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BY

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UNIVERSITY OF MIAMI LAW SCHOOL ALUMNI BREAKFAST

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I join with you this year rather than last for a reason that is still uppermost in all our minds. Against the beauty and eloquence of all that has been expressed, there can be little more to say. But there remains much to feel. I think Mr. Eliot would not mind my suggesting that now, perhaps it is November which is the cruelest month, and it will be thus for many Novembers to come.

This is not so merely because of what President Kennedy gave us of himself, but also because of what he gave us of ourselves. Eighteen months ago, at another university, he said, "Our problems are man-made; therefore they can be solved by man. And man can be as big as he wants. No problem of human destiny is beyond human beings. Man's reason and spirit have often solved the seemingly unsolvable, and we believe we can do it again." His subject that day was peace and disarmament, but the words applied to all the endeavors in which he led us -- and they apply today to the confidence in which we continue to go forward against the increasingly complicated, increasingly impersonal obstacles ahead.

Now we are led by another forceful man who found us united in bereavement and has helped make us united in purpose and progress. With forceful skill, we have gone forward to solve and try to solve our problems, man-made problems, in a spirit which confirms Edmund's dictum in King Lear: "Man must endure his going hence even as his coming hither; ripeness is all."

In the past year -- and indeed in the past four years -- there has been no area in which we have matured more than in the field of civil rights. This was a concern to which President Kennedy was most deeply committed. It is a concern to which President Johnson has devoted the greatest and most effective attention.

These are not considerations that require elaboration, least of all in a law school, and one in a Southern setting. But there is a vastly important aspect of this federal attention which is known less widely and understood hardly at all -- federal restraint and states rights.

There is perhaps no more difficult task in our government than to balance this scale. The debate over state and federal sovereignty vivifies our entire history. To the North, the Civil War was fought over slavery. To most of the South, it was fought over states rights. The current struggle for Negro rights involves striking similar positions -- in all parts of the country.

When we stop to think about the political order which the Constitution created, we must recognize that it was inevitable that our history should be punctuated with such disputes -- about states rights, about the appropriate roles of the federal and state governments, and about the power of the courts to impose limitations on both. The Constitution, after all, spells out a division of authority in terms which are necessarily general. Disagreement about the application of these principles to new situations cannot fail to occur.

But so long as the great majority of the nation agrees to live within the decisions, once they are reached, there is no substantial cause to fear these disputes. Rather, the very heat of the debate helps cast light on the merits of alternative solutions.

The difficult question comes when the debate is concluded, the decision is made, and yet obedience is denied. There are those who believe that states rights can be vindicated only by continued, last-ditch obstruction and resistance to what our legal institutions have framed as the law of the land. That negative view of states rights has the effect of tarnishing the historically and honorable philosophy of states rights. More, as we have seen in recent years, by generating injustice in one part of the country it generates mistrust in other parts.

The result is widespread demand for federal action, federal protection, federal force. And, as Attorney General Kennedy wrote shortly before he resigned this fall, the decision to use federal force against the wishes of a state government and many of a state's citizens "is one of the most difficult decisions that an Attorney General must recommend and that a President must make."

Both President Kennedy and President Johnson have approached that decision with the greatest restraint. There have been numerous demands -- often of the most compassionate sort -- that the federal government use force in local situations. But there were only three occasions on which such force was used -- at Montgomery, Alabama in May, 1961; at Oxford, Mississippi, in September, 1962; and at Tuscaloosa, Alabama, in June, 1963. And we made every possible effort to avoid the necessity for using force even in these instances.

For example, in the case of the University of Mississippi, the use of federal physical force came in stages. First, Attorney General Kennedy and President Kennedy made numerous attempts to persuade Governor Barnett to reverse his efforts to block a court desegregation order. Then, as the result of an agreement with Governor Barnett, a force of federal marshals was brought in. It was only after the failure of local law officers to keep order and after the most bitter rioting that federal troops were sent.

In the case of Tuscaloosa, efforts to dissuade Governor Wallace began three months before Vivian Malone and James Hood entered the University of Alabama. Attorney General Kennedy made a personal visit to the Governor in Montgomery to seek his compliance with the orders of the courts. And these efforts continued, through every possible formal and informal channel, until the last minute.

Surely in this case, and perhaps even at Oxford, federal police action could have been avoided had the two governors performed their most basic constitutional duties and had not proclaimed states rights as a license for disobedience. Surely from these cases it is evident that it is not the federal government, acting with restraint, which has corrupted the relationship of nation and state, but, the state governments, acting -- or not acting -- on legally irresponsible grounds.

These are the familiar instances. But there were a number of similar situations, in which court orders also were at stake. In each of these cases, the federal government made plans to take whatever steps might be necessary as a last resort to secure obedience to law. At the same time, we did everything possible to avoid the necessity for use of federal force. And in each of these other cases, this policy of restraint succeeded; the law was obeyed. Small groups of marshals were available in the event of emergency, but they were never used. No troops were used. The incalculable damage of blatant resistances to law, in the name of states rights, was avoided.

This damage is not limited to the inevitable resentment of a bitter local population when force is used by a reluctant federal government. When the doctrine of states rights is corrupted into mere obstruction, equal damage is done to the respect people in other parts of the country may hold for the whole concept of federalism.

