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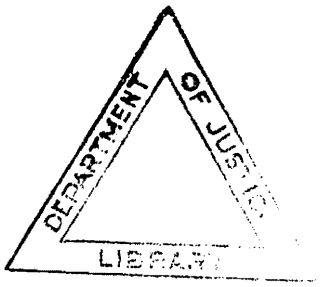

ADDRESS

OF

HONORABLE J. HOWARD McGRATH

ATTORNEY GENERAL OF THE UNITED STATES

Before

THE SUPREME COURT OF THE UNITED STATES

In Honor Of

THE LATE JUSTICE FRANK MURPHY

Washington, D. C.

Tuesday, March 6, 1951

12:00 Noon

May it please The Court:

The Resolutions which have just been read, and the addresses which were delivered earlier this morning before the Bar of this Court, have described how the late Justice Frank Murphy devoted almost his entire adult life to a most distinguished career of public service. That career is one to which fruitful consideration will be devoted at far greater length than is possible in these proceedings. I speak with personal knowledge, as it was my great privilege to have close associations with him during the major part of his public service. I came to know and value him when he was the Mayor of Detroit, and our friendship continued when he was Governor of Michigan and when he was Governor General of the Philippines. I was United States Attorney for the District of Rhode Island during the period when Justice Murphy was Attorney General of the United States, and, being an officer of the Justice Department, of which the Attorney General is the head, our duties brought us into frequent contact. After Justice Murphy became a member of this Court I appeared here as Solicitor General of the United States.

So it is that I am here, not only to pay a deserved tribute to a predecessor in the office I now hold, but also to speak of one who was my own chief in the Department of Justice, and who was my personal friend over a long period of years. It is, I believe, rare, indeed, that one who takes part in such ceremonies in an official capacity is privileged to bring to the occasion such an intimate and personal knowledge as I do of the departed Justice in whose memory we are gathered here today.

Justice Murphy was not one of those who thought that the only necessary or proper support for judicial action was a carefully constructed edifice of precedent. He by no means ignored the past; he accorded it all the respect that he felt was its due. But his realistic humanitarianism convinced him that the problems of today must be handled in a manner that will resolve them practically. He found abhorrent and incomprehensible the idea that old forms, which might indeed have contributed effectively to the attainment of justice in the past, should be permitted to govern in current cases where their operation seemed to him to result only in injustice. "The law knows no finer hour," he wrote in his dissent in the Falbo case,[1/] "than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution." Similarly, in his concurring opinion in the Hooven & Allison Co. case,[2/] wherein this Court held that imports from the Philippine Islands were protected against taxation by the States during the period immediately preceding the attainment of Philippine independence, Justice Murphy supported this view as "compelled in good measure by practical considerations," as well as by the "moral and legal obligations" of the United States to those Islands. Like many great judges of the law before him, Justice Murphy subordinated strict precedent to an altogether human ideal of justice. His was an instinct which is most intimately intertwined with our basic national ideals. And I am profoundly convinced that his decisions were motivated throughout by a deep

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1/ Falbo v. U.S., 320 U.S. 549, 561 (1944)

2/ Hooven & Allison Co. v. Evatt, 324 U.S. 652, 692 (1945)

awareness of those ideals, with an ungrudging and unquestioning disregard of any personal preferences of his own that might have stood against what he felt to be required by our national principles.

An outstanding instance of this appears in his actions in the various cases concerning the religious sect called Jehovah's Witnesses, members of which were involved in cases before this Court almost constantly during Justice Murphy's tenure. Another instance is his insistence that constitutional protection be accorded communists.[3/] A devout Roman Catholic, he disregarded personal preferences which we all know were very dear to him in favor of what his conscience told him to be his duty as a Justice of this Court. His views on the freedoms of religion and of communication were thorough. He consistently believed that their enjoyment should be guaranteed to all persons in whatever manner indulged in except when, as in the Chaplinsky case,[4/] the conduct in question was so deeply offensive to other principles vital to our society that the claim to freedom as an exercise of religion could not be tolerated. Thus, for instance, the late Justice wrote in his opinion for the Court in Hartzel v. U.S.,[5/] that:

> " * * * an American citizen has the right to discuss these matters either by temperate reasoning or by immoderate and vicious invective * * ."

3/ Schneiderman v. U.S., 320 U.S. 118

4/ Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)

5/ 322 U.S. 680, 689 (1944)

Justice Murphy was humanitarian in the deepest sense. He had profound confidence and faith in, and complete respect for, the individuals who constitute society. For him it followed logically from such a belief that the personal guarantees contained in the Bill of Rights should occupy a preferred position in the constitutional scheme. These guarantees, often referred to as "civil liberties" or "civil rights", seemed to him to merit special protection by the judiciary, so that the usual presumption of constitutionality should be reversed when the question concerned statutes impinging on these guarantees. In one of his most famous and influential opinions, written for the Court in the case of Thornhill v. Alabama,[6/] the late Justice declared that:

> "The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. * * * It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations."

