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ADDRESS

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When a leading American University honors its own founders, and the founders of our government, few men can be quoted so appropriately as our first educator-statesman, Thomas Jefferson. In 1816, after founding both a nation and a university he wrote:

"Some men look at constitutions with sanctimonious reverence, and deem them like the Ark of the Covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and labored with it. It deserved well of its country. It was very like the present, but without the experience of the present; and forty years of experience in government is worth a century of bookreading; and this they would say themselves, were they to rise from the dead. I am certainly not an advocate for reckless and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also that laws and constitutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. * * * * One generation is ... as capable as another of taking care of itself, and of ordering its own affairs."

In this spirit let us examine our Constitution as a chart to control administration of our organized society. Our forefathers never expected finally to solve the social and economic problems of their own day, much less those of all days to come, in the 4500 words of the original instrument. The chief purpose was to devise mechanics and to create a form of political organization, so that questions as they arise might always be answered by a peaceful method, and by a democratic process. The ultimate test of the Constitution is not doctrinal, but administrative. Will its machinery be continuously adequate for each generation to develop and apply the policies needful to its own time?

It is notable that while foreign statesmen have often praised our constitutional system they have rarely copied it. Since 1789 many peoples of the old world have readjusted their governments, but not one has taken our Constitution as a model. Following the World War, America, at the height of her prestige was responsible, through peace negotiations, for several new governments in Europe. Not one of them paid our Constitution the tribute of imitation. Even Masaryk, most American of European state makers, shied from our Constitution and its system of administration, in creating a government for his people. Our Presidential-Congressional-Judicial balance is too delicate, and too slow, and they turned to the parliamentary system of England. We may well weigh reasons for this conduct.

It must be admitted that any representative democracy is a relatively complex form of government, demanding much in time and understanding from its citizenry. Ours is particularly intricate due to its strict division into three departments and its equipment with many legal gadgets for checks and balances. It was formed when external pressure was little feared. Powers were granted only with a string tied to them. Legislative power was checked by executive veto--executive power was checked by legislative control of the purse. Presidential power of appointment was over-balanced by Senatorial power of confirmation. The two branches responsive to popular control are now over-ridden by life tenure, appointive judges.

But in addition to this involved system of representative democracy it was necessary to adopt a complicated plan of federation. Federating called for a further set of checks and balances. Populous states and

small ones were balanced in representation; the national legislators were only to represent local constituencies, while the President alone would represent a national constituency. State power was reserved from the federal grant, and the citizen was to look to no one source as responsible for his whole government. Thus when an American looks at his government, as a total operating mechanism, he finds no system of coordination, no method of cooperation and many devices for antagonism. Checks and balances work as effectively on spite, jealously or personal ambition as they do on patriotism or principle.

At times the government has ceased to function as a whole, because of conflict between state and national authority, or because of disagreement between the President and Congress, or because the policy of both President and Congress is cancelled by action of the judiciary. There is no assurance that governmental authority will present a united front against either domestic lawlessness, economic demoralization or even foreign intrigue or aggression. Europeans would fear to have government become a house divided against itself! But our Constitution sets up an unprecedented number of offsetting powers, in differently constituted bodies, designed to prevent quick or decisive action on any controversial policy. To prevent misuse of authority, it dissipates authority.

It is easy to separate sovereignties by monuments, or by landmarks such as rivers or mountain ranges. But we divide state from federal sovereignty by a philosophical boundary, left indefinite by the Constitution and worse confused by judicial decisions. An individual may spend a part of his day in activities subject only to federal sovereignty, an-

other part in duties regulated only by the state, still another in work subject to either or to both, and yet another beyond control of both.

This invisible legal frontier between two distinct and sometimes antagonistic governments, only the technically educated lawyers and judges claim to be able to locate, and they usually fall into violent dispute about it. The individual finds himself with the privileges and responsibilities of two citizenships. To understand the system is, to the average citizen, quite hopeless; yet, this baffled average citizen controls the destiny of democracy.

Our task is to make this complicated, conflicting and confusing machinery work. The most dangerous enemy of our democracy is the complexity of our government.

That we have surmounted the difficulties of such a system is a tribute to our American genius for making complicated machinery work.

