



Department of Justice

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LECTURE

BY

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BEFORE THE
FACULTY AND STUDENTS

UNIVERSITY OF KANSAS

UNIVERSITY THEATER
MURPHY HALL
UNIVERSITY OF KANSAS CAMPUS

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NOTES ON THE SITUATION: A CRITIQUE

Benjamin Harvey Hill was a distinguished Georgian who did his best prior to the Civil War to prevent the secession of Georgia from the Union. Having lost, he joined in the Confederacy. Following the War and Reconstruction, he became a United States Senator from Georgia, but it was during the Reconstruction that he became prominent by reason of a series of newspaper columns entitled, Notes on the Situation.^{1/} I have appropriated that title for my remarks tonight.

What happened to the South during the Reconstruction is a subject of continuing interest to political scientists as well as to historians. It was a period when one part of our country was under occupation by the armed forces of the nation. It was a period during which the national Congress engaged in a concerted effort to reconstitute the political and economic structure of the conquered territory.

We have no occupation as such today, but the entire nation -- not just the South -- is presently regulated by a force more pervasive and more powerful than all the Union armies of the Reconstruction. That force is the federal bureaucracy, which by laws and regulations, by orders and printed forms, and by a thousand other unseen methods subjects all of us to some degree of federal scrutiny and control.

It will be my thesis tonight that if the Republic is to remain viable, we must find ways to curb, and then to reduce,

this government by bureaucracy. We must return to government by directly accountable public officials -- local, state, and federal. The only other alternative, I predict, is to have an increasingly costly and inefficient form of government, wholly removed from democratic control -- and I use the lower case "d" in democratic here! When our society is threatened from within and without by such awesome problems as inflation, military aggression, poverty, and world famine, this ever-growing bureaucracy is more than a painful nuisance: it is a prescription for societal suicide.

In elaborating on this thesis, I speak to you from the vantage point of a public official, one who has served in the Federal Judiciary and who now serves in the Executive Branch. My observations are not those of a political scientist or an historian, although I claim to be an amateur in each field.

Obviously, for the next half hour, I will be speaking to you as a concerned citizen schooled in public service and not as a spokesman for the Administration. These thoughts are definitely my own -- as you will shortly hear!

Let me begin by noting my credentials to criticize the federal bureaucracy. As Attorney General I am in charge of some 55,000 employees within the Justice Department, who are spread over 23 separate component offices, bureaus, and divisions. Our budget, which is small by comparison, will come to about two and one-half billion dollars for fiscal year 1979.

I am not alone in concluding that the unchecked growth of the federal bureaucracy may be a mortal threat to our historic forms of government. New York's Senator Daniel Patrick Moynihan, the eminent scholar and former Ambassador to India, gave a memorable address last March in New York City, in which he spoke of the imperial presidency, the imperial Congress, and even the imperial judiciary.^{2/} He concluded that the inevitable concomitant of "imperial" government was the spread of bureaucracy from the executive branch to the legislative and the judicial branches as well. If I may quote from that speech: ". . . the long run effect will be to create government by submerged horizontal bureaucracies that link the three branches of government, speaking their own private language, staying in place while their Constitutional masters come and go."^{3/}

It is in the vein of Senator Moynihan's remarks that I speak to you tonight about our federal government. The restlessness of the American people is now manifesting itself in the notion of calling a Constitutional Convention through an application from two-thirds of the state legislatures.^{4/} The Founding Fathers gave us this alternative way of amending the Constitution, doubtless foreseeing that the people might some day lose control of the federal government and even of the Congress to the extent that they could not achieve their will.

This state of governmental affairs is worth pondering. Lack of control has a good deal to do with the scourge of inflation, fueled in part by government spending; it has much to do with the present flood of stultifying federal regulations; and it has much to do with citizen frustration, caused by a seeming inability to govern ourselves.

A recent Wall Street Journal editorial made the clearest statement about this phenomenon: "There is a clear sense in this country that government has become highly wasteful of resources and too big and internally contentious to respond to changing circumstances and needs. The time required to get the necessary government clearances and build a single electric power plant in the U.S. is now triple the length of the time the U.S. needed to mobilize for and fight World War II."^{5/} That is a cold and sober observation.

Senator Moynihan has provided us with a short and accurate description of the problem, but few have gone beyond rhetorical attacks on that problem. It has been often said that it is better to light one candle than to curse the darkness. As a lawyer, I put it in different terms in stating that one should not rail at the law. By the same token, we should not rail at the government; rather our approach should be to correct the government.

Therefore, I would like to make a few modest suggestions which, hopefully, may assist in turning the tide.

