carolina who are not particularly pleased with the public attention I have been focusing in their direction.

I think that my comments were shocking to some of our people because we in North Carolina, not very long ago, went through the process of "court reform", which I understand is now a matter of great interest here in the State of Georgia. Some people had the idea they had sort of done their duty

toward improving the courts and that they shouldn't have to worry about the efficiency or the effectiveness of the courts again for quite some time. I'm afraid that is not true.

We do have a new court system in North Carolina; one quite similar to that proposed for the State of Georgia during your last legislative session. By constitutional amendment adopted by a vote of the people in November 1962, North Carolina authorized the creation of the "General Court of Justice" and vested in it the judicial power of the State. Subsequent legislation then eliminated a hodge-podge of local courts with varying jurisdictions and established for the first time a unified State court system.

In the words of the amendment, "The General Court of Justice [constitutes] a unified judicial system for purposes of jurisdiction, operation, and administration; and shall consist of an appellate division, a superior court division, and a district court division." The administration of the court system was delegated to the Chief Justice of the Supreme Court, who in turn appointed an Administrator of the Courts, who is in fact the chief administrative officer.

I'm proud of the structure we have created in our State. Certainly I urge the people of Georgia to continue

their efforts to create a unified system because in my opinion this is the first great step toward improving the effectiveness of any State's judicial system. So long as you have hundreds of recorder's courts, domestic relations courts, mayor's courts, county courts and justice of the peace courts, all legislative creatures tailored to the particular fancies of individual towns and counties, you will never be able to institute changes on a broad enough scale to have any significant effect upon the system as a whole. You could work on them one by one till doomsday and never get around to all of them.

In our day, as never before, the people expect uniformity of services and equal treatment especially by the law and the judicial system. There is no way to achieve this with a fragmented system such as we used to have in my State and which I understand you still have to some degree here, where some courts run fulltime and others only a couple of hours a week; where salaries of judges vary drastically; where costs are different from court to court; and where some judges are professional jurists, while others judge actually as a hobby while engaged in some other profession.

You would be perfectly in order at this point if you asked why I recently questioned the effectiveness of my own State system if we already have in operation a unified system which I recommend to you for your favorable consideration.

Our Court Administrator asked the same question, pointing out to the media that North Carolina has a "model system". He incidentally labeled my comments "an unwarranted attack".

I pointed out that I had not criticized the structure of the Court System. I believe it is properly designed and its design is truly a model system. However, because it is designed right does not mean it is operating perfectly, that dockets are not overcrowded, and that all is well with the system.

It is like saying here is my brand new car, straight from the assembly lines of Detroit. It must run perfectly.

When you start the motor, it may not run well at all. It may skip, and it may have a rattle in the front end. It would be less than wise, though, to ignore the problem and insist that because it is new, because it was carefully planned and executed that it must also be running perfectly.

All is <u>not</u> well with the court system in North Carolina and I feel certain the same is true of the Georgia judicial system. If it were not, I do not believe you would have devoted so much time in recent months to the subject of court reform.

I hear from people almost daily who have been in the courtroom as witnesses, as plaintiffs, and as defendants who

say that the courts are bogged down, that justice is not being administered efficiently or expeditiously, and that their contact with the court has diminished their respect for it.

This is a modern tragedy. In years past, we have encouraged private citizens, especially students, to go to the courthouse and observe the court in progress in order to increase their understanding and their appreciation for the judicial system. I suspect that if we want to preserve what confidence the public has left, we should instead ask them to stay away and hope they don't become involved themselves in the disposition of a case.

Now the call for improvements in our courts is not new. As I noted a few moments ago, we heard it most recently in North Carolina only a few years ago when we adopted a constitutional amendment authorizing a new judicial system, then enacted legislation to implement it. You hear that call here in Georgia today, and anyone who believes it is a new and radical call should examine the history of court reform in this Nation.

