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REMARKS PREPARED FOR DELIVERY BY SECRETARY OF TRANSPORTATION BROCK ADAMS, TO THE AMERICAN UNIVERSITY LAW SCHOOL COMMENCEMENT, WASHINGTON, D.C., MAY 14, 1978.

You who graduate today are about to discover the difference between lawyers and professors. As the British judge, Lord Denning, once explained it:

> "The function of lawyers is to find a solution to every difficulty, while the function of professors is to find a difficulty with every solution."

There is a considerable flap in the legal profession as a result of President Carter's remarks before the Los Angeles Bar Association last week. I hope many of you will have a chance to examine the full text of his remarks. Basically, he emphasized that we have the finest system of justice in the world: but only in recent years has the legal community really begun to concentrate on making certain that all people have a fair chance to share in this system of justice.

As a lawyer who spent a decade in private practice, both civil and criminal, then served as U.S. District Attorney and a member of Congress, and now as a Cabinet officer, I must agree that we have come far, but we have far to go.

I can remember when many lawyers were shocked when I supported a public defender system in the Federal courts. It was simple. Lawyers in the trial court should be able to try cases, avoid error, and make the system work.

I believed it then; I believe it now.

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The President, as an engineer, is saying that we as lawyers should make the system work. We should not be "over-lawyered and under-represented." I would add that we should not be under-lawyered on one side and over-represented on the other -- or the adversary system, which is the basis of our system, will not work.

The President's words may seem to be a harsh welcome to the legal career, but if you read his remarks carefully, the President was challenging the legal profession, not indicting it. He said:

> "I would not change our system of laws and justice for any other in the world. From the beginning, it makes the citizens of our country the masters of the state. And it has extended increasing protection to the poor and to the victims of discrimination."

This is what we should be doing.

Gratefully, we have grown more sensitive in recent years to the truth Justice John Marshall Harlan pronounced eighty years ago.

> "In respect of civil rights," he said. "All citizens are equal before the law. The humblest is the peer of the most powerful."

This now applies not only to the state vs. individuals in the criminal court, but the state vs individuals in civil cases -- all the way from condemnation to safety rules.

I. DECISIONS AND THE LAW

When I was invited to address your commencement, I was cautioned that you have been lectured too many years and I should not use a commencement address as a lecture platform. I do not intend to do so. I would also hope that you remember the lengthy periods of time when you have had to study endless statutes, regulations, and decisions. As you enter the legal profession you also do not use your status as lawyers to lecture -- and that you avoid "hyperplexis."

This is a great word defined by the former Dean of the Stanford Law School, Bayless Manning, as "the pathological condition caused by an overactive law-making gland." As a lawyer, legislator, and regulator, I can tell you it's a chronic ailment of lawyers. It is hard to avoid catching, and difficult to cure.

The President in his speech in Los Angeles was reminding us anew of what Justice Brennan said twenty years ago:

> "The law is not an end in itself: it is pre-eminently a means to serve what we think is right."

As you practice the legal profession in the years ahead, it will be up to you to determine not only how to avoid being insufferable to your non-lawyer friends,

but also to avoid what is simply expedient, comfortable, and profitable -- or what is popular at the moment. Learn to say those difficult words. "I believe it is right" -- because the tides will turn -- the expedient become difficult -- the comfortable unpopular -- and the profitable may vanish in a quick new turn of events. What you believe in, however, is you -- and that is constant.

And how do you do that? Certainly what you have learned at this University has grounded you in the fundamentals of the law.

Also you have been given enough tools -- and you probably think too many. You have too many books -- too many looseleafs -- and too many articles on legal history and precedent.

But for all of your preparation, you will find that the life of the law is still as Justice Oliver Wendell Holmes declared, "not logic but experience."

When I was in Europe last year, our Ambassador to Greece reminded me of this old Greek story.

A young man had completed an arduous pilgrimage to a distant land in order to ask an old, very successful man the secret of his success.

"To succeed," the old man informed him, "you must make the right decisions."

"How do I learn to make the right decisions?" the young man asked.

"Through experience," he was told.

"How do I get experience?" was the next question.

"Ah," said the old man, "by making the wrong decisions."

It was a sobering thought -- I went ahead with the statement, but began to ponder how to make more right decisions than wrong ones.

After returning home and making a number of controversial decisions on aircraft, highways, buses for the disabled and many others -- and then seeing none of these become final in over a year, I though perhaps that story should be extended to include what happens to a person or a nation which cannot make any decision at all. What happens when controversial issues are not decided -- especially when it occurs in a nation which the world believes is equipped to deal forthrightly with even the most complex issues and which is looked to more and more as a leader in modern thought.

What happens if the system procrastinates -- wavers -- and vacillates -- the buzzword, I believe, is to "waffle" on any and every issue until the best that emerges is the decision to make no decision at all.

Then we should examine what we are about and see if that is what we want -- and who do we find at the heart of the matter: the legal profession.

As Pogo said, "We have met the enemy, and they are us."

II. FAILURE TO DECIDE

I am concerned as a Cabinet officer in a Department with over 110,000 people that we, as a Department, and we, as a nation, are losing the ability to finally make up our minds. We seem to be developing a proficiency for decision-avoidance. The decisions that should be made politically by the legislative branch, and then carried out by the executive branch and reviewed by the courts, are avoided and end up in the courts for a basic decision, implementation, and then review. When there has been no firm legislative action with a clear legislative history and clear executive action, or if regulations are involved with an administrative record on which the court can make a judgement, then the court must create the decision and the record in order to have a real judicial review. Too often the court must make both the initial decision and then the final judgement on the result.

There is a reason for this. For example, lifetime tenure insulates the Federal courts from the pressure of the political process. A structured process leads to a decision of some kind. There is great public respect for the judiciary. In this system, the judges really cannot avoid the tough decisions and the system protects them from swift public reaction.