The relationships of state and federal sovereignty in our system are subtle even for lawyers. But how does one explain them to the parents of three civil rights workers murdered on the first day of the Mississippi Summer Project? How does one make it clear to them that law enforcement is at root a state responsibility -- and, indeed, that it should be a state responsibility?

How does one tell a host of deeply troubled Congressmen that the federal government cannot send troops to protect peaceful demonstrators set upon with tear gas, hoses, and police dogs? Or a group of Mississippi Negroes threatened daily with bullets, bombings, and burning crosses?

There is no answer which embraces both compassion and law. And there can be no such answer until the use of the states' rights doctrine once more becomes a philosophy for political action, not an excuse for bigoted obstruction.

I have spoken thus far about the damage caused by a negative view of states rights. I hope I am not over-optimistic in thinking that this view is passing -- that, in large part because of the Civil Rights Act of 1964, this view will not much longer survive. It must not, because while it endures it exacts what might be even greater cost.

This negative view obscures the very great need of states and communities, throughout the country, to adopt a positive view of states rights. For this doctrine can and should mean something positive and productive. And to give the doctrine of states rights that kind of meaning is something which we, as lawyers, can do with particular responsibility and with particular skill.

For example, some of the legal development in the nation in the past decade often thought to most subvert states rights provide, on the contrary, the most dramatic examples of the opportunity to infuse new meaning to the states rights concept. Let me illustrate by citing three of these developments.

The new Civil Rights Act of 1964 deals with a number of areas of discrimination -- education, employment, public facilities, and federal funds. The Act provides some recourse to federal authority in each area.

For example, it has conferred upon the Attorney General authority which he did not have before to bring school desegregation suits; the federal courts now have jurisdiction over discrimination in certain areas of private employment. Yet in practically every case the Act places a staying hand on federal action, to allow states and communities first to try to solve specific problems.

The Supreme Court itself had earlier approached school desegregation in a similar way, by requiring that desegregation be effected only with "all deliberate speed" and by imposing the burden for devising desegregation plans on local school authorities. The Civil Rights Act did not change this method of implementation.

The new act also establishes a Community Relations Service which is available to assist local communities in solving disputes arising out of discrimination. The pattern, thus, is the imposition of a national standard of conduct, with an opportunity for the states themselves to meet that standard without federal intervention.

There is substantial basis for believing that states and communities are willing to take such positive action. A year before enactment of the new Civil Rights Act, we began an effort among representatives of business, the clergy, labor, civic and women's groups and others to encourage voluntary desegregation of public accommodations. But last July 2, when President Johnson signed the new Act, there had been at least <u>some</u> such voluntary desegregation in 70 percent of the cities of the South.

Another development I would like to cite is reapportionment, which is, in recent years, second only to civil rights in lasting social significance. The Supreme Court's activity in the reapportionment area is a model of how inaction at one level of government induces action by another. The Baker v. Carr decision was not a blow at states' rights. Rather, it is a challenge for states to solve their own problems, within the framework of our Constitution.

Baker v. Carr and the subsequent court decisions certainly will produce rearrangements of political power in the states. But again, the rearrangement seems to me to be no threat to the continued vitality of states as organs of government closest to the people and as their most effective representative.

On the contrary, one can expect the release of new energy from reapportionment. It has too often been the failure to act by state legislatures, unresponsive because they are malapportioned, which has resulted in federal programs which could well have been conceived and executed at a state level.

Let me turn to a third field. Many regard the federal tax burden as a threat to the financial responsibility and political independence of the states. True, there has recently been a significant reduction in federal taxation and hopefully more will come. Nevertheless, the problem will stay with us for a long time and it is a serious one. But it is not insoluble. President Johnson recently declared:

> "The national government, as a constructive partner in a creative federalism, should help restore fiscal balance and strengthen state and local governments by making available for their use some part of our great and growing federal tax revenues -- over and above existing aids."

The exact manner in which such a system of federal tax sharing could be most beneficial is now being given detailed consideration in Washington, but I think it is clear that this action could greatly strengthen state and local governments and make them more responsive to the needs of their constituents.

These are some of the areas in which great opportunities for constructive state action exists. There are many others. President Johnson's anti-poverty program is one. Perhaps the most vital section of the new poverty legislation establishes a community action program, involving federal support for efforts designed and carried out at the state and local level. Indeed, the whole war on poverty is a challenge to local leaders to exercise their leadership to help citizens without education, work, or hope, in their own communities.

The goals which we envision for America do not merely include satisfying the material wants of all citizens. We look to a society in which the abilities and aspirations of all can be unharnessed. This can not occur if all significant decisions are made in a capital hundreds or thousands of miles away. Such a society cannot exist unless each citizen does play a role in the making of those decisions. Such participation can only be achieved by preserving the vigor and enlarging the role of the states.

Nor can a Great Society exist when the state and the national government are operating at cross purposes. Common national goals and common national ground rules must exist if we are to remain one nation. Any great nation must inevitably decline and fall unless these national rules and goals are changed and expanded from time to time. We have seen such change and expansion in recent years.

But what has occurred has not enfeebled the states. On the contrary, it has provided the states with new challenges and new opportunities -- if only they are seen, if only they are grasped.

"I believe in democracy," Woodrow Wilson once said, "because it releases the energy of every human being." As Americans, and particularly as lawyers, let that be our text today.