Government was simplified when our ancestors quietly and effectively nullified the constitutional indirect method of electing a President, and informally established an unconstitutional, but direct popular election in fact, retaining the electoral college only as a method of registering and counting votes. Thus one of the wrinkles that appears on paper has been ironed out in practice.

Another aid in making our government function was the use of the political party, utterly unauthorized by the Constitution and deplored by its framers. James Bryce regarded the party system as an important contribution to the science of government.

Party rule, whatever its other defects, has supplied the cooperation

between departments nowhere established by the Constitution. It generally provided a tie of common purpose, interest, and philosophy between a majority of the state governments and the federal government; it united Senators, Representatives and the President into a cohesive governing group, and has usually bridged the gap between legislative and executive departments. It has had periods of failure, of course, but loyalty to a party has, more than any other single force, kept our governmental machinery from flying apart, and government from being discredited by petty conflict and inter-departmental dissension.

There has been some disposition to regard the political party as an illegitimate child of government, and to scorn its activities and loyalties. But without the party we have a choice between chaos or personal government. Party politics, though often offensive, is more responsive, more reasonable, more cooperative and probably less corrupt than personal politics.

A break-up into personal followings or into an excess of parties, or blocks, or groups would be almost fatal to stable government. They are usually based upon local, sectional, racial, religious or class appeals. By that fact they entertain little hope of prevailing by themselves, but seek power through combination with other groups. The multiplication of parties does not often make for the better representation of minorities, it usually promotes intrigue and corruption.

Bryce generalized all constitutional history as a ceaseless struggle between centripetal and centrifugal forces. Aristotle detected a cycle from anarchy to tyranny and back again. An eminent Australian points out how a weak and unsteady government leads to dictatorship. Says T. R. Ashworth,

"The ending of the anarchy of the Long Parliament by Cromwell, that of the French Revolution by Napoleon, that of Italy by Mussolini, that of Russia by Lenin, that of Spain by Rivera, are a few of the instances of the alternating phases of centrifugal and centripetal among the moderns". Our own history records a persistent struggle between centralization and diffusion of authority.

But the division in principle between the parties has not been wholly consistent. Each party, when in power, has modified its policies towards political concentration and extension of authority. Though the parties disagree roughly along the lines suggested by Bryce, they tend to exchange principles when they exchange positions. But if party discipline can join separate departments in a common policy, induce antagonistic personalities to cooperate and bind together an otherwise disunited administration, we may well forgive some inconsistency in principle.

Since a party in power tends to emphasize and extend authority, and to project governmental control to new fields, it must guard against burdensome government. Since the party out of power appeals to liberty and to freedom from what it will call "governmental interference," it must remember that the extreme of liberty is anarchy and guard against encouraging defiance of law. Government is likely to be best administered when a balance of power resides in voters not strongly identified with either party, and ready to administer punishments and grant rewards to that party which serves best.

When the people change governing parties it implies some change of policies. Choice of a new leader implies new objectives. The outstanding achievement of our system is in changing governmental control and policy by

elections instead of by violence. It was planned to direct the impact of conflicting social forces to the ballot box instead of to the battle field.

What if a new leadership finds its policies defeated and its promises broken by a hold-over judiciary, still adhering rigidly to the rejected regime? The answer is simple, even if not satisfactory.

Either democracy must surrender to the judges or the judges must yield to democracy. Which should give way, the people or the judges? Here is a pretty controversy that goes back to the origin of our system and is not yet obsolete.

Many men assume that it is a part of our Constitution that the courts shall as Hamilton said, act as a "barrier to the encroachments and oppressions of the representative body." (Federalist No. LXXVIII)

To which those of more democratic temperament answer, "Why should democracy discipline itself to accept decisions, at the polls, if its enemies reject the election and appeal to another forum where the decisions of the polls are reversed?"

Inducement to cooperation through loyalty to a common party has usually operated in reverse as between the judiciary and the executive. Every popular and aggressive President except Washington, who appointed all of his judges, has been in conflict with the judiciary. Jefferson, Jackson, Lincoln and the two Roosevelts each had bitter conflicts with the courts. And in each case the judges, by reason of the life tenure rule, were adherents of the principles, and were usually high in the councils of the rejected and defeated regime. The judiciary is never a contemporary institution. The judiciary is the check of a past generation on the present. It

is here that no extra-constitutional lubricant has been found. The friction caused by judicial review still presents the most vexing problem in making our system function as a whole.

