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J. Clay Smith Jr.

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REMARKS OF J. CLAY SMITH, JR.
PRESIDENT OF THE FEDERAL BAR ASSOCIATION
before the
PHILADELPHIA CHAPTER ON THE OCCASION
of the
ANNUAL MEETING/LUNCHEON
PHILADELPHIA, PENNSYLVANIA

October 8, 1980

Members of the Bench and Bar of Philadelphia, Pennsylvania, I am delighted to be here this afternoon in my capacity as president of the Federal Bar Association to participate in the annual meeting of the Philadelphia Chapter. I look forward to a productive year as president of the Association, and, on October 1, 1980, when I assumed the presidency of the Association, I embarked on an important voyage of my legal career while in the capacity of a government lawyer. This afternoon I would like to share some thoughts with you in two areas: the needs of government lawyers to understand law and reason and the need to foster creativity in a free society.

LAW AND REASON

The trademark of our democracy is the instrument of rule referred to as the Constitution. This instrument of rule embodies the political values of a people who chose a destiny of a representative government. This instrument continues to stand as a model to the world that this collective republic chooses to be ruled by law administered by men and women -- many who are government lawyers -- who are sensitive to the human needs

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of a free people.

As I speak to you, I am also speaking to myself as a Federal lawyer and to my colleagues throughout the government who are privileged to serve the nation as public servants. For, it is the Federal lawyer, as much as any one in the republic, who must grapple with our instrument of rule. It is the government lawyer who must constantly review the history of this nation so as to understand the thread of its being, the quality of all its citizenry, the meaning of its liberty, and the identity of its values. The decisions of the government always touch people. Hence, our personal vision must not be so shallow, or our personal opinions so inflexible as to disable the capacity to broaden our perceptions and alter our opinions. Such personal reflection by the government lawyer is required to make the constitutional government more effective.

The decisions of government have always been equated to the exercise of power. The persons who debated this issue before the Constitution became our instrument of rule had a uniform distrust for persons who would govern this country. One state legislator believed that "the predominant thirst of power . . . is in the breast of everyone" He believed that the temptations of the government executive, who, I believe, he referred to as "a ruler" would be too great by the "confidence placed in them by this system."

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Even Benjamin Franklin stated that there were two passions which powerfully influence the affairs of men: "Ambition and avarice; the love of power and the love of money." Alexander Hamilton was of the same accord for he stated directly: "Men love power." However, it was Jefferson who touched the root of constitutional rule I strongly believe must be understood by the government lawyer. In Jefferson's first inaugural address on March 4, 1801, he raised the notion that in order for government to cast its will and its power upon its citizens: "To be rightful, must be reasonable."

The relation between law, its application, our obedience thereto and debates on the reasonableness of its application is a topic that all of us as members of a free society must seek to understand. Hence, in any application of the rule of law, the constitutional authority upon which decision-making is reached must be based on notions of reasonableness. Constitutional obedience is therefore a condition for the privileged to serve the nation as a leader as well as to remain on the public rolls as a public servant.

The constitutional security of our nation is inextricably tied to the devotion of the government lawyer to obey the laws. Government lawyers may be the most important people in the democracy because of their power to implement vital policy delegated to them by virtue of the constitutional process. Hence, the words of Professor Harold Laski from his book, Democracy in Crisis echoes the philosophy of Jefferson in the recognition

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that "The roots of law rest in the wills of men." It is for this reason that the separation of powers is the framework of our government; and, the reason why a quest for reasonableness must always be the ultimate concern of government decision-makers. At the center of attention is the rule of law.

The nation prides itself on the fact that it is a nation governed by men and women pursuant to rules of law. But, what is law? What is this process by which and through which we govern and are governed? What is this process that our forepersons conceived; and yet, maintained an abiding fear? Law is power because it is enforced by the will of those who govern. But, what is law? Is law the reasoned result of legislative action? Is law the act of the president within his prerogatives under our instrument of rule? Is law the final order or finding of a court of law? What is law? What is this word upon which this nation stands as a model to the world?

I submit to you that the quest for a definition of law will be an endless search in the annals of jurisprudence. However, this nation and those who govern its people must have some operable rule to assist them in the exercise of their discretion on a day-to-day basis.

I offer the following definition of law to you: Law is the sum total of rules and regulations governing human conduct for which there is state sanction. This definition is one that was given to me during my first year law class at Howard University School of Law by Professor Herbert O. Reid, Sr.

