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Department of Justice

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ADDRESS

BY

THE HONORABLE EDWARD H. LEVI
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

THE DEDICATION CEREMONIES

OF

THE TEXAS LAW CENTER

10:00 A.M.
TEXAS LAW CENTER PLAZA
SUNDAY, JULY 4, 1976
AUSTIN, TEXAS



I am pleased to be with you today for this important occasion and on this significant date. Dedicating this magnificent new law center brings to mind the many roles of the legal profession in our society. Doing so upon this bicentennial of the signing of the Declaration of Independence reminds us of the many contributions of the bar to our history. Speaking in this distinguished company one cannot help but be reminded of the enormous public service which the bar now performs and has performed for our society both in times of relative quiet and in periods of the utmost crisis. If not all the members of the bar are heroes, it is also important for us to recognize that we do have heroes among us.

The American Revolution and the years of political creativity that followed it were suffused with a spirit of the law. It was a period in which human liberties were dearly won. It was also a period in which knowledge of the workings of the political institutions of a republic was widely learned by a considerable portion of the population. That period of agony and triumph and intensive learning during the difficult years between the Declaration of Independence and the making of the Constitution provided a strong tutelage for our country. As David Ramsay wrote in 1789: "The science of government has been more generally diffused among the Americans by means of the Revolution. The policy of Great Britain in throwing them out of her protection induced a necessity of establishing independent constitutions. This led to reading and reasoning on the subject. The many errors that were at first committed by inexperienced statesmen have

been a practical comment on the folly of unbalanced constitutions and injudicious laws. The discussion concerning the new Constitution gave birth to much reasoning on the subject of government...." But much as we find pride in the ultimate attainment of that period in the formation of our Constitution, it would be a mistake not to acknowledge the efforts of the long prior history which marks western civilization's progress through the creation of institutions to protect human rights. Because of that tradition of which our revolutionary period was a part, we were established from the beginning as a nation of law.

A nation of law--the phrase commends itself to us as an antidote to tyranny, not only the tyranny of men but also the tyranny of the moment. In James Wilson's inaugural lecture in 1789, as the first professor of law at the College of Philadelphia, given before an audience which included George Washington, Wilson coupled, as descriptive of the American character, the interlinked love of liberty and the love of law. And because of this he argued that "the science of law should in some measure, and in some degree, be the study of every free citizen and of every free man." This was a recognition that, if we are a nation of law, it is because the law is in some sense an independent force. It cannot be subjugated to other forces without great peril. The fundamental independence of the law and its existence for the people as a whole were ideas that informed the early development of our nation. When the colonists revolted, as historian Gordon Wood has written, they revolted "not against the British constitution but on behalf of it." They carried as

a banner the rule of law, a rule given meaning because it stood for values long and deeply held, and these values and that vision contributed greatly to the success in building a new government.

The system of government created in 1789 included many features not directly or solely attributable to the English heritage. The written Constitution, the Bill of Rights, the federal system, and the special embodiment of popular sovereignty in the three separate branches of governments, these achievements reflected the Founders' belief, as Hamilton stated in the Federalist Papers, that "The science of politics...like most other sciences has received great improvement. The efficacy of various principles is now well understood, which were either not known at all, or imperfectly known to the ancients." At the same time the insistence upon the rule of law, the protection of the individual, and the independence of law from the power of men and from the compelling circumstances of the moment, these were part of the Founders' inheritance. They passed them on as a legacy for the future. They gave to us also their belief that the science of government, like other sciences, was amenable to mankind's reach, and that the government they had created would itself be a continuing experiment in the craft of governance.

The principles and the craft of governance--not only the art of advocacy--have always been in this country a part of the study of law. The bar is often said to have a unique and overwhelmingly influential role in the governance of our country.

While sometimes the share is said to be too large, it is difficult to see how, in the earlier days of our nation, communities so widely separated could have been governed in common without this shared background, just as it is now difficult to see how our complex society could operate without it. Perhaps this diversity and complexity explain the phenomenon which Tocqueville noticed, and which surely persists today, that most questions of importance in American society end up as legal issues before the courts. Jack Greenberg, in a recent Cardozo Lecture, said, rather gleefully, I think, that "Lawyers still love the judicial forum." As we acknowledge this, we should perhaps take it also as a warning. The training of a lawyer, whether this is made explicit or not, has to be a training in the ways of our society and in the needs of our society. The cases he or she reads are filled with the concepts and categories which mark recurring problems and recurring acts. They tell us a great deal about the life and problems and coherence of our communities. But the material is in cases, and a court is always at the center of a case. There are other instrumentalities, I hardly need say, but it appears to require emphasis, which explicate, expound and make the law. Those who create the legal forms used in the lawyer's office are among the most influential. And then, after all, there is the legislature, and there are boards and local councils. While the courts have served an essential purpose in the governance of this diverse and complicated society by law, their central position at times has altered the strength of other political processes--not the least because when courts assume responsibility this sometimes

encourages other political institutions to hold back from making the difficult decisions or taking the unpopular steps which are required of elected officials in a democracy. Of course we must also recognize that courts have often stepped in because other institutions have not assumed their rightful burden. To recognize this is not for the purpose of giving praise or blame but rather to say that we must benefit from the experiences we have had.

