

DEDICATION

AHMANSON LAW CENTER*

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President Labaj, Chief Justice White, Dean Frankino, ladies and gentlemen, I wish particularly to say how pleased I am to be on the dais tonight with Senator Hruska. Few men have played a greater role in shaping the law of our time than has Senator Hruska. In his capacity as ranking minority member of the Senate's Committee on the Judiciary he has taken a leading part in shaping our laws and has screened those nominated as federal judges and as Attorneys General and other posts in the Department of Justice. He has been personally friendly and helpful to me and I wish to express my gratitude and feeling of personal warmth toward him tonight.

It is a great pleasure to participate in the dedication of the Ahmanson Law Center of Creighton University. You have built a magnificent facility. For me, for most of us, a center of legal scholarship is virtually hallowed ground because law is the ultimate value in our society. Law is not ultimate because it is final, but because upon it depend all of the other values we cherish.

The dedication of a new center of legal training and scholarship gives us the sense of a new beginning, of the law's capacity to regenerate and recreate itself.

Just being here and seeing your splendid facilities and meeting Dean Frankino and the faculty makes me feel at home. I can hardly wait to leave Washington and return to the academic world—and not merely to enjoy what some genius has called the leisure of the theory class.

It is the special province of the law schools to mount a sustained study and evaluation of our legal culture. Now more than ever our attention should be drawn to the condition of our legal order and the institutions that sustain it. If at moments I sound alarmist, I do not mean to sound pessimistic. There is always reason for concern, never reason for despair.

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Law is never secure. It is true that we rely upon law for our security but also true that law relies upon us for its strength. We tend to forget this. We tend to forget that our form of law is not immortal. It is a social creation of enormous value and great strength, but it is also complex, delicate, and distinctly vulnerable.

We live in a time—and perhaps we always do—when there are serious threats to our legal order. But—and perhaps this is also always true—we also live in a time when the real threats to constitutional government are largely unperceived.

We are immeasurably blessed in this country with a cadre of influential, articulate, and self-assured commentators who possess the uncanny knack of studying any situation and unerringly drawing precisely the wrong conclusions.

Since we survived the crisis of Watergate due to the strength of our institutions, they conclude that our institutions must be restructured. I would commend to them the words of Mark Twain: "We should be careful to get out of an experience only the wisdom that is in it—and stop there; lest we be like the cat that sits down on a hot stove-lid. She will never sit down on a hot stove-lid again—that is well; but also she will never sit down on a cold one any more."

Translated that means presidential power can be abused, as can be and has been all power, but that is no reason to destroy strong presidential leadership that has over almost two centuries proved indispensable to our national health and vitality.

The real agenda for reform is more mundane but absolutely crucial. Threats to our legal order are developing rapidly, but almost unnoticed—and these are older, subtler, and infinitely more difficult to cope with.

The law schools, for example, are coming out of a very difficult period. Their self-confidence was shaken badly by the student turmoil of the late 1960's and for some years afterward legal educators seemed unsure of themselves and their roles.

The schools of law mold the future of our profession and hence of much of our government. To one who believes that we owe our national stability and good fortune to the solidity of our institutions, it was disheartening to see that many of our law schools were manned by faculties that displayed, and hence taught, an unlawfully concern for ideological outcomes rather than for orderly, neutral processes. Being attached to universities, the law schools shared to some extent the intellectual residue of the revolutionary

'60's: an antipathy to intellectualism, a denial of the value of rationality, and a disdain for traditional institutions.

Ideologically, many of our major law schools were, and a few of them still are, so far out of balance that the range of respectable discourse was only a fraction of the spectrum in the society at large. That is not good for the schools, for legal education, or for the development of the law.

I am confident that Creighton was not among the law schools of this sort, and I think I see signs that many schools are returning to the thoughtful professionalism that was the special virtue of American legal education. Robert Hutchins once said that the best education anywhere in American universities is to be found in our schools of law. Some of us lost that virtue for a while but we are ready to earn the complement once more.

