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REMARKS PREPARED FOR DELIVERY BY SECRETARY OF TRANSPORTATION BROCK ADAMS
TO THE UNIVERSITY OF TEXAS SCHOOL OF LAW, AUSTIN, TEXAS, APRIL 26, 1978.

I. INTRODUCTION

I am very pleased to be with you today to welcome you to what seems to be America's fastest growing industry -- the law. I speak to you as a lawyer who has been in private practice, served as U.S. Attorney, helped draft and enact laws as a Congressman, and now is charged with administering the laws and regulations which affect our transportation system. Confronted with some of the decisions I have to make, I sometimes think it is the ultimate punishment to have to administer laws which you have helped draft.

Faced with the myriad tasks that Congress has assigned to the Department of Transportation, I am inclined to agree with the former Dean of the Stanford Law School, who in a recent article, said that we are suffering from "hyperlexis -- the pathological condition caused by an overactive lawmaking gland." And along with the laws come the regulations necessary to carry out the intent of Congress.

I also regret that carefree abandon with which we in Congress in the 1960's sprinkled legislation with the phrase, "The Secretary shall by rule or regulation. . ." Those of you who become lawmakers I hope will use this device with care and be very clear what you want the Secretary to do by rule or regulation.

I want therefore to complete today a trilogy of speeches I have made on administration of the law by also discussing implementation of the law through systems and people. As a former lawmaker and a Cabinet Officer, I am very

concerned by the growing failure of the decision-making process in the modern industrialized democratic societies. As lawyers, you may become part of the problem, but I would rather you become part of the solution. First, I want to outline the problem as I see it, and then give you my ideas as to how we should be handling decision-making in an executive agency, as well as how you can reform the Civil Service System so there are people in government to make it all work.

II. THE FAILURE TO DECIDE

I am concerned as a Cabinet Officer in a Department with over 110,000 people that we as a nation are losing the ability to make up our mind. We seem to be developing a system that avoids or stops a decision from being made. The result is that decisions that should be made politically by the Legislative branch -- then carried out by the Executive branch -- are instead going into the courts for the basic decision and often for implementation. There can be no real judicial review when there has not been a firm legislative action with a clear legislative history or an executive decision with adequate administrative record on which the court can make a judgement after adequate review. Too often the court makes the initial decision and finally sits in judgement on the result.

There is a reason for this. Lifetime tenure insulates the Federal courts from the pressure of the political process. There is also great public respect for the judiciary and these and other factors mean judges don't avoid the tough decisions. This is good, but too often those who must run for legislative office (a painful process) and those who are appointed to office (a most precarious existence) find it is much easier to send the hard decisions to the insulated security of the court, rather than fight it out on the legislative and administrative battle grounds. A final decision reached in the political arena may be final not only for the decision but for the decision maker's career in public office. Therefore no decision is made. The cause of this shift of responsibility is human nature and a politician's strong instinct for survival. But all too often it results in courts making decisions for which they were neither intended nor equipped.

There is a legitimate question: Why not leave it to the courts to decide the controversial questions on education, abortion, voting rights, environment, etc? As students of the law, you know the answer. Litigants are not equally matched in the adversary system. Judges do not have the resources for sufficient analysis of highly technical problems. Their staff is usually a clerk, a bailiff, a secretary, and sometimes a special master. Finally the legal system is highly structured. The limited decisions open to a judge to make can distort the analysis of the problem and prevent the innovation necessary to move to new solutions. The penalty for a policy mistake is neither as swift nor final as it is in the legislative or administrative areas -- defeat at the polls or loss of employment. The process moves slowly and often takes years. Therefore an error is slow in being recognized. Finally it may result in no decision at all with the matter being remanded to the Executive agency to start over or a statement to the legislative body to make a political decision.

As policy decisions have moved to the courts, our society has attempted to compensate as any truly representative system will always do. If the policy decision is not going to be made in the Legislative Branch or Executive Branch, then we try to achieve a representation by government in the Judicial Branch. We try to duplicate the political process in the courtroom. Of course, we do so inadequately.

