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GOVERNMENT UNDER LAW

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IT IS A PRIVILEGE to participate in and to address the 75th Anniversary Dinner of Chicago-Kent College of Law. I am particularly honored by the degree conferred upon me at the special convocation of the College this afternoon.¹

Chicago-Kent College of Law throughout its many years has made notable contributions to the progress of the law and to legal education. Its alumni grace the bench and bar of many states and serve the cause of justice in many communities. I am proud to number among my friends scores of graduates of the College who were my colleagues at the bar during my many years of practice in Chicago. I am happy also to pay tribute to Dean William Zacharias for his academic leadership, his outstanding scholarship, his high character and his dedication to the law.²

Since we honor a law school and its Dean, this is an appropriate occasion to speak about government and law, subjects in

* Associate Justice of the United States Supreme Court. The following address was delivered at a dinner at the Sheraton-Blackstone Hotel, May 8, 1963, honoring William F. Zacharias, Dean of Chicago-Kent College of Law, on the occasion of the school's 75th Anniversary.

¹ The degree of Doctor of Laws (LL.D., Hon.) was conferred upon the Honorable Arthur J. Goldberg, Associate Justice, Supreme Court of the United States, at a special convocation program held at the law school in the afternoon in recognition of Justice Goldberg's work "ceaselessly and devotedly for the upholding of the rule of law in a free society, the protection and preservation of constitutional liberties for all citizens, regardless of race, creed, color, or national origin, as well as the betterment of the lot of the poor and unfortunate," and because Justice Goldberg as "lawyer, soldier, advocate, teacher of law, United States Secretary of Labor, Associate Justice of the Supreme Court of the United States, and, most of all, as citizen, . . . symbolizes by his achievements the American principle of equal opportunity for all."

² Justice Goldberg here makes reference to Dean Zacharias' record of over a quarter century of distinguished teaching and legal scholarship in various capacities at Chicago-Kent College of Law from the time of his earning of the degree of LL.M. at Chicago-Kent in 1933, climaxed by his appointment as dean of the law school in 1959.

which all are concerned. On occasions such as this we generally pay due homage to the fact that we are a government of laws and not of men.

Yet that principle or slogan, if you will, like all sweeping generalizations is not wholly true nor can it ever be even as an ultimate goal. For it is plainly evident that we have always been a government of law and men, and on occasions in our history more of men than of law.

Since the role of man is inescapable in government, it would be better if we were to define our aspirations in terms of government *under* law or, more precisely, democratic government under law for this more nearly defines the aims of that remarkable group of men who wrote our Constitution. The heart of the democratic faith they expressed is government by the consent of the governed—but under law.

Professor Bickel in a recent book³ has properly recognized that this ideal—democratic government under law—pulls in what may be termed two opposed directions. The people are to rule but under law; majority rule is to apply but the rights of minorities are to be respected—the majority is to be checked. The executive, the legislature, the judges, the electorate at large are all to perform their great roles but under the law—no one above it.

I do not have to tell this audience how deep-rooted is this principle of democratic government under law upon which our Western democracies rest. Its full implications were certainly not fully understood by the feudal barons who wrung Magna Carta from King John in 1215. But Sir Winston Churchill was surely right when he said:

The leaders of the barons in 1215 groped in the dim light towards a fundamental principle. Government must henceforward mean something more than the arbitrary rule of any man. And . . . the law must stand even above the King. It was this idea perhaps only half understood that gave unity and force to the barons' opposition and made the Charter which they now demanded imperishable.⁴

On this continent the struggle against the British was essen-

³ Bickel, *The Least Dangerous Branch—The Supreme Court of the Bar of Politics* (1962).

⁴ I Churchill, *History of the English Speaking Peoples* 253 (1956-8).

tially a struggle for a government of laws. Our great documents reflect this, starting with the forerunner of the Declaration of Independence, the Letter to the People of Quebec, approved by Congress on October 26, 1774. The first grand right the Letter says is *representative government*—making people “ruled by laws which they themselves approve, not by edicts of men over whom they have no control.” The next great right is *trial by jury*—the guarantee that life, liberty and property will not be taken without a fair, public trial before a jury from the neighborhood. Then comes the right to *habeas corpus*—the procedure whereby a court can quickly inquire into the legality of a man’s imprisonment. The fourth right is the *free ownership of land*—farm laborers being paid for their work, not rendering service by reason of subservience to some overlord. The last right is *freedom of the press*—in broad terms designed not only for dissemination of political ideas and the criticism of government, but also for the advancement of truth, science, morality and the arts in general. And by this document and the Declaration of Independence and the Constitution, our goal of democratic government under law was proclaimed.

We gather tonight to reflect upon the fundamentals of our society—what we mean by government under law and how we can preserve and perfect it. In part we mean that government should serve our immediate material needs, but also, and more importantly, should preserve fundamental and enduring values. These values include, in the imperishable words, the right to life, liberty and the pursuit of happiness; and what to Mr. Justice Brandeis was the supreme right: “the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”⁵ And foremost in our democratic creed are the rights to speak and to write freely; the right to worship God as one chooses; the sanctity of the conscience; and the dependency of government on the consent of the governed.