The noted jurist, Roscoe Pound, in 1906, made a speech calling for court reform which is still quoted today. In his words, "(a)s long as there have been laws and lawyers,

conscientious and well-meaning men have believed that the attempt to regulate the relations of mankind in accordance with law has resulted largely in injustice. We must not be deceived by this innocuous and inevitable discontent with all law into overlooking or underrating the real and serious dissatisfaction with courts and lack of respect for laws which exists in the United States today."

Judge Pound went on to call for more modern techniques including management techniques in the courts. Fifteen years later, William Howard Taft, as Chief Justice of the United States, asked for the same thing - that we bring "modern management processes to the business of administering the courts." The Wickersham Commission's report, prepared in the '20's, and studies through the '30's, repeated the call for reform. Arthur Vanderbilt in the '40's and Earl Warren in the '50's and others in the '60's have had the same objective." (Ernest C. Friesen, Jr.)

There is "real and serious dissatisfaction" today and those of us who are a part of the system should not feel threatened by conscientious efforts to change it and most of all, to ensure a speedy trial. We must make the system effective in fact and justice is only effective "when it is fairly administered without delay". (Alfred Murrah) Note, I have said "without delay". In my opinion, delay is the

major problem facing us today. It is perhaps the greatest challenge to the strength and effectiveness of our system that we have faced in our history.

In his opening address to the National Conference on the Judiciary held in Williamsburg, Virginia, last March, President Nixon pointed to this very problem.

> "A system of criminal justice that can guarantee neither a speedy trial nor a safe community cannot excuse its failure by pointing to an elaborate system of safeguards for the accused. Justice dictates not only that the innocent man go free, but that the guilty be punished for his crimes ... (j)ustice delayed is not only justice denied - it is also justice circumvented, justice mocked, and and the system undermined."

I agree wholeheartedly and have said time and time again that swift and sure justice, not harsh punishment, is certainly the most effective deterrent to crime. The constant delay in getting cases tried has been defended on the ground that it is the defendants and their attorneys who are delaying the trials and, therefore, no one's rights are being abused.

Now I ask you if the rights of the prosecuting witness are not abused when he has been victimized and yet sees the lawbreaker remain free and unconcerned since the lawbreaker knows that he may never have to answer for his wrongdoing.

I ask you if witnesses are not abused when they are subpoenaed to court over and over again, when they lose time on their jobs and income, and often even put their jobs in jeopardy because cases are repeatedly postponed, usually without advance notice.

I ask you if the citizens of any state are not being abused when defendants are allowed to sidetrack the judicial mechanism and delay it to their advantage. I ask you if law enforcement officers are not being abused when they waste hours and days in court waiting to be called for cases in which they are witnesses.

Now I know that "(c)riminal adjudication will never be a completely efficient process but there is a good reason to believe that it can become a more efficient process than it is now, without losing anything that is worth keeping." (Richard G. Kleindienst)

Why are we faced with such a problem of delay in the courts? Why then are our courts so overburdened?

We should not allow the public to accept simplistic answers to this question. The solution is far more complex than the street-corner and country-store explanations we hear so often.

For example, as I have traveled around my own State, I constantly hear the criticism that judges do not make the most efficient use of the court's time. This certainly may be true in some instances, for judges are human like everyone else - I think - and some do fail on occasion to conduct their courts in a businesslike manner. In spite of this fact, we must remember that assemblyline justice is not desirable in any state of the union. And we must not be afraid to remind the citizens of our states of this fact.

We must remind them that "(i)n a decent legal order, it is not enough that justice be done; it must also be seen to be done. This common law maxim is a shorthand way of saying that the rectitude and humaneness of the law's workings must be manifest to all members of the community and particularly to those whose interests are adversely affected by the operations of legal institutions. It is an indispensable element of our legal tradition that everyone has the right to his day in court - that is, fair opportunity to state his claim or defense and assurance that his assertions will be considered carefully and in high seriousness before the decision comes down." (Harry W. Jones)

Some people cannot understand why the courts do not open for business each morning at 8:30 like their businesses do. In their minds "lawyers' hours" are one up on "bankers' hours". They do not understand, obviously, that it is

necessary for law enforcement officers, prosecuting attorneys, and defense attorneys to spend a great deal of time before court opens each morning getting their witnesses together and making sure the case can be presented in an orderly manner.