These suggestions are in the nature of refurbishment. They in no way undermine or even disparage our system. They are corrective in nature and are asserted under our duty as citizens to seek to improve the system. It is through such duty that we replenish our democracy under our constitutional system.

As a first step, I would amend the Constitution to provide one six-year term for the President.^{6/} This is certainly not a new idea, having been originally proposed in Congress in 1826 and reintroduced some 160 times since then. It has been advocated by several Presidents. But it is an idea whose time may have come. This change will enable a President to devote 100 per cent of his or her attention to the office. No time would be spent in seeking reelection. Under the present system, the President serves three years and then must spend a substantial part of the fourth year in running for reelection, assuming a President decides to seek reelection.

Moreover, the current four year term is actually too short to achieve any of the major changes and improvements that a President should accomplish. The funding cycles are so long that it is well into a President's third year before his own program changes take effect. This leaves the bureaucracy in control.

A single six-year term would permit the long-term, steady planning and implementation that our government needs, plus saving that fourth year now lost to campaigning.

Second, I would propose a complete review and reduction of the regulating and litigating authority of the independent federal agencies. The President has the authority now to curb those departments within the Executive Branch of the government, but, to the surprise of most Americans, the independent agencies such as the Federal Trade Commission, the Consumer Products Safety Commission, and the Nuclear Regulatory Commission are all wholly separate and not subject to his control at all. Most have the power to promulgate regulations and rules that affect all of us, and many have the statutory power to litigate in the name of the United States, even when the positions being advocated by them are contrary to those taken by the Department of Justice. And their regulations are legion and growing every day.

Third, I would place a severe restriction on the staffs allocated to the President, the Congress, and even the federal courts. More staff invariably means more time in which to evolve more ideas about how to increase government control over the lives of the American people. But at the same time we make this move, we as citizens must also lower our own expectations about government. In large measure, the size of government has grown because we have all benefited at one time or another from some federal programs. The temptation is overwhelming to ask that the federal government pay for this project or to support that program, because then

the average citizen cannot so easily perceive the linkage between the service delivered and the price paid in terms of the incremental federal tax dollars. Local officials and local citizens alike praise the award of federal grants to local communities, but they fail to recognize that such aid builds the federal bureaucracy and furthers the loss of local government control and responsibility.

As a former federal judge and now as Attorney General, in charge of our 3,800 lawyers in the Justice Department, I can personally testify to the growth of the federal judiciary and its increased own role in our lives. Again, this growth stems mostly from the desires of the American people, who now turn to the courts -- and especially the federal courts -- at the slightest provocation.^{7/} The caseload in turn fuels the demands for more and more judges and more and more support staff. The citizenry must reaffirm its commitment to other and more informal dispute resolution devices, or it cannot rightly complain when the judiciary, like its sister branches, continues to increase in size in response to cries for more services.

Fourth, I would urge Congress to sharply curtail, if not abolish, the so-called "rule-making" powers of the independent regulatory commissions. To most of you in this audience tonight, the concept of "rule-making" might sound as though it were simply a procedural device, used to set out

the rules under which a particular agency might conduct itself. That is far from the way that term is used in Washington! In truth, rule-making is a total substitute for all other forms of government, executive, legislative, and even judicial. Its abuse can stymie and frustrate the government of whole states and the operations of entire industries.

A classic case was presented to me while I was a Circuit Judge on the 5th Circuit.^{8/} The State of Texas had, pursuant to federal law, produced a state plan to control smog within the limits set down by federal regulations. The Environmental Protection Agency -- or EPA, as we call it -- disapproved the Texas plan and issued under its rule-making powers its own plan, which incorporated the Texas controls and a host of other more stringent requirements. To our surprise, we found that the EPA had established its standards for Texas largely on a study done for the Los Angeles, California, region, and that that study had been performed 15 years earlier, so as to be totally out of date. Yet, but for our order to the EPA, the citizens of Texas would today still be paying for a set of air quality controls promulgated by a set of faceless bureaucrats in Washington, based on a contracted study from Los Angeles, 15 years out of date. That is rule-making.

Of course, once the rule is made by an agency, all interested parties are given the right to comment. But the point is that rule-making has none of the safeguards of the legislative process and yet also is a non-adversary proceeding.

Fifth, I would urge strong support for President Carter's plans to reduce the volume, complexity, and cost of government regulations generally. As Attorney General, charged with enforcing the nation's laws, I have seen so much burden cast upon our citizens by the host of regulations. Federal regulations currently in force cover about 60,000 printed pages with thousands more in interpretations and guidelines. They are often written in defiance of the English language. Many of these regulations have retarded our real economic growth, by impairing our efforts to improve the productivity of labor and capital. And the paperwork and compliance burden on the smaller American businesses is simply impossible, so that the net result is wholesale disobedience, which then breeds disrespect for the law generally. If large numbers of our people begin to ignore our law, we will lose that cohesive attitude which has so symbolized our country and which has saved our Republic from anarchy and ruin on countless occasions.

