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"MODERN TENDENCIES AND THE LAW"

An Address by

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MODERN TENDENCIES AND THE LAW

Mr. Chairman, Mr. President, Members of the American Bar Association,
Ladies and Gentlemen:

The somewhat exalted topic I have been asked to consider seems to invite a learned discussion. An adequate treatment of its various aspects and implications would, I fear, lead me into pretty deep water. I have no such venturesome purpose in mind. I say this not only to give you a needed, and, I dare say, welcome reassurance, but also to suggest that what is going forward at Washington is so completely engrossing that but little opportunity is afforded to stand outside events and assess their value.

We Americans are much given to quick generalizations. We have a weakness for headlines. In a certain fashion we realize that we are apt to be misled by them, but that does not seem to shake our faith in them. We generalize our hopes, fears, vices, virtues, plans and ideals - give them a name and then think more of the name than of the substance. We talk of "economic law", "inherent rights", "fundamental liberty", "equality of opportunity", and "social justice" until these concepts register more as abstractions than as realities. For this reason we are apt to be bewildered when some movement like the "New Deal" comes along and seeks to treat ideas and principles as living and vital things.

It is interesting to note that already this movement presents, in some of its aspects, a slightly distorted picture, because of the mystic potencies and weaknesses of mere names. Would it assert new executive power, it becomes a "Dictatorship"; would it compel needed changes, it becomes a

"Revolution"; would it put reliance upon the best intellects it can mobilize it creates a "Brain Trust"; would it coordinate administrative functions, we behold a "Super-Cabinet"; if it seeks to combat crime by attempts to bring the police agencies of the country into closer co-operation, we find that "Scotland Yard" has been transplanted to America. Many of the current criticisms, as well as the excessive hopes it inspires, spring, I apprehend, very largely from this passion to generalize and to see it in the abstract for what it isn't, instead of in the concrete for what it is.

Fundamentally, all we can hope to do is to release and direct the vital forces that make for a healthy national life. I do not share the view that these efforts will result in the creation of a new social order, even though I realize there are forces moving to that end. New social orders, like poets, are born; not made.

Pressure of necessity, and wide-spread distress have made us acutely conscious of serious social maladjustments and have created a condition in which new ideals and forces, long gestating, have a chance to be born; and, under conscious planning and leadership, they may give us something of a new order. "Great distress", says Burke, "has never hitherto taught, and whilst the world lasts it never will teach, wise lessons to any part of mankind". Such counsels of despair, however, leave me as cold as do counsels of perfection, for I think the world does profit by its mistakes and miseries, if wise leadership shows it how. That, at least is the faith of the "New Deal".

Underlying this faith is, of course, something of a definitive philosophy with implications bound to have repercussions in the law. It

assumes that we are in one of those historic eras of change in which it is the province of government to lead, to assist and to direct. Its first obligation naturally was to put its own house in order - to face the exigent needs of economy, efficiency and solvency; and then to deal affirmatively and vigorously with the conditions which have caused so much heart-breaking misery and distress. Manifestly, the crisis was far too acute to permit of prayerful waiting for the curative forces of patient time.

It is a peculiarity of political, as well as juristic thinking, in its earlier phases always to seem more theoretical than practical. Presently, however, we see it penetrating and vivifying the social consciousness, and when time, circumstance and the leader meet, it becomes a revitalizing force, a new movement, a "New Deal" and, sometimes, a new order. Witness the effect of "academic" thinking in shaping the revolution of 1776, and that of the French; or note its even more striking bearing in the English "Reform Movement" of the last century, where such thinking changed the whole pattern of the social and economic order.

The unifying principle which lies at the heart of this modern movement is to be found in the very old concept of cooperation. Indeed, this idea seems so simple that its very simplicity conceals its tremendous strength and scope, as well as the basic part it has always played in the story of mankind. If it appears to be feeble or Utopian, consider for a moment certain patent facts. Note, for instance, the actual socialism already existing in our established order; and the steady change from the competitive to the non-competitive ideal. "Rugged individualism" so stimu-

lating in pioneer days or even in a period of economic adolescence, no longer seems to fit a highly relational society that constantly calls for greater service and solidarity. The competitive ideal, so deeply ingrained in our law, no longer seems so valid as a free working law based on economic stability and social unity. Surely it is not visionary, therefore, to regard cooperation - voluntary or even induced - as the way of least resistance, if not the only way out; or as the one and probably only cure for ill-balanced production, for demoralization in competitive industry, and for any threatened collapse of our social order.