For this reason, the court itself cannot open at the crack of dawn. Yet many people fail to understand this.

Many people are inclined to place the responsibility for the delay in our courts upon the trial lawyers. Again, I have tried to explain that most lawyers are anxious to bring their cases to trial for that is the only way they can make criminal law practice pay. Each time a case is continued, the lawyer has to spend additional hours reviewing the case with the defendant and having his witnesses visit his office again.

However, as long as the backlog in our courts is as great as it is now, continuances will be granted and when this is done, an attorney must continue to make the request if his client insists. If the defendant knows that continuances are handed out as a matter of routine, then he is sure to insist that his attorney ask for it. If the attorney refuses, the client very likely will feel that his representation is not aggressive or vigorous enough, and is apt to request that the court appoint new counsel. If actually brought to trial and convicted, the defendant probably will petition for a

post-conviction hearing and ask for a new trial on the grounds that his lawyer did not adequately represent his interest.

If these aren't the answers to the dilemma facing our courts, then what are they?

Perhaps President Nixon supplied part of the answer in Williamsburg when he said:

> "The Nation has turned increasingly to the courts to cure deep-seated ills of our society - and the courts have responded; as a result, they have burdens unknown to the legal system of a generation ago. In addition, the courts have had to bear the brunt of the rise in crime - almost 150% higher in one tecade, an explosion unparalleled in our history .... Our Courts are overloaded for the best reasons: because our society found the courts willing - and partially able - to assume the burden of its gravest problems. Throughout a tumultous generation our system of justice has helped America improve herself; there is an urgent need now for America to help the courts improve our system of justice."

But President Nixon issued this warning, which I think we should consider carefully:

"... (i)f we limit ourselves to calling for more judges, more police, more lawyers operating in the same system, we will produce more backlogs, more delays, more litigation, more jails and mor criminals. 'More of the same' is not the answer. What is needed now is genuine reform, the kind of change that requires imagination and daring, that demands a focus on ultimate goals."

That goal, President Nixon said, "is not to put more people in jail or merely to provide a faster flow of litigation, it is to resolve conflict speedily but fairly, to reverse the trend toward crime and violence, to reinstill a respect for law in all our people."

One step toward "reinstilling a respect for law" in our people is to examine our docketing procedures and work toward making them more effective.

Surely court dockets can be handled in a more efficient manner than they are. There is no reason why, with preplanning, the courts cannot determine to a greater degree what cases will be called on a particular day before a hoard of witnesses, plaintiffs, and defendants cram into the courtroom to be told they either must sit for days or that their case will not be called until another term of court. Worse yet, often they are told nothing.

We cannot expect this situation to change until we commit ourselves to the idea that the courts must have additional personnel, many of whom have tasks which we would consider "non-traditional", but which are necessitated by our modern dilemma. This is hard for many of us who have been involved in the courts for many years to accept. But I believe we must.

In my State, we still expect the solicitor to effectively prosecute the cases in his district just as we have for decades. At the same time he is faced with administrative duties which exceed anything we could ever have imagined a few years ago - and often with little or no special training for this task, even if he had time to devote to it.

In some jurisdictions we have given the solicitor an administrative assistant on an experimental basis. But we have done very little more in North Carolina.

Likewise, our judges must have some help. I was especially pleased to read the recommendation of your Governor's Commission that "... every Superior Court judge be staffed with a legal secretary and, to the extent justified, a law clerk and that the necessary funds be provided by the State to meet this responsibility." Your Legislature showed good judgment in enacting this recommendation into law. They are blazing a new trail which I hope other states will follow.