Those who run for legislative office (a painful process) and those who are appointed to office (a most precarious existence) aid in this because it is easier to send the hard decisions to the insulated security of the court, rather than fight it out on legislative and administrative battlegrounds.

The results on these battlegrounds often become final -- not only on the issue, but for those making the decision.

This wouldn't be bad, but all too often it results in courts making decisions they are not intended or equipped to make. Even worse, correction of error is very slow because the penalty for a policy mistake at the judicial level is neither as swift nor as final as it is in the legislative or administrative areas.

The legislator may soon be defeated at the polls and the administrator replaced, but the judicial process of review can be made to move slowly and, in fact, may go up and down through the appellate and trial levels for years.

Therefore, an error is slow in being recognized and all other parts of the system are relieved or responsibility. If this occurs, we get what I call the 15-year decisions in the Department where after first action and review, the executive agency must start over, or the legislative body must start on a political decision.

This may be ten years after the Houses were torn down, and everyone forgets what the original problem was.

To correct this, another system is now being tried. As policy decisions have moved to the courts, our society has attempted to compensate as any honest representative system will always do. If the policy decisions are not being trusted or being made in the legislative branch or executive branch,

then the judicial system tries to create a system of representation in the judicial branch.

This has meant an attempt to duplicate the legislative or executive decision-making process by creating more and more public hearings with more and more participants outside the elective process in the hope there will then be enough public debate to create a public consensus to replace the elected or appointed decision-makers. Then the judicial system tries to determine if those who were represented were proper and if democracy with all viewpoints had been represented.

This means judicially rewriting an ambiguous statute or creating substitute legislative-type process which can be reviewed for both process and substance.

Thus, we have ambiguous or conflicting statutes (passed to avoid political controversy) avoided by administrative officials who don't know what to do with them except to have a public hearing being reviewed by the judiciary, not just for Constitutional correctness or statutory compliance, but for correctness of the substitution process -- not the substance of the matter to the parties.

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 the choice that they didn't want elections and would rather not have clear statutory and executive actions, but use quasi-judicial officers presiding over individual town meetings for decision-making.

Our problem is we have both elections and town meetings competing to control the decision which usually means no decision because the buck passes and there is no end point.

This occurs when all parties to the process deny they have the power to make a final decision. This allows all to be absolved from blame for any bad result. This is what really causes "red tape." With no real decision, people in the bureaucracy don't know how to answer the public, so they write non-answer letters; say there will be a hearing; take a survey; hire a consultant -- and hope somebody who can be blamed for a mistake will decide it.

IV. IS DIFFUSED DECISION-MAKING NECESSARY?

Maybe to govern in a violatile world it is necessary that decision-making authority either be diffused or insulated so that decisions can always be deferred or avoided. This at least leads to stability, but of course at the expense of the change and innovation which produce a dynamic society. I prefer to believe that neither those conservatives who sanctify the creators of our Constitution as being omniscient, nor the liberals who reject all tradition as worthless believe that our future lies in the "senility of absolute stability."

Of course, 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; and it is not where we are today. The legislative and executive branches should not depend on the mood of the judicial branch to establish a direction for the nation. Each branch 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 the use of the ballot box and the rules for change established by the Constitution.

The people of this nation know that making laws is like making sausage--it's better if you don't watch it being made and that laws may need to be declared improper or revised. They know members of the executive branch are neither as good as their press releases or as bad as their press coverage.

Our people like to be part of crucial decisions, through the ballot box. They will become an enthusiastic part of elected government when they will know their votes will set policy through elected officials--that administrative officials will carry it through or be fired--and the courts will see that the whole process is being properly used under constitutional due process. In this fashion, the inalienable rights of each citizen will be observed both the excitement of really participating as well as the strict legal rights of the case.

The making of crucial decisions by our domestic institutions elective and appointed on issues such as abortion, education, energy, and voting rights is essential to maintain our way of life. It is a test of whether our democratic government can continue to discipline itself and thus survive as a free society. As Clemenceau said of democratic government,

"It is the art of disciplining oneself so that one need not be disciplined by others."

V. DECISION-MAKING

I consider it a great privilege, for the last 10 years, to have been a part of first the legislative and now the executive branch decision-making process in this government. Sometimes the decisions went for years against my position, as with my opposition to the Viet Nam war, attempts to achieve procedural reform and the Presidential elections of the late 1960's and early 1970's. But on other matters, I was on the majority side of the decisions, such as being a primary force in creating a local government for this city, establishing an orderly system for reorganizing railroads in the Northeast and organizing the new budget process for the Congress so budget-making would not reside solely with the Executive.

From this I believe to be successful as a nation we must be able to make up our national mind. The legal profession is probably the single greatest force today in influencing whether the nation makes decisions promptly before we are overwhelmed by the problem, or whether we make no decision at all because of endless delay in the court system. A wrong decision if promptly recognized can be corrected by new and proper action. No decision at all cannot be improved.

I see in the new generations of lawyers moving into the system from the 1960's and '70's a greater dedication to having matters decided on substance rather than procedure. To see that everyone has a chance to participate and to not be paralyzed by mistakes of the past. With your help, our people will see laws passed to meet problems and be assured access to the judicial system. It won't be perfect but it will be satisfying to you and to all around you.

VI. CONCLUSION

I returned to the Executive branch again last year because I have the same sense of expectancy and excitement I felt many years ago when John Kennedy brought many of us into government with his words: "I do not accept the view that our high noon is in the past and that we are moving into the late afternoon. I think our brightest days can be ahead."

I believe our country's brightest days are ahead. I wish you courage and good fortune. From our law schools we have received much - you and I - let us hope we use it well.

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