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Ignatius M. Wilkinson

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# The Lawyer and the Defense of Constitutional Democracy in America

## Cover Page Footnote

Dean, Fordham University, School of Law

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## THE LAWYER AND THE DEFENSE OF CONSTITUTIONAL DEMOCRACY IN AMERICA

IGNATIUS M. WILKINSON†

WHEN your President extended his cordial invitation to me to talk to you this evening, I wondered, frankly, what would be the outcome of my acceptance. I was well aware of the fact that professors—and particularly some law professors—are not entirely in good odor in this country at the present time. But then I reflected that I was not merely a law professor but also a dean, and I had hopes that that might get me by. A dean, you know, has been described as one who does not know enough to be a professor but who knows far too much ever to attempt to be a college president.

But then the further thought struck me that I never could come up either to your President's or your own expectations. You see, he invited me "sight unseen," and I rather surmised therefore that both you and he would look forward to seeing at least a middle-aged and perhaps a be-whiskered jurisconsult who would bore you with his learning and the profundity, at least so far as he was concerned, of his knowledge of law. Well, when I tell you that it is twenty-eight years almost since I was admitted to practice over in New York, and that I have been a teacher of law or at least a member of a law faculty, which is something else again, for twenty-six years, and Dean of the Fordham Law School for the last fifteen, I suppose I shall have to plead guilty to the indictment of being at least middle-aged. But as for the rest of it—the whiskers and the learning—I just knew that I could never fill the bill. In the second place, the choice of a subject was—as it is always for me—a matter of some difficulty. I felt that perhaps I knew some law, but I had the consciousness, which I am sure we all have as we grow older, that what I knew at best was little, in comparison at least with the vastness of the field itself. It was a discerning soul who said that as the diameter of our knowledge increases so also does the circumference of

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† Dean, Fordham University, School of Law.

Address, delivered as the guest speaker at the Annual Dinner following the Annual Meeting of the New Jersey State Bar Association on June 4, 1938 at the Hotel Ambassador, Atlantic City, N. J.

our ignorance. Moreover, I felt sure that whatever law I knew, doubtless many of you individually, and certainly all of you collectively, knew far more law than I ever could hope to master or contain within myself.

Nevertheless the attractiveness of your President's invitation to Atlantic City on a week-end in early June was too persuasive to reject. So I determined to come, and to avoid the difficulty of talking law I thought I might discuss with you the topic "The Lawyer and the Defence of Constitutional Democracy in America." For that constitutional democracy needs defenders in our day, not only in America but elsewhere in the world, is something which I am sure admits of little doubt. Moreover, the fact that we have been celebrating since last fall the sesquicentennial of the completion of the work of the Constitutional Convention of 1787, makes it particularly appropriate that we give some thought to the preservation of its handiwork.

One hundred and fifty years ago last September the Constitutional Convention completed its labors at Philadelphia, and adopted and submitted to the several states for ratification the Constitution of the United States. This immortal document, to be properly understood, must be read in the light of the statement of rights and principles contained in our Declaration of Independence. Chief among these, as Thomas Jefferson set them down, were "that all men are created equal, that they are endowed, by their Creator, with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness, that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

Here we have set forth a sound idea of government and civil authority. Things are put in their right order with first things first. The individual, the citizen, has certain rights *because* he is a human being, rights given him by his Creator, his natural rights in a word, and governments and states exist to protect those rights, deriving their just authority from the consent of the governed. Now if we turn to the Constitution itself, we find that the same thing was in the minds of the founding fathers. For example, its very preamble starts out, "We, the people of the United States" and then it provides that it is intended "to secure the blessings of liberty to ourselves and our posterity." Life, liberty, and the pursuit of happiness were natural rights in the eyes of the founding fathers, and if I may paraphrase St. Paul, the greatest of these was liberty. They had lived under the tyranny of George III and they were determined, come what may, that any government they set up would make impossible a repetition of that tyranny. So we find written into the document which they submitted to the several states for ratification, a most carefully devised system of checks and balances to accomplish this end, the most important of which was the novel provision

for a separation of the powers of government into three great departments, the executive, the legislative, and the judicial. Obviously what the founding fathers sought was not efficiency in government, nor yet security for the individual, desirable at times as these things in themselves may be, but rather liberty under the law for all, and the preservation of the natural rights of the individual as set forth in the Declaration of Independence. Mr. Justice Brandeis<sup>1</sup> puts it very well when he says:

“Checks and balances were established in order that this should be ‘a government of laws and not of men’ . . . . The doctrine of the separation of powers was adopted at the Convention of 1787 not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.”