For these reasons, the President has ordered the reduction in the number of regulations and a simplification of their reporting requirements.^{9/} Thus far, the number of

reporting hours has been reduced by 85 million hours per year, or about 10 percent -- which is equivalent to the work of 50,000 people for one year. He has also required major new regulations to be accompanied by a comprehensive cost-benefit study, so that the social and economic merits can be weighed against the likely costs. That, too, will reduce the number and complexity of regulations. Necessary and proper regulations will be continued but at the least expensive and burdensome level. And this will help in the fight against inflation, because each incremental cost added to a product or service by a new and perhaps unnecessary regulation further erodes the buying power of the American dollar. Such a watch over the cost of new regulations might be termed an "inflation impact statement."

And, sixth, we need to restore confidence and non-partisan support to some of the fundamental units of the federal government. It is interesting to note that three Cabinet officials were exempted by the President from attending the recent mini-convention of the Democratic Party in Memphis: the Secretary of Defense, the Secretary of State, and the Attorney General. That suggests to me that these officers and their departments have to be seen as non-partisan, charged to work under neutral principles of law and policy. There is no room in our federal system for the vagaries and viscissitudes of partisan politics in the conduct of our

national defense or our foreign relations; in like fashion, the laws of our land must be enforced without fear or favor as to party affiliation.

I mention this last fact, not because it relates to my earlier observations about bureaucracy, but because these three arms of the executive branch are the guardians of our freedoms. It is through their independence and professionalism that we American citizens have the liberties -- and even license -- to debate and discuss how our government is to be run. So in their strength lies the strength of the American people.

I can tell you that we at the Justice Department have tried very hard over the last two years to erase the ugly stains of the Watergate era and to create a truly independent, professional organization. I am proud that from the FBI to the DEA to our litigating divisions, we have accomplished that goal. We operate by and fully in accordance with the law, on a non-partisan basis, as President Carter pledged to do when he took office. That will be the pledge of the Department from now on.

As I said at the beginning of these remarks, I am speaking as an American citizen proud of his country's achievements over two centuries and yet fearful of what lies ahead for his nation. We have come to a crossroad in the history of this land -- politically, morally, and philosophically.

Each of us must now decide who, if anyone, shall be given this enormous power over our lives.

I have often said that the wisest use of power is not to use it at all. But if such power must be used, use it sparingly. That is the prescription I would write for our federal government today, for the temptation of great power may otherwise be too great to resist. As Abraham Lincoln so aptly put it in 1837, "I believe it is universally understood and acknowledged that all men will ever act correctly, unless than have a motive to do otherwise."^{10/}

President Carter and I share a common conviction that it is time to return government to the people. We believe that we have no roving commissions to do good, that such an attitude on the part of government constitutes a gross abuse of power. Our Administration is committed to devolving power back to the people of this country, to save the nation from its own ever-growing government.

So, in closing, let me once again refer to Benjamin Harvey Hill, that distinguished Georgian and American, whose statue in the Georgia State House bears this inscription: "Who saves his country saves himself, saves all things and all things saved do bless him. Who lets his country die lets all things die, dies himself ignobly and all things dying curse him." Thank you.

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FOOTNOTES

- 1/ B. H. Hill, Notes on the Situation, (Augusta, Ga., 1867).
- 2/ Senator Daniel Patrick Moynihan, "An Imperial Presidency Leads to an Imperial Congress Leads to an Imperial Judiciary: The Iron Law of Emulation," Herbert H. Lehman Memorial Lecture, March 28, 1978.
- 3/ Id., p. 17.
- 4/ U. S. Constitution, Art. V.
- 5/ Wall Street Journal, January 22, 1979, p. 20.
- 6/ See Hearings before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, S.J. Res. 77 (to amend the Constitution by providing a single, six-year term for the President), October 28-29, 1971. See also Lyndon B. Johnson, The Vantage Point, p. 344 (Holt, Rinehart: New York, 1971).
- 7/ See, e.g., "Why Everybody Is Suing Everybody," U. S. News and World Report, December 4, 1978, pp. 50 et seq.
- 8/ State of Texas v. Environmental Protection Agency, 499 F2d 289 (5th Cir. 1974), stay denied, 421 U.S. 945 (1975).
- 9/ Executive Order 12044, March 23, 1978.
- 10/ Abraham Lincoln, Speech in the Illinois Legislature, January 11, 1837.