We meet today also to remind ourselves that, concerned as we are about ultimate ends, our way of life is equally concerned with method and means. The history of man’s struggle to be free is in large degree a struggle to be free of oppressive procedures—the

⁵ Brandeis and Warren, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

right to be free from test oaths and legislative attainder; the right to trial by jury; the right to confront the accuser face to face; the right to know the charge and to have a fair opportunity to defend. Dr. Johnson aptly told Boswell: "The habeas corpus is the single advantage our government has over that of other countries."⁶

We cannot help note that both the procedure which we offer for the protection of the rights of man and the rights themselves are denied in the Soviet scheme of things and, sadly, in some other countries, both old and new, which profess adherence to the democratic faith. This gives the American ideal great advantages in the world market of ideas—if we will only be true to it.

How true are we to these principles? How truly are we a democratic government under law?

You will, I am sure, recall the circulation a few years ago by a newspaper of a petition incorporating the Bill of Rights and the refusal of most of those solicited to subscribe to the petition. Perhaps this can be explained away by the reluctance of people during that troubled era to become involved by signing anything, but what cannot be explained away is the lack of familiarity by many of those approached with our basic document.

You will recall also the fears expressed by Irving Dilliard, the respected journalist,⁷ that today were the Bill of Rights proposed for ratification it would be rejected. Perhaps this reflected an overstatement, but notwithstanding it is properly a matter of deep concern. But there are other more immediate manifestations of our failure to achieve our goal of government under law—the extent of lawlessness in our society is reflected in our statistics and is an overriding problem in every community.

Tonight is not the occasion to elaborate on this obvious and menacing fact or to analyze in detail the reasons for the ever growing crime rate. But that we are in fact a government of men as well as law lies at the root of the problems. For it is men both in and

⁶ Boswell, *Life of Samuel Johnson* Mod. Lib. Ed. 348 (1791).

⁷ The reference here is to the distinguished writer and lecturer, Irving Dilliard, LL.D., Colby College, 1953, editorial writer and correspondent for the St. Louis Dispatch and the Christian Science Monitor, who is perhaps best known for his biography of Brandeis, *Mr. Justice Brandeis—Great American*, 1941 and his collection of speeches of Justice Learned Hand, *Spirit of Liberty*, 1952.

out of government who have failed to prevent unemployment, to rid the cities of slums, to eradicate illiteracy, to abolish discrimination in education and employment, to provide for proper mental health programs, to deal with school drop-outs, to provide a proper home and family environment, and in countless other ways to help bring about the good society which will be inhospitable to crime and delinquency.

And, of course, as every judge in America knows, we are a government of men and not of law when law enforcement officials do not observe the law. We cannot have respect for the law, if those sworn to uphold it flout or violate it—notwithstanding they do so in the name or under the guise of law enforcement.

And equally we are not true to our fundamental principles when great private groups protected and benefited by our constitutional safeguards fail to recognize that these rights impose obligations basic to the preservation of our democratic society. A recent case in point is the New York newspaper strike. It is not proper in my present office nor am I armed with the facts to appraise the merits of this dispute. But it is appropriate for me to observe that the newspaper industry, and that includes both publishers and unions, enjoy a unique constitutional status—freedom of the press is protected by the First and Fourteenth Amendments from abridgment. And whether it is called a preferred or a fundamental right, or by some other label, a free press is indispensable to the preservation of democracy under law.

Yet if I may say so, I do not believe that either publishers or unions in the newspaper industry fully comprehend the duty implicit in their constitutional right to publish. That duty, which I emphasize, is moral, and not legal, is voluntarily to agree upon means by which they can discharge their necessary function to publish—to be a free press without interruption. I am confident that those means can be found without abridging management's or workers' rights—if both parties approach the task in a spirit of constitutional dedication.

Lawyers will soon be tested as to their fidelity to constitutional principles. Our Court a few weeks ago ruled that the Fourteenth Amendment requires that an indigent charged with crime be

afforded the right of counsel.⁸ This decision has been almost universally acclaimed as a step toward our goal of equal justice under law. I ask you to reflect upon the responsibility which this constitutional principle imposes on the Bar and also to ask yourselves whether the Bar is ready to assume it.

Until both in the federal and state jurisdictions adequate public defender systems are established, the Bar will have to assume what will be a very great burden and it will be a measure of the fidelity of lawyers to the Constitution how they discharge it. Surely, it is not too much to ask of lawyers what doctors have traditionally done, and that is to devote the equivalent of a few hours of their professional day to protecting the legal rights of indigents.

One final word. Judge Learned Hand in eloquent words voiced great doubt as to whether courts could save a society which by preachment and practice did not in its very soul commit itself to the spirit of liberty, and, indeed, whether judicial review did not do more harm than good. You remember what he said:

I do not think that anyone can say what will be left of those (fundamental principles of equity and fair play which our Constitution enshrines); I do not know whether they will serve only as counsels; but this much I think I do know—that a society so riven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes, no court need save; that in a society which evades its responsibility by thrusting upon the courts the nurtures of that spirit, that spirit in the end will perish.⁹

Perhaps because I am a new judge, I do not fully share his skepticism as to the judicial role in our society. I should like to believe and I do believe that by asserting, defining, enunciating, applying, and educating, if you will, judges do play a significant part as pronouncers and guardians of the enduring values of our democracy under law, and that in so doing, judges nurture rather than diminish the spirit of liberty. But I do agree with the thought underlying Judge Hand's statement that abiding dedication to government under law by all—governors and governed—is indispensable to the preservation of liberty.

Tonight in honoring a law school devoted to law and justice, let us rededicate ourselves to "Government Under Law."

⁸ *Douglas v. California*, 372 U.S. 353 (March 1963).

⁹ Judge Learned Hand is well known for his many speeches relating to this same topic, the "spirit of liberty," some of which are recorded by Mr. Irving Dilliard in the aforementioned collection, *supra* note 7.