It was Bagehot, as I recall, who said that when an Englishman finds himself really thinking, he thinks he is sick, and I suspect that our own sudden compulsions to do stiff planning and hard thinking explain in part the fear that the country is much sicker than it really is.

Manifestly local government has proved in many ways quite incapable of meeting present emergencies. In the banking crisis, which occurred at the moment of inauguration, it was to the Nation's Chief Executive and to national legislation that the country had to look for relief. The colossal attempt under the National Recovery Act to spread labor and to raise wages and purchasing power, and, under the Agricultural Adjustment Act, to control crops and to make the farmer's product capable of supporting him, is a Federal effort to which the states and the people are lending willing support. The Department of Justice itself is the subject of demands for the Federal solution of problems hitherto thought the proper subject of local control - racketeering, kidnaping, and the whole problem of crime.

But centralization of power has been looked upon with distrust :

not only since the days of the thirteen colonies, but from time immemorial.

It was an ancient Greek who said that democracy could not survive beyond the reach of the human voice. Clearly he meant that the acts of the leader must be within the immediate knowledge and subject to the direct approval of the people. The genius of local self-government lies in no mystery; it is in the axiom that if you want a thing that concerns you well done, you must do it yourself. This was the idea of the Greek city-state. This was the idea of the New England town meeting. This was the theory of colonial government in America, and of its revolt against remote control. This was the basis of resistance to the formation of the union; and it was for lack of central power that government failed under the Articles of Confederation. This was the theory that preserved, in large measure, the sovereign powers of the states. At that point in our history, and for generations thereafter, this theory of government worked exceedingly well. The thirteen original states were small in population and isolated. What was done in one, little affected any other. The only democracy within reach of the magistrate's voice was the local democracy. President Washington was never heard at one time by all, or even a substantial part, of the people; nor was Lincoln; nor even Wilson.

But, there have been changes. We are no longer a Nation whose problems are local and isolated. A bumper crop one hundred years ago was a boon where it grew, or, at the worst, in part a waste. Today it may be a national menace. A shut-down of a grist mill or a smithy in Boston a century since was not felt in Rhode Island, must less in Pennsylvania.

Today almost every economic and social problem is both local and national. Manufacturing, merchandising, transportation, agriculture, mining, oil production, problems of employment and unemployment, of strikes and the settlement thereof, are upon a national scale, or, if local in scope, are national in effect. Child labor in one state may destroy an industry in another. Crime is organized on a nation-wide basis. Neither the vigilance committee of the Old West nor the metropolitan police force of today can cope with this problem without national aid.

Goods and people move as quickly now from San Francisco to New York as they once moved from Philadelphia to the National Capital. From Chicago to Washington is no more distant in time today than from Concord to Boston, by foot or horse, one hundred years ago.

The radio, the airplane, the sound-picture have drawn us very close together. Three times within the past five months has the voice of the Chief Executive of this Nation reached, in intimate fashion, fifty million eager citizen-listeners in an instant of time. The President's far-flung appeal to the American people to cooperate with the National Recovery Administration was heard by the Nation in a single half hour, and long before the hour was out, the response began. Washington today is thronged with citizens coming, within a few hours, from the four corners of our Country to apply for codes affecting their several industries; and the mails are surcharged with voluntary agreements sent to the President by employers of labor throughout the land. Who is there so dull as not to catch the drama in these significant events?

The theory of our government has not changed; but the times have changed and invention has altered the scope and tempo of our life. I think it is hardly to be doubted that the average citizen of today senses his participation in government more acutely and more personally than he has for a generation. In very truth, a Roosevelt and a radio have made a town meeting of America.