One duplication of the elective process has been to create more and more public hearings with more and more participants -- hearings outside the elective process. The hope is that there will then be a public debate which can be reviewed and sent through the Judicial system so those involved can say that democracy has prevailed and all viewpoints have been represented. Thus the development of a political policy position in political debate about controversial matters is replaced first by a public administrative hearing, then a survey, then a consultant's report.

This becomes even worse when the public regulatory bodies which were created to represent the public interest is involved. It now is a forum for another quasi-judicial adversary proceeding (which can then be reviewed by the judiciary) rather than being public protectors.

The administrative decision by an appointed public official is also replaced by an administrative proceeding using quasi-judicial administrative public hearings. Administrative actions are then reviewed for process as well as substance by the judiciary.

III. WHAT BECAME OF THE ORIGINAL CONSTITUTIONAL SYSTEM

If the original system of elections to determine policy officials (legislative and executive) who in turn appoint regulatory officials and Executive Branch administrators had been abolished by a constitutional convention and replaced with the new system, the people would at least have made a choice as to which system they preferred. Instead, we now have both systems. The result is what the people now call "red tape." This is usually caused by a stalemate of the decision-making process produced by a diffusion of responsibility which has no end point. This occurs when all parties to the process deny they can make a final decision. This allows all to be absolved from blame for any bad result and usually means no decision at all because by the time the result occurs everyone has forgotten what the problem was. Thus "red tape" is not just lazy people or too much paper.

IV. IS DIFFUSED DECISION-MAKING NECESSARY?

Maybe to govern in a volatile world it is necessary that decision-making authority be either diffused or insulated so that decisions can always be deferred or avoided. This leads to stability at the expense of the innovation and changes that mark a dynamic society. I believe that neither those

who sanctify the creators of our Constitution as being omniscient nor those who reject tradition as worthless believe that our future lies in the senility of absolute stability.

It may be necessary at times in our nation's history for the courts to rescue the legislative system from its faults, or to hold firm against executive abuse, but this is not the way our system should be operated on a day-to-day basis. The Legislative Branch and the Executive Branch should not depend on the friendliness or unfriendliness of the Judicial Branch to establish a direction for the nation. Each must make its own decisions in its own way. Only in this fashion can the people examine the policies being made and truly control their government through use of the ballot box and the rules for change established by the Constitution.

Our people will then face crucial decisions and will become an enthusiastic part of elected government because they will know their votes will set policy in the Legislative Branch -- that administrative officials will carry it through -- and the courts will see that this process is being properly used under Constitutional due process. In this fashion the inalienable rights of each citizen under the Constitution will be observed.

III. DECISION-MAKING IN THE EXECUTIVE BRANCH: FISH, CUT BAIT OR GET OUT OF THE BOAT

There is an old New England expression: "fish, cut bait or get out of the boat." That is good advice for a Cabinet officer faced with tough decisions. When I came to the Department a year ago, I knew I would be faced with tough decisions. I didn't know that some issues had been waiting for a decision for 15 years. My first six months in office were occupied with clearing away the old cases. I didn't want to get out of the boat so I cut a lot of bait. One thing I discovered is that delay is not only a bad policy, but delay just makes most things worse. A tough issue creates strong emotions and the longer a decision is postponed the stronger the emotion grows -- and the less rational is the debate. The Concorde landings, the Westway in New York City, I-66 in Washington, D.C. and air bags in cars all required decisions by the Secretary of Transportation and all inspired strong feelings. Once decisions are made they are accepted by most -- grudgingly by those whose views did not prevail but accepted by the majority. And the country moves forward to solve the next problem. So the joking advice of those who say, "Don't just do something, stand there," is wrong. I agree with Justice Brandeis when he said: "It's often better to take an issue and decide it promptly than to wait forever and do it perfectly." 11

