



Department of Justice

ADDRESS

BY

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BEFORE THE

INSTITUTE OF DIRECTORS

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It is a genuine pleasure for me to meet with you today and to be here in Australia. During my visit here, I have commented frequently on the similarity of our systems. We have much in common besides language. Our legal systems are descended from British common law tradition. The forms and instruments of government we have chosen, constitutional federal democracies, are remarkably alike and are relatively unique. Our national characters are similarly independent, energetic and idealistic.

The beginnings of my own state you will also find familiar. I am from a small town in Georgia, very near where President Carter was born. Georgia was one of the original thirteen British colonies founded in America. It was founded as a British colony by General James Edward Oglethorpe with the express purpose of having a place to send debtors and other British criminals to start a new life. I like to think that the people of Georgia, like the people of Australia, have demonstrated the unexpected genius of such a plan.

Our shared political and legal traditions have resulted in a warm and reciprocating relationship between our countries over the years. Our earlier start in the experiment of democratic government has meant that, in some things, you have had the opportunity to observe our successes and mistakes and learn from them. One of your eminent jurists, Sir Owen Dixon, who served as Chief Justice of the High Court, wrote a few years ago:

"The framers of our own federal Commonwealth Constitution (who were for the most part lawyers) found the American instrument of government an incomparable model. They could not escape from its fascination. Its contemplation damped the smoldering fires of their originality."

That description catches nicely the spirit of the relationship between our countries -- a friendly fascination with each other's system, and an on-going reference to the other's experience.

Today, I would like to make several observations on the relationship between business and government in America. These observations are personal, and necessarily peculiar to America. I make no effort to interpret their applicability for you, although I do hope you find insights of interest in them.

My country is now facing a great new challenge in rethinking the methods and scope of its regulation of business. For much of our early history, businesses operated with little or no interference or regulation by government. In the late 1800's, two developments took place. First, reformers began to seek new legislation to correct abuses in working conditions. Safety conditions, sanitation, working hours, wages, and child labor were all areas of legislative reform. Second, as corporations grew in economic power and became intertwined with national interest, our political process began to intervene selectively in the marketplace through specific statutory prohibitions or creation of new regulatory agencies. For example, the Sherman Antitrust Act passed in 1890, prohibited monopolies and other combinations in restraint of trade. In this period, the Interstate Commerce Commission was created to regulate railway and other commercial transportation of the day.

This early development of governmental regulation of American business activity accelerated markedly during the Great Depression of the 1930's. Businesses failed adequately to protect themselves, their employees, and their consumers from the devastation of that Depression. Substantial new government regulation of business responded to the suffering of that period in an effort to rally and stimulate economic recovery.

The growth of business-related regulations and regulatory agencies has been steady ever since. The last decade in particular has seen many new and expanded areas of regulation. We have new air and water quality regulations, endangered species regulations, occupational health and safety regulations, covering every possible work hazard and a few you couldn't have imagined, regulations prohibiting discrimination in employment, education, and credit. The total number of pages of regulations issued in the last 40 years is approximately three-quarters of a million, and this year's set runs about 60,000 pages.

Linked to all these government regulations are voluminous paperwork requirements. A recent government study concluded that present government paperwork requirements cost our society 100 billion dollars annually, of which 43 billion dollars are processing costs to the federal government. This figure of paperwork costs is equal to about 5% of our current annual Gross National Product of just under 2 trillion dollars. Estimates are that 850 million hours are taken in completing government forms in America, although this includes personal income tax forms, which account for roughly half that total. Let me give you an example of this cost to a specific company. Several months ago at my request, the Chairman of the Board of Standard Oil Company of Indiana sent to me a summary of the costs of regulatory and reporting compliance. For Standard Oil of Indiana alone, the costs in 1976 of complying with federal regulations was 17.2 million dollars and the reporting costs were 4.1 million dollars, for a total of 21.3 million dollars.

Despite these rather staggering statistics, I believe the decisions made long ago in our Republic to regulate business were wise and well-intentioned. The objectives of most government regulations continue to

be noble. Nevertheless, we are now seeing that some of our reforms may have gone too far. We have promulgated provisions without reckoning the costs or truly understanding their full effects. These excesses do not condemn the entire system, a system which I serve. But these excesses are exacting a cost that we are just now beginning to fully recognize. These excesses have several manifestations.