It is but natural that some of the legal aspects and implications of what is now going forward should disturb the more "static" members of the bar. I have had occasion to discuss these problems with many of my learned brethren who, while suppressing any public expression of doubt, are manifestly doing so with difficulty.

Later on, all in good time, I suppose these matters will be argued out before our courts and disposed of in orderly fashion. That hour I look forward to with a knowledge of its certainty, and with considerable tranquillity of spirit.

Unusual and difficult questions undoubtedly confront us. The field of administrative law, already clouded by much uncertainty, is being widely extended. The functions and limitations of the various departments and agencies of government have been taking on new aspects; and the attainment of administrative unity in this vast complex of powers presents a fascinating problem.

Nevertheless, there is no occasion to indulge artificial fears as to the ultimate outcome. There has not been the slightest fundamental departure from the form or nature of our Government or the established order.

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Our jural system remains intact. The Federal equilibrium has not been disturbed. The life, letter and integrity of the Constitution have not been impaired. Its checks and balances, its definition and division of authority, and its complete supremacy remain inviolate. The law of the land is still the law of the land.

Every new power entrusted to the President has been conferred by the people, acting through their duly elected representatives, and must be and will be exercised within the letter and the spirit of the organic law. Emergency legislation is recognized as such by the Government and will end when the emergency ends. The Congress has neither abdicated nor shirked its rights or its duties; it has functioned patriotically and efficiently to meet a national crisis. What is really happening is not an alteration in the established form or texture of Government, but a change in the spirit and application of Government.

Manifestly, emergency conditions do not justify emergency theories of the law. It is not the duty of the Attorney General, for instance, to attempt to make new law, but to construe and uphold the law and the Constitution as applied and interpreted by the Courts. Equally it is his duty to help give practical effect to the ends sought by the recent legislation and the policies of the administration. In this effort, I shall hope to be guided by a sense of economic realism, rather than by any narrow legalism - to be helpful and constructive, rather than hyper-technical or reactionary; and to make the application and interpretation of these laws

fit not only into our established jurisprudence, but into the new patterns of economic planning and broad statemanship which these disturbed times demand.

If it were true, as some persons affect to believe, that the Congress by its recent legislation has created a Dictatorship, my duties as law officer, sworn to uphold the Constitution, would be arduous indeed. But we have done nothing of the kind. The long story of dictatorships from those of the early Roman Republic to the present time, offers no single historical parallel. With us there has been no usurpation of power; no substitution of the executive will for the national will; no resort to force or fear; no repression of dissenting thought or criticism; no pretensions to omniscience or omnipotence. New laws and new powers! - yes; - but they march with the sense of Justice and the needs of our common country. They rest on established and traditional sanctions. This philosophy of "Government in action" is based upon traditions and ideals fundamental in Americanism: - leadership, justice, moderation, co-operation, unity, confidence, faith, enthusiasm. These concepts are as old as America, as old as the basic idea of Democracy, and by them we shall find our way back.

The constitutional difficulties inherent in the recent legislation, I think, are grossly magnified. Our fundamental law is faced with no unusual stress or strain. During the World War, we put it to a far more radical test in emergency laws like those relating to Selective Service, Espionage, The War Industries Board, the Food Administration, the Control of Railroads, Industrial Mobilization, and the like. Now, as then, we

face a war - a war to win back prosperity. Then, as now, the Constitution met the test and marched with the need of the times. Conditions and public opinion change from one era to another; and so does judicial interpretation. As President Wilson once said: "The Constitution is no mere lawyer's document, but the whole of the Nation's life". Each crisis, each era, produces its own peculiar legal problems, and our judicial tribunals have never failed to solve them with constructive intelligence. In dealing with given cases, I am confident that the Courts, in the words of Mr. Justice Holmes, will consider them "in the light of our whole experience, and not merely by what was said a hundred years ago". It is this very flexibility which has permitted the Constitution to withstand strain and to endure. What is going forward is not, therefore, a violation but rather a vindication of our form of constitutional government.

To my mind, the law is not a mere body of precedents. I visualize it as a living, vital, growing thing, fashioned for service and constantly being refashioned for further service. Its function is to serve. It changes and it grows. It is not, and it should not be, the unloved ruler of a reluctant people. It is, and it should be, a trusted servant ministering to the needs of mankind. It should serve to cement, and not to strain, the bonds of affection that ought to exist between the people and the government they have erected.