When I came to the Department I found that, over the years, the decision-making process had been delayed and diffused. The modal administrators for highways, aviation and railroads were viewed as some sort of ¹⁰ spokesmen for the transportation modes within their charge. Therefore, a review process was created that had the people on the tenth floor, where the Secretary's office is, checking on what was recommended by the people on the other nine floors. This was called "creative tension." In my view, ¹¹ it wasn't very creative, but it did create a lot of tension leading to delays and to endless meetings, memos and rewrites in a vain search for the ¹⁰ Perfect Recommendation. I think that the various views should be heard ¹¹ and

considered by the Secretary before he makes a decision, but a good argument is better than creative tension. Further, there is no such thing as the Perfect Recommendation which will lead to the Perfect Decision, agreed to by all and unassailable in any court. If one can keep more than 50 percent of the people satisfied more than 50 percent of the time, democracy is alive and probably moving ahead.

I am fortunate that I have an extremely capable group serving as modal administrators and assistant secretaries. Now I can work directly with them to arrive at the best decision we can make and my staff helps me. Once we have decided then there is a Departmental decision and then the Department speaks with one voice; the argument comes before the decision, not after. Ultimately, the tough decisions reach the Secretary's desk and a judgement must be made. No amount of options papers are going to make those decisions any easier. But they must be made, and the consequences faced. They are then open to the Congress or the courts to review and, if they so decide, to reject. But a decision left in limbo merely stymies the process and accomplishes nothing.

IV. HOW DO WE GET THE PEOPLE

As with any human endeavor the results will be only as good as the people involved. The President has sent to the Congress a proposed reform of the Civil Service System. This is essential if the Federal government is going to make prompt and enlightened decisions.

A key element of the proposal is aimed at providing incentive for bright innovative people who can make decisions at the management level by having those at GS-16 or above (9200 people) be in a Senior Executive Service. They would form a pool of people who could transfer from one point of the government to another and be eligible for annual bonuses but could also be removed from a job and sent back to the pool if they couldn't do the job right.

This is in contrast to the present system where almost nobody new can ever be hired for top management, nobody can be fired, almost nobody changes jobs in the ladder he is on and pay is based on how many years a person is in the job.

This is why policy often does not change with administrations or decisions often cannot be promptly implemented because nobody wants to rock the boat or stop doing what they have been doing for many, many years.

In a department of 110,000 people at DOT fewer than 200 changes could be made and many of these were confidential secretaries or special assistants rather than heads of policy departments.

President Carter wants to give everyone in the system greater opportunity to share in the rewards of good service and to get full credit for hard work that produces good results. This is long-needed reform that will be good for all concerned -- the employees, those who deal with them and, most of all, the public.

V. CONCLUSION - DON'T LEGISLATE FOR THE FUN OF IT

In closing, there is one thought I would leave with you as you begin your career as lawyers -- remember that the law is at best a blunt instrument. There are limits to what it can do. As the historian Gibbon commented: ". . . the operation of the wisest laws is imperfect and precarious. They seldom inspire virtue, they cannot always restrain vice." You cannot by rule or regulation create the perfect society. Just as the Ten Commandments have not eliminated theft and murder, neither have safety regulations prevented human error or carelessness from causing transportation tragedies.

As regulators and legislators we should not fall prey to the temptation to publish regulations or to enact laws as if there were a productivity test for our jobs. We should subject our legislative and regulatory proposals not to some arbitrary and venal economic standard but to a test of practicality -- will the worthy goal in fact be achieved in the real world; will the safety device that works as well in the lab function as it should day after day on a working freight car or truck or auto; will the consumer actually read the label and if he or she does will the information help; and will the cost in time, money and paper work be worth it? There are lots of things we would like to see happen in this imperfect world. But we should always be mindful of what we can achieve by rule or regulation. Legislative fiat will not turn swords into plough shares or make the lamb lay down with the lion. Let us as lawyers do what we can as best we can, but face the fact that Utopia is up to the prophets, not the law.

The people are saying we want better government not simply more government.

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