As a first matter, the complexity of our government regulations is astonishing. The volumes containing all the federal regulations currently in force now run around 60,000 pages, with thousands of additional pages devoted to administrative interpretation and implementation of those regulations. Not only is the sheer number of the regulations overwhelming, their lack of clarity and conciseness is legend. Every evening in one of our newspapers, The Washington Star, a box appears with the caption, "Gobbledygook." Readers are invited to send in an example of tangled and tortured prose from government manuals for a small cash prize. The column never wants for material.

Second, these regulations have imposed high additional costs on American production. One of our Cabinet secretaries recently stated that rough estimates fix the direct additional costs to business from compliance with these governmental regulations at between 60 and 130 billion dollars annually. A 1975 Brookings Institute study on the effects of regulatory compliance in America estimated that such efforts cut productivity growth by 20 to 25 percent. We are only now beginning to calculate the toll which these extra costs are taking on the productivity and competitiveness of American businesses.

A third problem results from the sheer size and complexity of these regulations. Businessmen, chiefly those in smaller enterprises, are simply unable to keep up with all the regulations applicable to them. Major corporations have available large, specialized legal departments to help them be informed and maintain regulatory compliance. Smaller businesses, lacking such resources, are forced to ignore them. Moreover, some regulations appear unnecessary to many people.

As you may know, President Carter's brother, Billy, owns and operates a gasoline service station in Georgia. He received some publicity when he protested a government regulation on fire extinguishers. He said he agreed with the federal regulation requiring him to have a fire extinguisher in his station, but he thought it was a bit excessive when he was told that the extinguisher was improperly placed on the wall. That federal regulation dictated that it couldn't be placed three feet high on a wall but had to be at least three feet six inches high. Some people argue that, at that level, the government is not a partner but a pest. We may be reaching the point of the Roman Emperor Caligula who, in his arrogance or at least arbitrariness, ordered that all laws were to be posted in small print and high places to better confuse the populace.

As the chief law enforcement officer of the United States, I believe it is serious when our laws are so burdensome or so detailed that compliance with them is impossible for many. If large numbers of our people begin to ignore our law, we will lose that cohesive respect of the rule of law which has so symbolized our country.

These problems are of great concern to me, even though my specific Cabinet assignment is as a law officer rather than economic or business

advisor. I think that the regulatory measures which we are now seeing as excessive are, in large measure, unnecessary. Moreover, they have tended to create an adversary rather than mutually supportive relationship between business and government.

Upon assuming office, President Carter immediately began to address these overregulation problems. One step, important both substantively and symbolically, has been President Carter's order to reduce and simplify the number of federal regulations and required reports. To date, the number of reporting hours has been reduced by 85 million hours per year or about 10%, equivalent to a year's work by 50,000 people. Countless regulations have been eliminated or linguistically clarified. And, in an effort to make government regulators more responsible, the government official responsible for drafting a regulation is now required to affix his own name to it for future reference. Incidentally, President Carter attributes the problem to lawyers -- said to be the regulation writers.

President Carter has also instituted a process by which the economic impact of proposed new regulations must be calculated and reviewed prior to finalization. In a recent example of this procedure at work, a proposed health regulation governing the levels of cotton dust in textile plants has been given reconsideration because it would have cost industry millions of dollars to comply with. The purpose of this reconsideration was to ensure that the new cotton dust regulation will be the most efficient means of safeguarding worker health while minimizing compliance costs. This process

by itself will reduce significantly the cost of our regulation and should prevent wasteful or unnecessary regulations from slipping by unnoticed.

Beyond these general regulatory problems, several specific industries in America have become comprehensively regulated by government. These are chiefly the trucking, airline, and railway industries, and, to a lesser extent, radio and television. The respective government agencies regulate prices, allocate routes or frequencies, and generally supervise conditions in these industries. While the reasons for the initial decision to regulate these industries were sound, we have come to realize that we have paid too heavy a price for these regulatory reforms in the lost benefits of competition.

In the last two years, my Department has sought to bring more competition back into these industries -- a development we call "deregulation." As an example, we have supported price and route competition in airline service to Europe. The introduction of additional airlines and lower fares into this market in the past year has opened a whole new area of meaningful competition and sparked a growth which has benefited North Atlantic travelers as well as airlines.

This recent deregulation, even though relatively modest to date has demonstrated once again the benefits which flow from the stimulus of competition. It has also served to remind us that government sometimes governs best when it governs least.