But there is another problem in the law that I would particularly like to discuss tonight. It is not preposterous, I hope, to begin with what I have observed in the Office of the Solicitor General. It is a small, specialized unit but in the matters I am discussing it is a microcosm in which the larger problems of government and something of their causes may be discerned.

We are sitting in the center of an explosion of federal litigation. A comparison of two years is illuminating. In the 1963 Term of the Supreme Court, the office handled 910 filings in the Supreme Court. Eleven years later, in the 1973 Term, we handled 2,428, or well over two and one-half times as many.

A main problem of the office, then, is simply a staggering workload. The staff is enlarged but coordination of work and positions to be taken inevitably suffer. This rising torrent of federal litigation might not be very worrisome if it damaged only the Solicitor General's office but, in truth, it is only one manifestation of overload that threatens all of our major governmental institutions and is even now altering their nature, perhaps irreversibly.

The reasons for the accelerating workload are also suggested by a statistic. The Solicitor General's cases in the 1963 Term comprised 33% of the Court's total docket. My cases in the 1973 Term comprised 48% of the docket, and the percentage will rise again. That means government litigation is rising not only absolutely but as a proportion of all litigation.

The reasons are obvious. We, along with every other western nation, are steadily transforming ourselves into a highly-regulated welfare state. The tasks government undertakes grow steadily more numerous and always more complex. Under this accelerating

workload all of our basic governmental institutions are changing and they will not be the same again.

The deleterious effects upon the Presidency are obvious. The Presidency now in large measure exists in the enormous staff known as the Executive Office of the President. The Executive Office includes such organizations as the Office of Management and Budget, the Council of Economic Advisers, the Domestic Council, the National Security Council, and many more. Post-Watergate critics of the Presidency note that anonymous, unelected, unconfirmed men and women make decisions crucial to the nation. That is certainly true and worth thinking about. But some analysts attribute the White House apparatus to something they call the "imperial Presidency" and a growing lust for power. They would legislate the bureaucracy away.

That analysis could not be more inaccurate and the proposed cure could not be more harmful. The presidential bureaucracy is not a manifestation of a power drive but the inevitable response of the Executive to the enormous tasks of regulation and coordination that a welfare state thrusts upon him. To legislate away that staff is merely to render the President helpless to control, or even substantially to affect, the policies of his own branch of government.

Had presidential staff grown because presidents have usurped power, congressional staffs should have diminished or grown idle. In fact, however, during the same period, congressional staff sizes have exploded, and on those staffs, just as in the White House, anonymous, unelected, unconfirmed men and women help make decisions crucial to the nation.

These developments are ominous for the future of responsive and open institutions of representative government. The institutions of our democracy were designed in 1787 upon an assumption of limited government and it may be that to function tolerably they required a substantial measure of *laissez faire* in social as well as economic policy.

As lawyers, however, we should be particularly concerned for the federal judiciary which is equally threatened by this trend. The proliferation of social policies through law creates a workload that is even now changing the very nature of courts, converting them from deliberative institutions to processing institutions, from a judicial model to a bureaucratic model. The signs are everywhere. Caseloads rise steadily. Time for oral argument is steadily cut back and is frequently eliminated altogether. Many cases are decided without opinion. Some cases are decided in minutes rather than

hours. Courts are adding more clerks, more administrative personnel, moving faster and faster. They are in imminent danger of losing the quality of collegiality, losing time for conference, time for deliberation, time for the slow maturation of principle.

Ironically, these changes that threaten the ability of the courts to give every case its due spring precisely from the desire to extend law to more and more subjects and to give every one perfect justice.