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This definition suggests that there is something existential about law -- and there is. The laws of the land are designed to govern -- not solely for that sake alone, but to manage human conduct. Hence, law and its application are directed to preserve humanity as well as to police those who participate in humanity. Yet, human dignity cannot be preserved or protected unless the law, when violated, provides sanctions against violators, or against those who knowingly refuse to enforce the law. This means that in the final analysis, it is the government and those employed by the government who hold the keys to preserve human dignity through the mechanism of the rule of law.

Now, hopefully, you see why the government lawyer, the government executive and those who work in the decisional area must understand the risks associated with arbitrary decision-making. We run the risk of defacing the rule of law, negating the possibility for human dignity and substituting the sword of arrogance for the shield of reasonableness.

CREATIVITY

Creativity remains the greatest test for the survival of American institutions -- for a nation that loses its capability to be creative in its planning, its management, and in its spirit cannot expect to compete in the World Order. There is something about our history which indicates that the element of creativity is a part of this nation's makeup. We have people in this country who like to "fool around" with junk, and, who

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keep "fooling around" with it attempting to make something out of nothing -- until they do it. We are fortunate to have little people who push and pull at the system attempting to be heard; attempting to be identified; attempting to leap from a state of insignificance to prominence. We have people who believe that a cup of luck, a pint of ability and a quart of faith will enable them to survive when failure, hunger and defeat lurk at every corner. We are fortunate to have educational institutions in which the possibility for free flowing thought and unlocked bookcases permit the student to pierce the sound barriers of the unknown, and trigger multiple concepts by open and frank discussions.

This, and all of this, is necessary to sustain that necessary quantum of creativity which inevitably leads to judgments which affect people and stimulate people to think; to generate new ideals -- even if such ideals appear radical. This republic has, can and has always taken advantage of ideals that once seemed radical. This nation has done so because it cannot fear the creativity of its constituency. Rather, it must seek out creative minds and listen to creative voices. It must cultivate these minds, these voices in order to build and sustain a creative society.

For in the final analysis, the creative society is seeking to find; to identify itself; its people. It is seeking to establish that we are unique; that we can create for the sanctity of human needs, demands, aspirations -- for human dignity.

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The end product of creativity and measured management is productivity. The American people are production-minded. Hence, a frequent question which is asked is: How much can government provide to us at the smallest cost? This is a legitimate question, but is also a complicated question to answer. Our government is in the business of preserving the republic and the liberty of a free people. Therefore, a theorist can say that this nation's goal is to produce more freedom, more liberty. Indeed, this may be argued to be the end product of law. John Locke, in his Second Treatise on Civil Government thought so. Locke said,

The end of law is, not to abolish or restrain, but to preserve and enlarge freedom. For in all the states of created beings capable of laws, where there is no law there is no freedom.

Yet, our nation's survival may also turn on the efficiency of its productivity, the ethics of its government and a clear understanding by the women and men in government of their function as protectors of the instrument of rule, as well as law per se.

CONCLUSION: A QUEST FOR REASONABLENESS

The right of government to rule must be based upon the rule of law applied in a reasonable and creative manner. If we are to succeed as a people, it must be clear to all of us what, we as a people want to preserve under a system of laws. Democracy is a continuous march toward human dignity and the rule of law during which there cannot be any significant pauses or rest stops for breath without subjecting the republic to challenge.

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As government lawyers, as a people - as Professor Laski says in his book, Democracy in Crisis -- We cannot "forget how fragile a thing government is . . . "

We are a government of laws and not of persons, but it is people that make the laws, interpret and apply them. It is people who are obliged to quest for reasonableness so as to preserve human dignity and the rule of law. The imperfect government lawyer is entrusted to preserve this democratic fee.

In closing, I quote from a passage which may be found in a 1937 Senate report during testimony given in response to the "Court Packing Bill" sought by President Franklin Roosevelt. It sums up most of what I have tried to convey to you speaking to you as a government lawyer:

The courts are not perfect, nor are the judges. The Congress is not perfect, nor are senators and representatives. The executive is not perfect /nor are those who advise them on questions of policy/. These branches of government and the office under them are filled by human beings who for the most part strive to live up to the dignity and idealism of a system that was designed to achieve the greatest possible measure of justice and freedom for all the people. We shall destroy the system when we reduce it to the imperfect standards of the men who operate it. We shall strengthen it and ourselves, we shall make justice and liberty for all men more certain when by patience and self-restraint, we maintain it on the high plan on which it was conceived.

Thank you.