Carlyle thought that Democracy was bound to fail because he said you could not have "Government by discussion". Some of our citizens, who have more or less covertly sympathized with the idea of Carlyle, have

become so discouraged that they have frankly despaired of our civilization and maintain that it is not merely upon trial, but that it has failed.

Others, pointing to the swift and even fundamental changes that have overtaken other peoples in other parts of the world, have freely predicted the break-up of the foundations of our government. These fears I do not for a moment share. Nor do I believe that they are entertained by any substantial portion of our people. As I look about, I see no swift and disturbing governmental changes amongst peoples long habituated to self-rule under democratic forms. A well established democracy is the most stable of governments. Its very structure admits of necessary adjustments in times of stress. As for ourselves, the heritage of liberalism stands us in good stead. Those who founded our government, and gave their lives for it, have not been forgotten. America is made of stout stuff and our democracy runs too far back into the history of the struggle for liberty to succumb merely because our governmental machinery is out of adjustment.

For years our people have been upon a long, bitter trek, with its wastage of life and treasure -- a downward, disheartened, bewildered, retreat toward lower levels of civilization and to the very verge of economic and financial disaster. What man of vision, or understanding, or human sympathy, could have witnessed this prolonged retrogression without profound sorrow and acute apprehension? The frantic and, for the most part, futile attempt to adjust debts, in the face of constantly falling price levels, has taken its toll upon every hand. No one has escaped. Values have disappeared; taxes lie like a dead hand upon enterprise; the

savings of years have vanished; industry is prostrated; millions are unemployed; the farming population has been reduced to penury; the nations of the World have retired into the watertight compartments of a narrow nationalism; commerce no longer puts to sea; and, to a disturbing extent, fear and animosity have taken the place of common good-will and common sense.

Who is there who does not turn with distaste from this dark picture to welcome the harbingers of a new day! A program of progress is already unfolding before us. It has passed the period of promise and entered the stage of fulfillment. Moreover, it is being developed under a leadership so inspiring that, schooled as I am in the disappointing business of politics, I feel my pulses stir and my heart leap again at the sight of America emerging from her dark dream. This is no time to assess responsibility for our present troubles in terms of narrow partisanship. This is a period of national emergency that engages the faith and service of every man, woman, and child in America. The spiritual resources of the Nation must be mobilized and the hidden reservoirs of abundance drawn upon. The artificial restraints that have dammed back the flow of prosperity must be released once more; that which was unplanned or selfishly guided must take its place in an orderly governmental process and a great cleansing and rebuilding program must go forward to its conclusion. If I mistake not, the people of America, without respect of partisanship or previous party affiliation, welcome this wholesome process with glad hearts.

If, however, these emergency laws and constructive acts are to succeed, or are to accomplish lasting good, it will not be because of

their coercive powers or their perfections of plan and detail, or the aggressive enforcement of agents and officials, but rather because they correctly interpret, as I believe they do, the thought and spirit, the tone and rhythm of today.

Never was there such a need or such a chance for the profession of the law to do creative and constructive work and rise to its old power and prestige. One of the most heartening features of our trying work in Washington is the generous and helpful spirit thus far shown by the members of the Bar. It has been particularly so in the work on the difficult business codes, where there is so much opportunity for the merely clever lawyer to show his skill; and for the great lawyer to show his constructive capacity.

The legal mind, I suppose, is instinctively individualistic and client relations probably accentuate the stress laid upon private as opposed to public interests. If it is difficult for business to adjust itself to emergency regulations of wages, hours, and trade practices, I dare say it is even more difficult for the practising lawyer to do so. It is neither unnatural nor improper to respect the past and to be influenced by precedent, but in this dynamic hour of change it is the new, the untried, you are called upon to interpret and support, and I have an abiding faith that you will do this with that fidelity and sincerity and that larger vision and sense of horizons which have always characterized our profession at its best - and that you will do it, too, in that spirit of constructive cooperation for which the necessities of our people so eloquently plead.