The bar has had a special role in the judicial forum, and this role has increased in importance, breadth and challenge as the legal process has been made available to more and more people. But the role of the lawyer must be seen in a wider horizon. As every lawyer knows, the shape and meaning of the law are created and nurtured in the lawyer's office in the process of advice giving. Without the lawyer as the intermediary our complex society could not function. I realize that this very complexity is sometimes thought caused by the lawyers. This danger is another mark of the lawyer's great responsibility, for simplification and understanding are greatly required, and much of this, if it is to be accomplished, must be undertaken by the bar. Thus the bar becomes the interpreter of the requirements of the citizens;

it becomes the interpreter of the rules and regulations of governance. Thus the bar and its members play the role of public citizens, whether they are in or out of government, and the very ability of lawyers to move in and out of government is a welcome reminder of the purpose of government, which is to protect and perfect the liberties and rights of all.

It is the lawyer's genius for the practical that the bar brings to the nation's governance, because we do have a government which always has an element of change and of experiment. The science of government calls for an art-- the art of reconciling principle and the practical, or of giving life to principles in their application. The art becomes more difficult and more necessary when values which are generally accepted seem more indeterminate and changing. There once was a time when, as Tocqueville wrote, in America "every moral principle ~~(was)~~ regarded as fixed while the political process ~~(was)~~ left open to debate." Today the debate has to be about the values themselves, as well as their application. To understand the values, to expound them, to see the relationships among values have to be part of the lawyer's task. The task is a heavy one and one searches for points of guidance.

One basic theme--and it is a commonplace which always needs to be kept fresh--is that a political society exists for the good of its members.

The simplicity is, in a complex society and perhaps in any society, deceptive. The members of a society will always have different and competing interests. The constitutional government established in 1789 in this country was designed to mediate these differences and to minimize the corrosive effect of faction upon liberty. The result of the constitutional system of accommodation and compromise, with its division of powers and its theory of popular sovereignty, has not always been a steady progression. Our history is marked by cycles in which the interests of one group--along with the institution of government in which it holds greatest power and the values that favor it--have gained ascendancy for a time only later to decline. The use of the governmental system by one group to "get even" with another is a kind of vindictiveness that has no place in our constitutional system. It is the role of the bar, and of the law, to mediate the effect of these cycles by insisting upon a due regard for the importance of other institutions and for the protection of other fundamental values. This is what the Constitution and the rule of law require.

We are now in a period in which many legal and political institutions have come under intense scrutiny. Coming at a time in which non-governmental social institutions that give us stability have gone into decline, this puts a heavy burden on the law. The burden is in part to support those institutions and in part to reinforce its own strength which inheres in the faith people have in it.

Another theme, which relates to the first, is that a government of law requires some separation of powers. The constitutional doctrine of separation of powers developed out of a healthy skepticism for the effect of power upon the men who hold it. It was Montesquieu's vision. Madison wrote in Federalist 47 that "his meaning. . . can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another, fundamental principles of a free constitution are subverted." In Federalist 51, Madison elucidated the point by reference to the proposed new American Constitution. He wrote that the branches had both independence and interdependence so that "ambition [could] be made to counteract ambition."

Separation of powers is a fundamental principle of a free constitution because without it there is no guarantee of deference to the limitation of government power and protection of individual liberty that the Constitution was established to maintain. From time to time elected representatives may seek to give certain rights greater emphasis than others or to favor certain groups. But if power is divided, this may only be done within the context of the values embodied in the Constitution. Other engines of government are free to check power at its edges, to refer back to the central precepts the society holds, to counteract ambition or malice or a surfeit of good intentions. This is a part of the meaning of the independence of law.

The administration of justice must always be non-partisan. It is often forgotten that separation of powers makes this possible. Though it has become something of a fashion now to think of justice as an arena of power and politics, there is nothing more destructive than the belief that justice is to be used by those in power to reward their friends or punish their enemies. As Laurence Freedman recently put it, "Without faith in authority, the formal law can look like a wheel of fortune for the average man." If faith in the law is shaken, so too is the law's efficacy, since its greatest strength lies in voluntary compliance. Yet despite the fashion of cynicism, I think that the shock we feel so profoundly when we see the law used in a manipulative way for personal or partisan purposes indicates that independence of law is part of our central beliefs as a people. We hold this to be without doubt, that the law must not be made to order for any man or any faction.

The bar has a great responsibility for seeking solutions to our social problems, for mediating the cycles of reaction, for enunciating the values we cherish and approximating them in practice. I need hardly say the law does not exist entirely for lawyers. An attorney can neither properly be solely an advocate of his clients' cause to the exclusion of all other concerns nor completely his own man using his clients to serve his own ends. It is a complicated duty lawyers have; it looks both to the individual client's interests and also to the interests of society, which are the law's. This requires a special

honesty and objectivity. Cicero said that if you couldn't state your opponent's case, you didn't know your own. Beyond that, as every lawyer knows, arguments can be stated in such a way as to mislead or inflame. This is not the road to problem-solving which is at the center of the bar's responsibility.

The law in the United States has been under a severe strain. The bar must attempt to make clear to the public, with an eloquence that suits the importance and subtlety of the matter, the nature and importance of its special role. This need for eloquence and clarity is generally required of us, particularly in this period, to persuade the society of what we know is true: that the law deserves the people's faith and that without this faith the law fails.

The complications of life in our society grow. The rules increase in scope and complexity. Interpretation and explanation of these rules by the bar are required. So too is the willingness to explore hard problems, to find them before they explode upon us, to reach for solutions as part of the science and art of government. Finally, it is essential that the bar hold first to what we have that is good and strong and wise and valuable--not afraid to be alone in asserting that the value abides--for that is what the American vision 200 years ago was about.

These are the many jobs of a law center. They present a glorious opportunity, and it is the good fortune of our society that the bar recognizes it as its special challenge.