And then to make assurance doubly sure, we know that shortly after the adoption of the Constitution itself, the first ten amendments, the Bill of Rights, were submitted and adopted, included in which of course was the Tenth Amendment, providing that the powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people. Not only was liberty to be preserved by setting the power of the executive as a check upon the legislature, and that of the judiciary with its clearly implied power to set at naught legislation at variance with the Constitution as a check upon the other two; but this end was to be further achieved by a division of the powers of government as between the national government, to which were granted strictly limited powers, and the several states.

For almost one hundred and fifty years thereafter our nation, protected by the Constitution and with liberty under the law guaranteed for all, grew and prospered to an extent such as has not been seen at any other time perhaps in the history of the world. But just as in 1787 when our Constitution was submitted for ratification to the thirteen original states strung out along the Atlantic seaboard our country faced critical times, so today events which have followed as a necessary aftermath of the cataclysm of world war have brought about conditions which threaten the security and the continuance of constitutional democracy in America.

Abroad, almost wherever we look in the world today, we find the principles upon which this government of ours was founded either challenged or denied. Everywhere, it seems, in Europe and even in the western hemisphere, dictatorship is on the march. In Germany, in Russia, in Italy, to say nothing of Mexico, we find governments which are essentially one-man institutions. All of the powers of government, executive, legislative and judicial, in fact—if not also in theory—are merged

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1. See *Myers v. United States*, 272 U. S. 52, 292 (1926), Brandeis, J., dissenting.

in a single individual, the executive, who governs substantially by decree. If the other departments of government exist at all, they do so only to ratify and approve, or else to enforce the executive's decree. The thought of an independent judiciary, for example, appointed to hold office during good behavior, standing equal and disinterested as between the citizen and his government in any controversy affecting the citizen's rights, is utterly foreign to such a system. Indeed, the citizen is not recognized as having any rights, for at the root of all such systems of government we find applied the principle of the authoritarian or the totalitarian state. The individual is merely a creature of the state, with no rights either of person or property as against the state. His rights therefore are but concessions of and come from the state, instead of as with us, where the rights of the state come by concession or grant of the people who compose that state. Here if you analyze it is the fundamental reason why under all such systems of government sooner or later we find a conflict with and an attempt to destroy religion. Whether it be in Red Russia, where the slogan is that "religion is the opium of the people" and great cathedrals have been stripped of their art and turned into museums for associations of the godless, or Nazi Germany, with the attempt on the part of Rosenberg and others to destroy Christianity and replace it with the old pagan mythology, the result is always the same. If the omnipotent or totalitarian state is to be made the foundation and origin of all rights, then man must have no rights of his own. But to destroy man's rights—his natural rights—his rights set forth in our Declaration of Independence, you must destroy his Creator, the author of these rights. So the omnipotent state, as experience with it in our day abundantly demonstrates, tends logically and necessarily and inevitably to militant atheism.

How did such systems of government come into existence? In every case the fundamental causes were the same. Because of the dislocation of business and the ordinary affairs of life consequent upon the great war, large numbers of their citizens were in want or unemployed or uncertain in their employment. Hence when a leader appeared who promised to remedy all this, they were willing to exchange whatever liberty they had for what they thought was a greater security. So it always happens. In ancient Rome, when the great masses of the people became interested only in bread and the circus, *panem et circenses*, when the Roman citizen became willing to exchange his citizenship and become the slave of rich patrons for the security thus obtained, the republic was at an end and the empire with its tyrannical Caesars replaced it. Inevitably of course a people finds—but usually too late—that when it barter liberty for security, in the last analysis it loses both. For what is called security in some of these countries abroad amounts to nothing

but the obligation to work as directed by the omnipotent state for a bare subsistence in food and clothing and shelter—and sometimes not even that. I am amused at times when some of our “parlor pinks” in this country boast that there is no unemployment in Red Russia. They forget, of course, that exactly the same statement is true of the inmates of your state prison at Trenton or ours at Ossining. But I am sure that neither you nor I, nor the “parlor pinks” who make the boast, would be satisfied with *that* kind of security.