I would now like to move to a subject in an entirely different vein. Business and government in America today share a common challenge in the area of public ethics. The ethics standards of public officials have become a prime topic of discussion in America as of late. And as much attention has been given to the ethics of lawyers and of businessmen as

of politicians. This attention is partially the result of our national tragedy of Watergate. You may recall that, among other things, the scandal included a number of corporations and corporate officers violating campaign contribution laws.

In addition, I believe the attention to public ethics in my country is also related to the sharp decline in the popular respect for public institutions. In America, we are constantly conducting polls to determine what the average man thinks on almost every issue. We also use these polls to identify any trends. According to recent polls, there has been a steady decrease in the confidence which Americans have in their public institutions and officials, both governmental and business.

We see several manifestations of this apparent skepticism about the ethics of public officials. In our Senate confirmation hearings, nominees for appointive office are relentlessly and often rudely grilled about every aspect of their private lives, even when there is no hint of improper conduct. This questioning is defended in the name of maintaining high public ethics. We also are seeing proposed in Congress new legislation to establish stringent and detailed ethics standards for both government and business. Some of this new legislation goes far beyond the ethics rules that have served us for many years.

Let me give one instance of this in the business area. Congress last year enacted the Foreign Corrupt Practices Act, forbidding American corporations from paying bribes to officials or agents of foreign governments. This legislation responded to revelations of such payments in the past by American businesses. I believe this prohibition, though decried as unrealistic by some businessmen, is appropriate. However, this legislation also contains a provision making it a crime for businesses to fail to keep accurate books and records. Although this provision was included because

some payments to foreign officials had not been properly recorded, this provision goes far beyond situations involving foreign bribes. Technically, under this provision it is a crime for a business to fail to record properly a transaction which in itself was neither criminal nor improper. I think this illustrates how far responsive ethics reform may take us.

Other business practices also now are coming in for greater scrutiny and government regulation in the name of ethics reform. Expenditures previously treated as legitimate business expenses are being re-examined for their genuineness both by government tax planners and by zealous stockholders. The use of corporate facilities for private purposes by business executives is no longer being tolerated as an incident of office. Public statements and public documents of corporations are being held to high standards of truthfulness and full disclosure.

One other development in the current ethics reform deserves mention. In our past evaluation of public officials, we have required proof of actual wrongdoing before disqualifying a man or woman from public service. We now have a new category of ethics disqualification generally referred to as "conflicts of interest." A "conflict of interest" is not an actual wrongdoing by an individual but the mere presence of a temptation in his or her life. For instance, if a man owns a few shares of stock in a large oil company, he would have a conflict of interest for any decision which might affect that oil company. The present popular view is that he is unable to make an objective and unselfish judgment and is thus disqualified as to any service relating to oil companies. The presumption is that no

individual, no matter how high his situation or untarnished his reputation, must be exempt from even the lowest forms of temptation. We no longer look to a person's reputation and past conduct for fair dealing as the best indicator of his character. Our system now treats the existence of a conflict of interest as a character stain in itself and as grounds for complete disqualification. This trend is discouraging honorable men and women from entering public service.

A similar trend appears to be developing in the business world. In a recent article, one writer noted that in the law of fiduciary duty the wrongdoing is not to be found in the subjective intent of a fiduciary to betray his trust but now will be deduced from the mere existence of a factual situation that in the average man might create temptation. It is not unlikely that presumptive conflict of interest disqualification will soon extend to business leaders as well as public officials.

I hasten to note my absolute belief in the need for honest and honorable people in public service. I am committed to enforcement of the highest ethical standards in my Department. But I have sought to note here the trend for government to involve itself increasingly in the definition of ethics standards for all sectors, and to note that this is a reflective reform that will be sweeping. In short we are in a period in our country when we are in danger of overreacting to the Watergate era syndrome.

I am convinced that no amount of legislating can produce levels of ethical behavior sufficient for our responsibility. We must complement legislative reforms by developing leaders with conscience and fairness and compassion, so that the spirit of rightdoing permeates all our conduct. That spirit will be communicated naturally to employees beyond the capacity

of formal ethics rules to inspire. That is our ultimate hope for achieving genuine ethics reform in business as well as government. I serve with President Carter who, I believe, embodies those high ethical principles in exemplary fashion.

I hope that these brief observations about the challenges and future of American business and government have been worth your attention. I have mentioned some errors we have made in our system, but I note that they were errors of exuberance. One of our Presidents, Woodrow Wilson, once stated that he believed in democracy because it released the energy of human beings. It is that ever releasing energy in our peoples that we must sustain, both in government and in business. And we must make certain that we do not dampen that energy by suffocating its spirit. Thank you.