We are attempting to apply law and judicial processes to more and more aspects of life in a self-defeating effort to guarantee every minor right people think they ought ideally to possess. Simultaneously, we are complicating trial and pretrial procedures in what must ultimately be an impossible effort to make every trial perfect. The two trends, I think, are flatly incompatible. We are seeking to handcraft every case. At the same time we are thrusting a workload upon the courts that forces them towards an assembly line model.

Assembly line processes cannot sustain those virtues for which we have always prized federal courts: scholarship, a generalist view of the law, wisdom, mature and dispassionate reflection, and—especially important for the perceived legitimacy of judicial authority—careful and reasoned explanation of their decisions.

We cannot afford an erosion of these judicial virtues. As law proliferates and is made up faster it has less time for theory and tends to become both simplistic and inconsistent within itself. That raises several dangers, not least of which is contempt for law. The perception that despite its procedural guarantees, law may be substantively arbitrary, damages its moral authority, and law cannot be effective unless it carries moral authority as well as the threat of sanctions. Should any sizeable number of people come to feel that the only reason to obey law is the possibility of unpleasantness with the courts, the cost of maintaining social order with our present degree of individual freedom will approach the prohibitive. We cannot afford to dissipate any more of law's moral authority.

Something must be done and done within the next several years if we are to preserve the judicial system as we have known it. The altered nature of the executive branch and the Congress makes it more imperative that the judiciary be preserved.

The preferred solution would be to reverse the movement toward ever more regulation. That may, in the long run, be the only solution that can preserve our traditional legal order. Karl Mannheim noted a long time ago that the western concept of the rule of law can survive only under conditions of limited government.

But that is an issue beyond our immediate control. The legal profession must pay attention now to the plight of the federal judiciary. It is to the great credit of Senator Hruska that he has helped focus discussion, heading a Commission that has proposed major reforms in our national appellate system. The problem of overload, however, affects the entire system, from district court to Supreme Court. The federal judicial system is being nicked and dimed to death by the immense quantity of legal trivia that a welfare state generates.

One solution might be to take such matters out of Article III courts. The social policies are important but the legal questions are not difficult. Thus, in addition to considering the abandonment of diversity jurisdiction, we ought to consider an entirely new set of tribunals, analogous to small claims courts that would take over completely litigation in a variety of areas such as Social Security litigation, federal housing programs, consumer protection, truth in lending, environment disputes, and so forth. Appeals from those tribunals could be funneled into an administrative court and stop there. Only the occasional serious constitutional claim or issue of statutory interpretation need move from the administrative court into an Article III court.

Senator Hruska and his Commission on Revision of the Federal Court Appellate System have made a notable start on one aspect of the problem, but, as he would be the first to agree, much more remains to be considered. It is a task that belongs to all branches of the profession. I have recommended that the Department of Justice take the lead in a study of the entire system and I hope that it will.

But the Department cannot do it all. We look to the other branches of the profession—the organized bar and the law schools—to face with us this slow crisis in our legal system.

We ought not tinker with institutions lightly, for, as a wise conservative put it, "Unless it is necessary to change, it is necessary not to change." But right now we are changing the federal court system, and hence our legal order and our concept of the rule of law, not in detail but in essential nature, and we are doing it not deliberately but through sheer inattention to the pressures that are warping it.

Only by reducing their caseload can we preserve our courts to handle the central problems of our society—the constitutional protection of individual liberties and of democratic processes of government. These are precisely the values that will be increasingly threatened in the regulatory-welfare state.

We have lived through times of grave turmoil and division, but we have learned again that our institutions were not built only for the easy, sunny days. They were built in the confident anticipation of trouble, and they were ready when trouble came.

Of all the institutions that preserved us, none was more important than the federal judiciary. We must pay attention to the federal courts. We must not take their virtues and strengths for granted. We are facing an ever-deepening crisis but we can deal with it as we have dealt with others. If we go forward toward reform, calmly, without either gimmicky tinkering or panicky overreaction, in the light thrown by the highest traditions of the law, there is no doubt whatever that our institutions will continue to prevail over our troubles.