SPEECH TO THE FEDERAL BAR ASSOCIATION OF TULSA OCTOBER 1970

Mr. Cordell and friends in the Federal Bar Association of Tulsa, for me and my wife, Helen, it is a genuine pleasure to come back to Tulsa to see our friends and be with you on this fine occasion. It is a special honor to me to be invited to participate in the ceremony of your chapter celebrating the 50th anniversary of the Federal Bar Association. From the days of my work in the Department of Justice in Washington, later in private practice, and now in judicial work, I have always enjoyed the privilege of Federal Bar Association membership. This group nationally does a real service for the country, for the Bar generally, and for the courts, and I am happy to join in your celebration.

Helen and I are especially glad to come back to Tulsa and see many friends here. My father always reminded me of his many friends and supporters in Tulsa whom he deeply respected, close friends of 30 and 40 years ago. I particularly feel close to Tulsa in legal matters because I tried to learn to become a lawyer here, in coming to Tulsa to appear before one of the really great judges of our country, Royce Savage. And about that time, a young U.S. Attorney, Bob Rigbey, was making the headlines—and teaching me a lot also. Now, I am enjoying working with his wonderful successor, Judge Barrow.

When Dave Cordell invited me, I wondered: What will I do up there? I told Dave Cordell that I would make it short, when we visited about this talk. If you like short talks as well as I like short briefs then I should be able to please you in that respect at least. The story is that one of the most effective briefs in the Supreme Court consisted of a question of six words. It was filed, the story goes, in an admiralty case on behalf of the libelant that had obtained a substantial judgment for a ship collision. The question was, "Why didn't they blow the horn?" The question did the job and perhaps a short question this evening might do the same. The question might be, "Can the courts function in a courtroom of bedlam

and violence?" This is one serious problem that has worried all of us for many months and which troubled the Supreme Court last term.

Let me give due credit at this point for thoughts that I will discuss with you to my former Chief Judge, Judge A.P. Murrah. He has addressed himself to this problem eloquently and I must confess, or very gladly claim, that he has expressed these sentiments in recent talks.

The Preamble to the Constitution solemnly says that its purpose is to establish justice and secure the blessings of liberty. The Declaration of Independence declares it to be self-evident that all men are created with certain unalienable rights, among them life, liberty, and the pursuit of happiness. These cornerstones of social order flow from Magna Carta, which declared several hundred years ago that no man shall be seized, condemned or dispossessed but by lawful peers or the Law of the Land.

Yet, within the confines of these ideas the paradox arises. On the vigorous exercise of the right to be heard in court, what restrictions can be imposed? If a trial judge can determine that a lawyer's performance is too colorful or too vigorous and offensive, can the cause he is espousing be fairly represented? And yet, the maintenance of a system of justice carries the implication that it must function, so the conflict and paradox arises that has beset us in recent months.

As I mentioned, the Supreme Court faced the problem last term, as most of you know. It came up, though, in a post-conviction case brought by Allen long after his 1956 trial. *Illinois v. Allen* involved a situation that is not too bizarre these days. The defendant, charged with armed robbery, had appointed counsel. Allen said he wanted to conduct his own defense, and the trial judge permitted him to do so, with the appointed counsel sitting in to protect the record. Allen began examining the jurors and continued at great length. Finally, the judge interrupted asking him to confine his questions. In abusive and disrespectful language, Allen started to argue, and the judge asked the appointed attorney to continue the questioning of the jurors. Allen continued to talk, saying when he went out to lunchtime the judge was going to be a corpse. He tore up the file his attorney had and threw it on the floor. The court warned one more outburst and he would be removed. Allen said that there was going to be no trial and that he was going to sit there but there was going to be no trial.

Allen was brought back after recess and warned that he could remain on proper behavior. When the jury had returned, Allen said again there was going to be no proceeding. The judge ordered him removed. Later,

Allen gave assurances of proper conduct and was permitted to be present throughout the rest of his trial which was conducted by his appointed lawyer.

What worried all the judges, at trial and on appeal, was the interference with the unquestioned right to be present at trial recognized as fundamental in *Lewis v. United States* (1892); to confront witnesses against him (*Pointer v. Texas* held in 1965); and all the elements of a fair trial guaranteed by the Due Process Clause. The Court of Appeals held removal invalid—other means; the Supreme Court, however, held the bedlam that confronted the judge and the direct threat to block the trial amounted to a waiver of the right to be present. Cardozo: may be lost by consent or *misconduct* through three powers: (1) bind and gag, (2) cite for contempt, and (3) remove until assurance of proper conduct. What Justice Black said is the guide we now follow. He spoke for the Court in these words:

> It is not pleasant to hold that the respondent Allen was properly banished from the court for a part of his own trial. But our courts, palladiums of liberty as they are, cannot be treated disrespectfully with impunity. Nor can the accused be permitted by his disruptive conduct indefinitely to avoid being tried on the charges brought against him. It would degrade our country and our judicial system to permit our courts to be bullied, insulted, and humiliated and their orderly progress thwarted and obstructed by defendants brought before them charged with crimes. As guardians of the public welfare, our state and federal judicial systems strive to administer equal justice to the rich and the poor, the good and the bad, the native and foreign born of every race, nationality and religion. Being manned by humans, the courts are not perfect and are bound to make some errors. But, if our courts are to remain what the Founders intended, the citadels of justice, their proceedings cannot and must not be infected with the sort of scurrilous, abusive language and conduct paraded before the Illinois trial judge in this case. The record shows that the Illinois judge at all times conducted himself with that dignity, decorum, and patience that befits a judge. Even in holding that the trial judge had erred, the Court of Appeals praised his "commendable patience under severe provocation."

> . . . Deplorable as it is to remove a man from his own trial, even for a short time, we hold that the judge did not commit legal error in doing what he did.

After this landmark decision, considerable writing has gone on on the subject. The American College of Trial Lawyers issued a report in July on disruption of the judicial process. It included principles as guides for the courts, the lawyers, the parties to the cases, and the public. Probably the paramount idea is stated in the second principle in the report. It recognized that courts are required to do two difficult jobs: (1) discover where truth lies between two often conflicting versions of the facts, and (2) applying law and reason to them. The principle says, "These tasks are as demanding and delicate as a surgical operation and, like such an operation, they cannot be performed in an atmosphere of bedlam." The other principles enjoin on the lawyers and the courts their responsibilities.

Principle III calls on the lawyers to represent the client courageously, vigorously, diligently and with all his skill and knowledge; that he do so according to law and standards in the canons of his profession; that he conduct himself to avoid disorder or disruption in court; and that he advise his client of the behavior expected and required there and, so far as lies in the lawyer's power, from creating disorder or disruption.

The judges' duties are solemn. Under Principle IV he has these professional obligations: to consider objectively any challenge of his right to preside; to deny it courageously if unfounded, and to allow it if well founded, and to disqualify himself without challenge if he is biased or plausibly may be suspected of bias; that he recognize the obligation of the lawyers to represent their clients courageously and vigorously and to treat them with courtesy and respect; and that the judge avoid becoming personally involved, and preside firmly and impartially. He is especially enjoined where disorder is anticipated to make known in open court the behavior required *and* the nature and extent of his contempt powers—and the warning should be repeated as often as deemed necessary.

This statement of principles did not end efforts to disrupt courts and tragic occasions have followed. But, they have outlined what you and the judges with whom you work have in solemn responsibilities in court. This is our workshop and we need to keep it in order so that we can do our work effectively. But, above all, we need to keep the workshop in order because it is where justice must be done.