The same emphasis appears in his vigorous dissent from the Court's holding in the first decision in Jones v. Opelika.[7/] Tersely, but solemnly, Justice Murphy declared his conviction that "If this Court is to err

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6/ 310 U.S. 88, 95-96 (1940)

7/ 316 U.S. 584, 623 (1942)

in evaluating claims that freedom of speech, freedom of the press, and freedom of religion have been invaded, far better that it err in being overprotective of these precious rights."

He expressed this conviction perhaps most plainly in his dissenting opinion in Prince v. Massachusetts.[8] "In dealing with the validity of /these/ statutes," the late Justice declared,

> "* * * we are not aided by any strong presumption of the constitutionality of such legislation. * * * On the contrary, the human freedoms enumerated in the First Amendment and carried over into the Fourteenth Amendment are to be presumed to be invulnerable and any attempt to sweep away those freedoms is prima facie invalid. It follows /he concluded/ that any restriction or prohibition must be justified by those who deny that the freedoms have been unlawfully invaded."

Justice Murphy was anxious that democracy should exist in action, in practice rather than merely in theory. Accordingly, he was profoundly distressed by manifestations of discriminatory treatment based on race. Governmental actions based on this factor were particularly abhorrent to him. In the Kahanamoku case,[9] which arose from the imposition of martial law in the Hawaiian Islands during the recent war, he protested strongly against the implication that the people of Hawaii, because of their racial situation, should be deprived of trials by jury. He expressed his deep feeling in these moving words:

8/ 321 U.S. 158, 173 (1944)

9/ Duncan v. Kahanamoku, 327 U.S. 304, 334 (1946)

"Especially deplorable, however, is this use of the iniquitous doctrine of racism to justify the imposition of military trials. Racism has no place whatever in our civilization. The Constitution as well as the conscience of mankind disclaims its use for any purpose * * *."

In the Hirabayashi case,[10/] Justice Murphy expressly pointed out in his concurring opinion that "Distinctions based on color and ancestry are utterly inconsistent with our traditions and ideals." Nevertheless, he did not feel that he could declare unconstitutional the curfew order applied to persons of Japanese ancestry on our West Coast in the early days of the recent war, even though he warned that he considered that the "restriction * * * goes to the very brink of constitutional power." But further than this he could not go. When the Court in the Korematsu case[11/] held constitutional the war-time removal of Japanese-Americans from the West Coast, Justice Murphy dissented. Solemnly, he declared:

"* * * Such exclusion goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism.

* * * *

"I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States."

10/ Hirabayashi v. U.S., 320 U.S. 81, 110, 111 (1943)

11/ Korematsu v. U.S., 323 U.S. 214, 233, 242 (1944)

The strength of his feeling on this subject never waned while he lived. In the Restrictive Covenant cases[12] and in Smith v. Allwright, the White Primary case,[13] he joined the Court in invalidating the enforcement of restrictions against Negroes. Similarly, in the Steele case,[14] the late Justice concurred, expressly on constitutional grounds, in the Court's decision invalidating conduct by a labor union, under the Railway Labor Act, to discriminate deliberately against Negroes because of their race. Once again, Justice Murphy gave expression to the principle that "The Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color."

The importance of procedure and administration in the rendition of justice has long been recognized as fundamental. The late Justice Murphy regarded it to be the duty of the Court to insist on strict adherence to all the requirements of procedural fairness set out in Constitution and statute. His vigorous dissent in the Yamashita case,[15] objecting to "the needless and unseemly haste" of the conviction there; his strong statements in the Lyons case[16] on the extreme impropriety of admitting in evidence a second confession which was obtained after a first one had been coerced; the exceptionally clear analysis characterizing his dissent in Akins v. Texas,[17] which involved the constitutionality of the selection of a jury; his insistence on the fullest definition of an accused person's

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12/ Shelley v. Kraemer, 334 U.S. 1 (1948); Hurd v. Hodge, 334 U.S. 24 (1948)

13/ 321 U.S. 649 (1944)

14/ Steele v. L. & N. R.R. Co., 323 U.S. 192, 209 (1944)

15/ In Re Yamashita, 327 U.S. 1, 26, 28 (1946)

16/ Lyons v. Oklahoma, 322 U.S. 596, 605 (1944)

17/ 325 U.S. 398, 407 (1945)

right to counsel in the Canizio case[18]; his attitude toward police search and seizure as evidenced in his Harris[19] and Trupiano[20] opinions: these and many others of his written expressions from this Bench amply testify to his awareness of and concern with the procedural protections to individual liberty.

The late Justice Murphy was a great humanitarian, who combined with his humanity and idealism a practical realism which moved him always to emphasize the need for effective solutions to actually existing problems. His practical idealism proved to be a precious endowment to the people of his city, his State and his Nation. It is a quality all too rarely found in men. All of us have reason to feel deeply the absence of Frank Murphy from our midst.

Therefore, may it please The Court: On behalf of the Bar of this Court, who speak in this matter for all the lawyers in our land, I move that the Resolutions in memory of the late Justice Frank Murphy be accepted by The Court and that, together with the chronicle of these proceedings, they be spread upon the permanent records of this Court.

18/ Canizio v. New York, 327 U.S. 82, 87 (1946)

19/ Harris v. U.S., 331 U.S. 145, 183 (1947)

20/ Trupiano v. U.S., 334 U.S. 699 (1948)