The same forces and conditions, which have tended to the destruction of democracy and the rise of dictatorship and the totalitarian state in other countries have been operative also here. We have had our seven lean years with perhaps a few added for good measure—or bad measure if you will. We have witnessed economic dislocation and the spectre of unemployment affecting the morale of our people. Government—both state and federal—perforce found it necessary to intervene. The dark days of early 1933 cried out for action. And as in any time of great national peril, when democracy is confronted with the emergency of war or natural disaster or as in this instance economic dislocation on a vast scale, the very structure of our government designed to function in normal times for the preservation of liberty by a separation and distribution of the powers of sovereignty was found ill adapted to meet the conditions of the emergency. Hence, as always in such times, we found the Congress delegating—and properly—to the exclusive branch, powers which normally it would reserve to itself. Moreover, we found a natural tendency on the part of the sovereign states to look to Washington for the solution of their pressing problems of want and economic disaster and unemployment. Herein as I see it lies the danger in our situation. What is tolerated or perhaps even necessary in times of emergency, may come to be looked upon by large numbers of our citizens as usual and something which is even desirable, and to be continued as conditions return to normal—as I am perhaps naive enough to believe that they must and will eventually, merely because in the past in similar times they always have.

There is evidence about us which seems to point in that direction. There are those among us who would have us believe that our whole constitutional system is obsolete and not to be tolerated in this modern, streamlined age. Professor Roscoe Pound,<sup>2</sup> the former Dean of the Harvard Law School, recognizes the existence of these groups when he says:

“Also in the United States the realists and on the Continent a type of nationalist consider the idea of a state ruling according to law and not according

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2. POUND, THE FUTURE OF THE COMMON LAW (1937) 19-20.

to will as superstitious or as decadent. They scoff at the idea of a people solemnly covenanting by constitution or bill of rights to hew to announced principles of right and justice and to reason, and striving by continued adherence to judicial construction of their covenant to make it real in their political behavior."

Now if proof were needed of the truth of Pound's assertion, we have it in the statement of a then distinguished professor of law in one of our leading law schools, who in a book recently published and which has had a wide circulation says:

"The language of the Constitution is immaterial, since it represents current myths and folklore rather than rules."<sup>3</sup>

And if further evidence were desirable, the editor of a so-called liberal publication wrote recently in the law journal of the same school:

"To understand the fetishism of the Constitution one would require the detachment of an anthropologist. Every tribe needs its totem and its fetish, and the Constitution is ours."<sup>4</sup>

When we can find those among us who reduce our Constitution to a totem pole and tell us that its language is immaterial because it represents nothing but the myths and folklore current at the time of its adoption, it is time for the rest of us to recognize that we are witnessing a serious attack on the fundamentals of our constitutional system.

Another evidence of a tendency away from our constitutional system with its separation of the powers of government and its adherence to rules and principles, is the rapid growth, particularly of recent years, in the field of administrative law. Administrative law is essentially an extension of the executive power and to the extent that it takes over or encroaches upon the field of the courts or reduces their power of review of its findings, it represents both in state and federal governments a tipping of the balance in favor of the executive and perhaps the legislative departments at the expense of the judiciary.

A common provision in statutes setting up administrative tribunals is, that if the findings of fact of the administrative board be supported by evidence—mind you, not by the weight of evidence—they shall be conclusive when submitted to the courts for judicial review. In other words, a determination of the facts by administrative officers, usually not lawyers, and frequently not following any of the rules of evidence at common law, is given a conclusiveness denied those of a trained judge made in proceedings where the rights of litigants are protected by all of the safeguards of our system of common law procedure.

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3. ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935) 29.