"Traditional court procedures, when working at their best, accomplish the kind of patient hearing and discriminating investigation that we associate with the just administration of the law. But this takes time and sufficient resources in adjudicative personnel to handle the flow of work. The arts of the judge, like the arts of the sculptor and the cabinet maker, are most perfectly performed when the craftsman has no assembly line to rush him and can give full and painstaking attention to one commission at a time." The Courts, The Public and The Law Explosion, Harry W. Jones.

Justice Burger has drawn an analogy between the court system and hospitals, which I think is interesting. He noted that both have been subjected to the same stresses and strains but the hospitals responded long ago by recognizing the importance of system and management in order to deliver adequate medical care.

He then points to the development of hospital administrators and notes that every hospital of any size has a trained administrator dealing with management and effective utilization of the institution's resources.

"Courts and judges have, with a few exceptions," says Justice Burger, "not responded in this way. To some extent, imaginative judges and court clerks have moved partially into

the vacuum, but the function of a clerk and the function of a court executive are very different, and a court clerk cannot be expected to perform both functions."

In my opinion, it is folly to believe that one can significantly improve the management functions of a judicial system where there is not a unified state system. I emphasize again the fact that significant improvements in the judicial system of any state must be preceeded by the adoption of a statewide court plan. I know how disappointed you must be that your Legislature failed to recognize this and to follow the recommendations of your Governor's Commission. I hope, as you do, that through research made possible by your LEAA grant you will be able to lay the foundation for the eventual adoption of a unified court system for the State of Georgia.

There is another way I believe we can reduce the backlog in our courts and insure speedier trials and I want to comment for just a moment on the problem of victimless crimes. I am of the opinion that the courts are in fact handling some matters that can properly be removed from the judicial system. There is some disagreement among even the best intentioned people about this and your own Commission failed to make a specific recommendation. But I have been concerned about this for a long time and want to share my experiences with you.

According to a study made in my own State of 83 counties during the period from January to April 1969, 34% of our criminal cases, other than motor vehicle violations, were public and social misconduct and this category is largely composed of drunkenness and disturbing the peace. Public drunkenness and social misconduct is the second largest category of all criminal offenses docketed, motor vehicles violations being the first.

You know these cases require just as much administration by the courts as a full-blown homicide - this includes booking the defendant, issuing a warrant, jailing the defendant, docketing and ultimately trying the defendant.

As an illustration of the countless hours spent in dealing with an individual commiting these offenses, I know of a man from my home County of Harnett, who has been charged 53 times in the past 15 years with public drunkenness, disturbing the peace, or crimes stemming from drunkenness. The time and effort expended by the judicial system as exemplified by this common example is readily apparent. Even though this individual was committed approximately one-third of the time, time off for good behavior invariably cut the imposed sentence considerably. To give you some idea of the paper work involved with a person of this type, the Clerk of Superior Court has one five-drawer file cabinet full of documents pertaining to this individual alone.

In order to help cure this overcrowding of our court dockets and insure swifter justice, I suggest abolition of public drunkenness as a criminal offense. I do this for very practical reasons. With the public drunkenness cases out of the courts, the other criminal cases would move more rapidly, thus increasing the possibility of swift and sure justice.

I note as a point of interest that many states, including North Carolina, have statutes providing that chronic alcoholism is a defense for public drunkenness. The United States Supreme Court has also declared this to be the case.

I mention this to illustrate that our traditional concept of the public drunk is changing. My suggestion of eliminating public drunkenness as a criminal offense is just a continuation of the current realization that there are better and more effective ways of handling individuals with drinking problems than requiring complete criminal judicial proceedings.

I hope you will not be so discouraged by the failures of cities such as St. Louis and New York that you will cease to consider the decriminalization of the public drunk as one answer to relieving the workload of our courts. I believe there are some practical ways that this can be done if we set out minds to it and recognize that it may require the

allocation of additional resources. I suspect that any resources deboted to a program designed to deal with public drunks would be less than the costs of repeatedly running them through our courts.

