

DREW PEARSON 8-1-68/69

Burger Blasts Trial Methods

WASHINGTON—It now develops that chief justice nominee Warren E. Burger addressed the same "Center for Study of Democratic Institutions" partly financed by the same Parvin Foundation which has paid an annual retainer to Justice William O. Douglas.

Burger must have known where the money came from because Justice Douglas' connection with the group had been well publicized. Burger spoke long before in the summer of 1968.



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Judge Burger spoke before the center at Santa Barbara, Calif., and was paid approximately \$400. Officials of the center emphasized this was to cover expenses and was not a fee.

What Judge Burger said at the Santa Barbara meeting, however, is probably just as important as the fact that he appeared before an organization subsidized in part by the Parvin Foundation and Las Vegas money.

IN HIS SPEECH, Burger raised doubts regarding the American jury system, the Fifth Amendment, and the present system of criminal trials in the United States.

His speech was reported in the November 1968 issue of Center Magazine, official organ of the center.

"I say that the adversary system (of American courts) is not the best system of criminal justice, and that there is a better way," Judge Burger told the Santa Barbara group. "The American system, up to the time of the final verdict and appeal, puts all the emphasis on techniques, devices, mechanisms. It is the most elaborate system ever devised by a society."

Judge Burger explained what he meant by "techniques, devices, mechanisms," as the presumption that the accused is innocent; the use

of juries and the consequent rules regarding evidence; the right of the defendant to remain silent; the placing of the burden of proof on the prosecution.

Many of these "incidents of the adversary system," he said, were introduced after the Magna Carta and after the development of a legal profession because lawyers wanted to offset the enormous imbalance between the power of the king and his establishment on the one hand and that of the individual person on the other. "But are all these devices of the adversary system valid in today's society?" Judge Burger asked.

"I heard one supreme court justice say in a seminar that the presumption of innocence is 'rooted in the Constitution.' Well, it may be rooted there, but you cannot find it there. I think we have been deluded by some of our own utterances. Certainly you have heard — and judges have said — that one should not convict a man out of his own mouth. The fact is that we establish responsibility and liability and we convict in all the areas of civil litigation out of the mouth of the defendant..."

"I am no longer sure that the Fifth Amendment concept, in its present form and as presently applied and interpreted, has all the validity attributed to it."

The original reasons against compelling a defendant to answer have been somewhat dissipated, the judge continued. "But whenever I discuss this with some of my colleagues they are horrified. They conjure up images of the rack and the screw."

JUDGE BURGER said it is

very difficult to explain the American adversary system of criminal justice to enlightened lawyers and judges in Europe. They are baffled by, for example, the exclusionary rule in the American system. This rule excludes evidence if it has been obtained by a procedure that violates a statute, a regulation, or a basic Constitutional right.

One of the fundamentals, the jury system, was questioned by Judge Burger. He noted that use of the jury is rapidly disappearing in England, and it generally does not exist on the continent. In America, however, fewer defendants are waiving their right to a jury in a criminal case than ever before.

Although conceding that time and money are not the only important factors, Judge Burger pointed out that "if we could eliminate the jury we would save a lot of time. In Pennsylvania, juries are waived in 80 per cent of the cases and the system works much better. You can try a case without a jury in one day that would take you a week or two weeks with a jury."

A major cause of the defects in the American adversary system, Judge Burger said, is that the appellate courts and the supreme court, in their concern for the rights of the individual, have started down a road in which each step is a logical extension of the step immediately preceding it, "but when you get to the end of that road and look back, often you find you have arrived at a place you hadn't intended to go to at all." As an example of "unlooked-for consequences," Judge Burger cited the problem of the police lineup, and the defense attorney acting as monitor of that lineup.