We will no doubt leave to posterity, unimpaired, our inherited controversy over judicial supremacy. It is not a mere conflict of personalities. It roots from the Hamiltonian attempt to set up, within a democracy, a check on democracy. Even if you think it desirable to check the legislative and executive branches when backed by strong majorities, the question remains whether you can check them by the judiciary device, dependent as it is upon the other branches for its maintenance and the enforcement of its decrees. I am convinced that the check on democracy must be found in the reasonableness and self-restraints of popular majorities and not in judicial decisions. Education will protect our rights and our institutions better than litigation.

The architect of the new Supreme Court building has the lighting fixtures in the patio mounted on the backs of turtles. Whether this was a sly symbol that light penetrates to that legal shrine with tortoise speed, I do not know. But there is evidence that judicial response to public needs, even if slow, is certain.

During the year last past the Supreme Court has cleared the way toward improving the functioning of the United States as an operating and cooperating mechanism.

In upholding the Wagner Labor Relations Act the court took a realistic rather than merely legalistic view of interstate commerce.

In the old age benefit case the general welfare clause was so con-

strued as to permit the nation to direct its united resources against evils in our economic and social life. Justice Cardozo laid down these principles:

"Congress may spend money in aid of the 'general welfare.'

"The purge of nation-wide calamity that began in 1929 has taught us many lessons. Not the least is the solidarity of interests that may once have seemed to be divided.

"The hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near.

"The problem is plainly national in area and dimensions. Moreover, laws of the separate states cannot deal with it effectively.

"Only a power that is national can serve the interests of all.

"When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states. So the concept be not arbitrary, the locality must yield."

The most important decisions to the structure of our government were the unemployment compensation decisions. The unemployment plague was described by Mr. Justice Stone:

"The evils of the attendant social and economic wastage permeate the entire social structure. Apart from poverty, or a less extreme impairment of the savings which afford the chief protection to the working class against old age and the hazards of illness, a matter of inestimable consequence to society as a whole, and apart from the loss of purchasing power, the legislature could have concluded that unemployment brings in its wake increase in vagrancy and crimes against property, reduction in the number of marriages, deterioration

of family life, decline in the birth rate, increase in illegitimate births, impairment of the health of the unemployed and their families and malnutrition of their children."

But, proclaimed all the legal theoreticians, it is unconstitutional for the Federal government to take the lead and extend inducement to the state to join in solving this problem. States and nation composed, they said, a system of dual sovereignties. They should be compelled to act without concert, if not actually in antagonism. Counsel urged in their briefs, "If Congress has this power, no longer may a clash of sovereignties ring out."

But the Supreme Court saw no reason for desiring the "clash of sovereignties."

Mr. Justice Stone wrote:

"The United States and the State of Alabama are not alien governments. They coexist within the same territory. Unemployment within it is their common concern. Together the two statutes now before us embody a cooperative legislative effort by state and national governments, for carrying out a public purpose common to both, which neither could fully achieve without the cooperation of the other. The Constitution does not prohibit such cooperation."

Is it not a sad commentary on our legal learning that this statement, which to the layman is so obvious as to be almost a platitude, came to most of the legal profession as a shock, and to all as a landmark in constitutional law?

Chief Justice Hughes has rightly said of the Supreme Court that "far more important to the development of the country than the decision holding acts of Congress to be invalid, have been those in which the authority of Congress has been sustained and adequate national power to meet the necessities of a growing country has been found to exist within constitutional limitations." It is again responding to this philosophy as it did in the

days of Marshall.

Today we may well express gratitude to the founders for our heritage. We may be even more grateful if we have been endowed with the good common sense to preserve it. Institutions of government, like institutions of learning, can not be protected by spendthrift trusts against the improvidence of succeeding generations. Only the forms can be transmitted or conserved, the spirit is perishable and must constantly be renewed. By this process even ancient institutions soon find the level of intelligence, tolerance, honor and justice of those among whom they flourish. We may well remind ourselves that there is not only a past and a present, there is also a future. And we are among its founders. The opportunity to advance our culture and strengthen our social organization was not exhausted or spent by our forefathers. Our Constitution is always in the making for as Woodrow Wilson said, it "is not a mere lawyers document; it is a vehicle of life and its spirit is always the spirit of the age."