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Reflections on 60 Years of Outside Scrutiny of Prisons and Prison Policy in the United States

The Honorable Nicholas de B. Katzenbach*

***Editors Note**: This speech, in transcript form with minimal editing, was one of the keynote presentations made at the "Opening Up a Closed World: What Constitutes Effective Prison Oversight?" conference held at the University of Texas in April 2006.*

While it has been 40 years since my involvement with the 1967 Commission on Crime, my interest in prison oversight actually dates back more than 60 years! Let me take you back to February 1943, when I was taken prisoner by the Italians in

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* Nicholas Katzenbach's career of public service includes several key posts and accomplishments, including his appointment as the Sixty-Fifth Attorney General of the United States in 1965 by President Lyndon B. Johnson. In that post, he helped to draft the 1965 Voting Rights Act. Earlier, as Deputy Attorney General, he was responsible for securing the release of prisoners captured during the Bay of Pigs raid on Cuba. He also oversaw the Justice Department's efforts to desegregate the University of Mississippi in September 1962 and the University of Alabama in June 1963, and he worked with Congress to ensure the passage of the 1964 Civil Rights Act. Following his resignation as Attorney General in 1966 after clashes with J. Edgar Hoover, Mr. Katzenbach was appointed Under Secretary of State (1966-1969) and one of a three-member commission charged with reviewing Central Intelligence Agency activities. He also chaired the 1967 Commission on Crime in the United States. In 1969, Nicholas Katzenbach became General Counsel of the IBM Corporation, where he remained until 1986, and he is currently Non-Executive Chairman of the MCI Board of Directors. A former prisoner of war for two years during the Second World War, Mr. Katzenbach later attended Princeton University and then Yale Law School, becoming Editor-in-Chief of the Yale Law Journal. He also received a Rhodes Scholarship and studied at Oxford University for two years. Early in his legal career, he was Associate Professor of Law at Yale University (1952-1956) and also Professor of Law at the University of Chicago (1956-1960). Nicholas Katzenbach co-Chaired the Vera Institute's Commission on Safety and Abuse in America's Prisons from 2005-06.

North Africa. I want to recall some aspects of that experience that have implications for our discussions.

It was at that time that I learned about the use of the Geneva Convention. I was only 21, but I had heard something about it, and so when I saw all the Italian officers eating well and drinking wine, I said that under the Geneva Convention, we prisoners were entitled to wine as well. That bothered the officers a great deal, because they didn't know anything about the Geneva Convention.

This was not a regular prison camp—I hadn't gotten into one of those yet. The result of my insistence was that they served us wine. I should say that in the 27 months I spent as a prisoner, that was the last time that I had a glass of wine!

The Geneva Convention laid down standards and I believed this to be one of the standards: that we were entitled the same food and drink as the Italian officers. In fact, the standards didn't go quite that far. However, it was my first experience with what a prisoner should be able to expect—some kind of scrutiny, some kind of standard, some kind of oversight.

And I can tell you now how grateful I was while sitting in a German prison camp for the oversight provided by the Geneva Convention, for the visits that we had from the Swiss, and for the complaints that we registered under the Geneva Convention. I can't help feeling that if President Bush had had a similar experience he might have a different attitude about the treatment of prisoners in wartime.

I would add that we had Russian prisoners nearby. Russia was not a signatory to the Geneva Convention. As a result, the treatment that the Russian prisoners received was absolutely brutal and abusive. So the Convention made a real difference to us.

To talk about oversight in a slightly more current context, I feel very presumptuous in talking to you about the topic, because there isn't anybody in this room who doesn't know more about prison oversight than I do. I can't really tell you anything you don't know, but I can give you the thoughts of an amateur looking at the process.

It seems to me that "Yes," of course there has to be oversight of prisons, just as there is oversight of virtually every other public institution. One may wonder about whether there

is a valid comparison with schools and hospitals. The only difference that I see is that these other institutions have natural constituencies of their own to provide a broader range of oversight, invoking standards that are central to their concerns. The standards for hospitals come out of the fact that hospitals have to treat patients, and patients (with their families and friends) have ideas about how hospitals ought to operate. With the schools, you have Parent Teacher Associations. All parents that I know, including my wife and myself, think we have pretty good ideas about how children ought to be educated, and about what is right and what is wrong about the education that the children are getting.

You don't have a natural constituency, unfortunately, for the oversight of prisons, a constituency that is recognized by the public as well as by the people who run the prisons.

It is also true that it's very hard to think of anybody running an operation who in any sense really welcomes oversight. Now, we've heard a lot of people at this conference welcoming oversight and talking very positively about it. That's a very good sign. But people in power, in my experience, rarely think they need a lot of advice from other people as to what they should do, because they consider they know what it is that they should do and they are in the process of doing it. There is an arrogance of power that exists, I think, in all people who have power; and God knows people who are running prisons have a huge amount of power in terms of what they can do.

So I was curious as to why in these times we suddenly are getting a much more welcoming attitude from the people involved who could expect to be criticized with oversight. Oversight, I think, implies at least an opportunity to criticize. Moreover, oversight carries with it a little bit of a negative thought: We are looking, at least in part, to see what's wrong with what you're doing. Yet I think that maybe, just maybe, things are changing in this respect, too. I wondered why this might be so. I began to think that at least in the case of prisons, as it must have occurred to many of you and your colleagues, it is difficult for people who are running a good prison operation to be opposed to external scrutiny when that lack of oversight protects those who are running very bad operations. That is not the position that any good

administrators want to be in. I think they will have the thought, "We'll take our lumps if we have to take them, but we want others to take them, too, because we know that we are doing a better job than the others."