4. Lerner, *Constitution and Court as Symbols* (1937) 46 *YALE L. J.* 1290.



Now my point is not that administrative law and administrative tribunals should be abolished. No lawyer of experience would contend that, of course. In the matter of dealing with public service corporations and the giant aggregations of capital which characterize our age, to say nothing of supervising the intricate relations between capital and labor, they are perhaps essential and serve useful purposes. But it is well to recognize nevertheless that in an over-extension of the administrative process, bound up as it usually is with a procedure which rather glorifies the fact that it is not held down by rules or principles or precedents as are the courts—there is the danger that we shall cease to be a government of laws and shall degenerate rather into a government of men. The Supreme Court of the United States as recently as six weeks ago in reversing an order of the Secretary of Agriculture fixing stockyard marketing rates, based in turn upon conclusions of the Bureau of Animal Industry, had occasion to criticize a proceeding of an administrative tribunal in these respects. Speaking through the Chief Justice of the United States, the Court, with two justices not sitting but only one Justice dissenting, said:

“The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand ‘a fair and open hearing’,—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process.”<sup>5</sup>

And the Court in another part of the opinion remarked:

“Congress, in requiring a ‘full hearing’, had regard to judicial standards,—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature. If in an equity cause, a special master or the trial judge permitted the plaintiff’s attorney to formulate the findings upon the evidence, conferred *ex parte* with the plaintiff’s attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing. The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps.”<sup>6</sup>

Much of the current criticism of some of our newer administrative

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5. See *Morgan v. United States*, 304 U. S. 1, 14 (1938).

6. See *id.* at 19.

bodies, it seems, has its foundation in proceedings by these bodies which occupying the dual status of prosecutor and judge have disregarded the principles which lie at the root of the Chief Justice's criticism.

Now by pointing out these symptoms I do not mean to suggest for a moment that I fear the onset of the ailment cannot be arrested or that the patient is going to succumb to the disease. What I would bring home to you rather is the importance of seeing to it that the proper anti-toxin is administered. And that, my brothers in law of New Jersey, although I speak in medical metaphor, is the particular privilege and duty of the bar. The danger present in our country today is not that the proletariat, if I may borrow a European term, led by some be-whiskered revolutionary, will seize the government, nor yet that a man on horseback will appear and suddenly and violently impose on us a dictatorship of the fascist type. It is rather that while preserving the *forms* of constitutional democracy we shall have the substance sucked out of them and in fact see our great heritage of freedom destroyed by those to whom the Constitution is nothing but a totem pole and its language immaterial because it represents only the myths and folklore of colonial times.

The lawyer by the very nature of his calling is better able than his fellow citizens to appraise this tendency because he is familiar with the principles and the fundamentals of our constitutional system. It must therefore be his particular business to see to it that his fellow citizens are made to understand these fundamentals and when and how they are being attacked. Our bar again must assume and retain the leadership in formulating a sound and enlightened public opinion which it held in the early days of the republic when men like Marshall and Story and Martin and Wirt were not only great advocates, but great publicists as well. To this end our bar associations should pay more attention to the output and content of our legal periodicals and law reviews. It is in these publications that the theories and vagaries which are destructive of our American system of constitutional government as well as of our common law generally first make their appearance. I could take you back over the last dozen years, in some of our leading law reviews published by some of our best schools, and show you articles which in the philosophy of law they expound form a perfect background for, and furnish a complete explanation of, much of the current phenomena in the political field. Standing committees in our bar associations on legal literature would not be amiss. They should be charged with the duty of watching and answering articles of this character. They should keep themselves ready to aid in the preparation of material for the press and where possible for delivery over the radio, taking issue with unsound views there expounded.

The useful function which our bar may perform in such matters is well illustrated in the great Supreme Court controversy of last year, when the issues on both sides were carried to the country in almost every instance by lawyers. If we of the bar will but continue the work there begun I have no fear of the result. The people of our country can be trusted to react soundly once they understand the real nature of the issues before them. We must therefore seek to educate them to grasp better the purposes of our constitutional system in this country. We must help them realize that while our national government is a government of strictly limited powers, there is a vast reserve of governmental power in the several states as yet largely untapped. We must seek to make them understand that by having the two sovereignties, state and federal, work in cooperation and harmony with each other, employing the full sovereign power of the several states in conjunction with the correlative powers granted to the national government, we shall at one and the same time be able to cope with the peculiar economic and social problems of our day within and not without the framework of our Constitution, while we shall avoid so concentrating power either in the national government or any particular branch thereof, as to endanger the precious heritage of liberty and local self-government which it was the purpose of the founding fathers to preserve.

Doing this we shall be but keeping the oath of office which we took on admission to the bar, to preserve and defend the Constitution of the United States, we shall be living up to the best of the classic traditions of the great profession of which we have the honor to be members, while at the same time we shall be rendering the highest kind of service to this great country of ours which commands the love and devotion and the loyalty of us all.