I note in your Commission report that you have obtained a LEAA grant to develop pattern jury instructions. I commend this effort. It is something we have tried and found extremely useful in my own State. I believe that in the long run, it will have a significant effect in reducing the number of cases reversed because of erroneous charges to the jury. In addition, as a practical matter, it makes your job easier.

I know that it makes mine easier in North Carolina because my staff has the duty of representing the State in every criminal appeal beyond the trial level. Our attorneys have copies of the pattern jury instructions and when a charge is attacked, we can turn immediately to our file to determine if a pattern instruction was used and if so whether it has been sustained by our appellant courts before. If the attack on the charge is successful in the Appellant Court, we immediately notify the Institute of Government, which is responsible for up-dating the charges, and the pattern instruction is changed to comply with the most recent

decision and judges are so notified. This can be of great assistance to you, and I encourage your active interest and participation in the drafting of pattern jury instructions for Georgia judges.

Likewise, I was pleased to see that you spent some time considering the desirability of negotiated pleas. Your Commission stated that "... using plea discussions and plea agreements [is] the most effective means for the disposition of criminal cases." I share your belief that negotiated pleas are a vital and certainly a legitimate part of our judicial system. However, I also believe the court should never be guilty of coercing guilty pleas simply for the sake of expediency.

Often attorneys and judges alike are hesitant to speak out publicly and defend the practice of plea bargaining. This is understandable because if plea bargaining is not explained adequately and the theory is not understood, it is natural for the layman to assume you are talking about the proverbial "fixing" of a case. I believe that it is time to start talking publicly about the desirability of plea bargaining but at the same time make sure we explain the theory behind it, its historical precedent and assure the public that pleas will be negotiated only in open court, in full view of citizens

and the news media alike, and that we have no desire to participate in or be accused of "backroom deals".

There are many other changes we could mention which would improve the effectiveness of the judicial system. We ought to explore them all and make a conscious effort not to resist change simply because constant practice in the old system has created familiarity and self-confidence. We are all capable of change, and I believe that the times demand it.

As I was preparing this speech, I was pleased to pick up a copy of the March ABC Journal and see an article by Harold H. Green titled "Court Reform: What Purpose?" Mr. Green made some very pertinent observations which I would like to refer to as I conclude my comments today.

He pointed to many of the same problems and solutions that we have just discussed and put a great deal of emphasis on the fact that "[j]ustice includes both speed and fairness; it combines swift, efficient adjudication with a policy of preserving due process as a method of arriving at the truth. Each of these objectives is vital to our legal system; neither should be sacrificed to the other," he said.

He urged us not to sacrifice due process in our quest for efficiency, and I agree with him. This is a concern of mine also and I certainly do not want to ever see the day

when we have the judicial mills of some of our larger cities where no one, including the court itself, is ever satisfied that true justice has been done.

But his most pertinent comment was this one: "There are no short cuts. A system that is speedy yet fair will need more efficiency in administration, just as it may benefit from simpler procedures or the diversion of some matters from the judicial scene. But it must be clearly understood that such a system will also require more resources in personnel and equipment and hence more money."

I do not believe we should allow anyone to deceive himself by thinking that the judicial system as now constituted and staffed can continue to carry its increasing burden merely by "short cuts" and even the best intended internal changes which, in Mr. Green's words, "de-emphasize the need for additional reforms." Mr. Green states, and I believe we all agree, that when we do so, we "do a disservice to the cause of judicial reform. That simply provides a convenient excuse to political leaders and the taxpaying public, both of whom, quite naturally, prefer answers requiring no expenditure of public funds."

As I have tried to emphasize in my own State, this is not a time for excuses or ignoring problems which are equally

apparent to us and the citizens of our states. It is time for everyone to analyze as carefully as possible the dilemma we face in our courts, to determine specific objectives of reform, and then set in motion the process of deliberate and constructive change. Our dilemma, in my opinion, thus can be transformed into an opportunity to provide a more effective judicial system.