I think there is yet another reason that prison oversight is becoming more welcome. It lies in what's been happening in the criminal justice system at a broader level—though we haven't been discussing it directly at this meeting, it underlies much of our discussion. The attitude toward crime and punishment that we've had in this country since 1967 has led to a great shift of power from judges to prosecutors and to huge sentences being imposed routinely. Indeterminate sentences giving way to fixed sentences without the possibility of parole, the length of the sentences, and the numbers of people convicted of non-violent crimes that suffer such sentences have raised huge issues for the prison system, including the issue of hope. Where in the system is the hope—the hope of the prisoners getting out, the hope of the keepers, the hope that we can do better?

It has been made almost impossible to fix prisons in the ways that the wardens and commissioners know to be the right ways to fix them. We don't have the money, we don't have the facilities, we can't do it. Now with sufficiently broad oversight there can be help on this. One of the things that I've been hearing about is an effort to move oversight from looking at what's wrong with what's going on in prisons to really using oversight as a kind of tool for informing people as to why things are going wrong and all the difficulties these problems are causing. I applaud the effort. I think it will be a great contribution if you can use oversight in this way and I think that you probably can.

However, I think we have to recognize that in our American society there is still a very big tension—although I hope and believe that the pendulum is starting to swing to some extent in the other direction—between those people who want these changes and those who not only want crime punished but want criminals to be put into jail forever with the key thrown away. The fewer privileges they have as prisoners, the less they are molly coddled, the more punishment and the better it is. That's about as shortsighted and idiotic a view as could be adopted in terms of the safety of our society, in terms

of human rights, in terms of what's going to happen to those prisoners.

We've also complicated our problems enormously by throwing huge numbers of the mentally ill into the prison system. That's bad enough for those who are mentally ill; it's worse for those who are not, given the crowded conditions in most prisons. I think much of the violence and other difficulties in the operation of prisons come from trying to handle the mentally ill. This is not the place where they ought to be. Most prisons don't have the facilities to deal with them, and we are dealing with them in a very unsatisfactory fashion. I think good administrators are perfectly willing to be told that, even to be told this publicly if the people telling them also say why this is happening and why this approach of dealing with the mentally ill through the criminal justice system is unsatisfactory: if they talk about the lack of capacity, and the lack of funds for dealing with the mentally ill.

One would also hope that oversight could lead to some further consideration of what prisons are all about. It's not just what a small but vocal group would say, it's not just all about punishment. Ninety-five per cent of the people in prison are going to go back at some point into the larger society, to a society very different from the one that they've been in during imprisonment. Going back home with a chance of success takes a lot of work, a lot of training, a lot of help, a lot of supervision, a lot of money. If we expect success from these former prisoners, it just isn't fair to throw them back into the larger society without investing in these things.

If I go back to the days when I was a prisoner of war—which I don't pretend for a moment is really comparable with having been convicted of a crime and being in prison in this country—I recall two things that were the same in a way and that certainly affected me.

One was how awful it is to lose your liberty. It's very hard if you've never lost it to realize really how awful that is. You might think that being in the army you didn't have much liberty anyway and therefore, what's the difference between that and being a prisoner of war? It wasn't true, it wasn't true at all, that the loss of liberty on becoming a prisoner didn't make a difference. The loss of liberty is something that just permeates every single bit of you.

The second thing that I recall from my imprisonment was boredom. You have to have something to do, you have to get your mind going, you have to do something physically. If you want to rehabilitate people, if you just want to keep order in prison, it seems to me that you have to recognize that boredom is the biggest enemy that you have.

If you are going to release people you have to give them some sense that when released they have a chance in the world outside. In many, many places we are not doing that. It is not that prison wardens, prison commissioners, and experts don't want to do it. The political system is not giving them the funds to do it. There is somehow a notion that you can throw that many more people into prison with much longer sentences and not have the costs go up. Of course, if you don't have oversight you won't be aware of those costs going up. One of the functions of oversight has got to be to show what is at stake in these costs: what can't be cut if safety and order are to be preserved and if some hope is to be reserved for at least most of those prisoners when they go out to their future in the outside world.

There has been a lot of talk here about opening the gates, opening prisons up, connecting groups and public life outside with the prisons. I agree that these are wonderful things to do. It is true that prisoners are never going to get the unqualified charitable attention that other people get. Nobody's going to march for prisoners' rights. Yet most people if they really know the situation can be fairly rational about it. I think that includes politicians. I have faith in the political system. I don't think politics gets permanently in the way of good policy—we can prevent that from happening. Most people who are elected to office would like to do the right thing. The important thing is to make sure they have the information to do the right thing. Beyond this, politicians need to know that there are important people in society who believe that it's the right thing, people who are willing to speak out and say so and give the politicians some cover for doing it.

It seems to me that we are beginning to get to that point now with groups like this, and with what the American Bar Association has been doing. I think we could do even more with judges. Every state has a judicial conference. There ought to be a session at every judicial conference dealing with

the prisons in that state. Judges have a stake in prison oversight. Judges don't like the fact that they've been given a lesser role in the running of the criminal justice system as a result of the greater discretion that has been given to prosecutors.

Judges should visit prisons. Law students should also visit prisons, not just the students interested in being prosecutors or defense attorneys, but all of them, to see what prisons are like and what is going on in them. I think there are many, many things of that kind that all of you and the people that you work with can do.

Those people who have been acting so harshly in the criminal justice system and demanding harsher punishments are now, as they always have been, talking loudly. But they are far fewer in number than they used to be and have far less support for their views. By helping build an effective constituency for enlightened prison oversight, you can do a great deal to reduce that support further, and I know you will. Thank you.