Martin, Arthur Theodore

Convocation Address
Legal Machinery for Democratic Ideals

The ideals of democratic and nondemocratic governments have been placed in vivid contrast by the present world conflict. We had grown accustomed to a civilization which gave at least lip service to the democratic ideals of individual freedom, equality before the law, and objective justice without regard to race or creed. Recently we have been shocked by the functioning of governments which openly challenge and actively repudiate democratic ideals. This has not shaken our belief in those ideals. On the contrary, our belief in them has been intensified by a realistic appreciation of the alternatives offered by dictator governments.

In spite of this widespread concurrence in the ultimate ideals of democracy, very few persons have any real understanding of the process by which those ideals are to be achieved. Democratic ideals will not be realized merely by general belief in them. Ideals require implementation. If the machinery provided is unsuitable, or if it becomes maladjusted, democracy may fail as completely as if it had not been sought. In our democracy the ultimate control of means as well as of ideals is placed in all of us as the electorate. This power to control carries with it an incidental responsibility to control intelligently. This is a responsibility which we cannot pass to any special group such as political scientists, lawyers, or professional politicians. The details can be left to such persons but the electorate must comprehend enough of the fundamentals of the democratic legal machine to give intelligent direction to those who operate it.

Law exists in many forms and comes from many sources. It may be promulgated by a village council or by our national congress; it exists in opinions of justices of the peace as well as in opinions of the United States Supreme
Court. Law of all types must be continuously adapted to the changing needs of a changing society. This adjustment of law to new social needs is not the result of any magical or mechanical process. It is the product of the thinking of those who administer law. All law involves the exercise of discretion. If the discretion is wisely exercised a wholesome adaptation results. Here, as in all other problems involving human judgment, the thinking of the law administrator may be affected by bias, ignorance, or ulterior motives.

The range of discretion which is afforded by a rule of law is clearly apparent when courts reach inconsistent results in applying the same rule. This has occurred in recent years in certain cases involving deed provisions which are intended to prevent the transfer of the land to Negroes. In considering the validity of these provisions the courts have uniformly discussed a rule which is known as the rule against restraints on alienation. This rule developed in England at about the time of the industrial revolution as a specific phase of the general policy in favor of free marketability of things in a commercial society. In 1917 a court in a southern state was asked to pass on the validity of a deed provision which forbade sale of the premises to Negroes. The court said that the restraint was not so substantial as to violate the rule against restraints on alienation. At about the same time a similar case arose before a court in a northern state, and the court said that the provision violated the rule against restraints. Neither court mentioned the number of persons who were within the purview of the provision but census figures show that in the case in the southern state the land was located in a county where more than 60 percent of the people were Negroes. On the other hand in the county in the northern state where the restraint was held excessive and void less than 2 percent of the people were Negroes.
It may well be doubted if any court will find the correct solution to a twentieth century social problem in a rule which had its origin in quite a different environment in the seventeenth century. Certainly the inconsistent results mentioned in the foregoing illustration could not be dictated by the one rule which was invoked in both cases. The rule itself is probably consistent with the objectives of a commercial democracy. The result of the application of the rule in specific cases should be appraised against a similar standard of democratic objectives. Democracy is not advanced when undemocratic results are reached in the name of democratic rules.

It is particularly important that laws which set the pattern of our government be administered with considered effort to secure effective correlation between particular decisions and the broad objectives which our government is to serve. Any legal pattern of government which will continue to be usable must be sufficiently flexible to fit changing social conditions. The relative permanence of constitutional provisions requires them to be broader and more flexible than ordinary rules of law, and this flexibility affords a wider range of discretion to those who are called upon to interpret and administer governmental powers.

In seeking to establish "a government of laws and not of men" the founders of our government were not trying to escape from the flexibility which is characteristic of law. In their unhappy experience as British colonists they became familiar with the tyranny which is apt to result from an unrepresentative government and from the concentration of power in one individual. They regarded such a government as one of men. They wished to create a government in which the powers of those who governed would be limited by laws which were
subject to the control of the people themselves. Personal liberties and individual property rights were to be protected from arbitrary destruction. The basic device used to secure these objectives was a constitution which set out a pattern of government consistent with those objectives.

There have been remarkably few formal changes in the federal constitution. The first ten amendments constituting the Bill of Rights, were adopted in 1791 and are commonly regarded as part of the original constitution. Of the remaining eleven amendments the average person would regard only six as now affecting the substantive structure of government. These six include the three slavery amendments, an authorization to levy income taxes, provision for direct election of United States senators, and the women’s suffrage amendment. These six amendments are the only formal changes which we have needed to make in one hundred and fifty years in order to adapt our constitution to the needs of our changing society. During that same period we have had many significant inventions; we discovered and developed tremendous natural resources; our national income increased from about two-thirds of a billion dollars to approximately 74 billion; our population increased from about 4 million to about 130 million; our population changed from one primarily rural to one primarily urban; we changed from a nation of economically self-sufficient persons to a nation of persons heavily interdependent economically. The structure of our federal government has been adapted to these great social changes largely by a process of interpretation by those who are our government administrators.

The process of correct interpretation has been made very much more difficult and complicated by the social and economic changes which have taken place in recent years. When our federal constitution was framed, protection
against political tyranny was the thought uppermost in the minds of those who drafted it. Comparatively little attention was given to social and economic regulation. The commerce clause which is found in Article I, section eight of the federal constitution giving Congress power to "regulate commerce among the several states" was thought of as merely a grant of power to Congress to control state tariffs and similar discriminations. In 1887 with the development of interstate railroads that clause was interpreted as a source of power for federal regulation of rates and other phases of railroad activity. The Interstate Commerce Act was only the beginning of a great amount of regulatory legislation which was enacted and sustained in response to a widespread belief that such legislation was essential to a proper functioning of our society. The Sherman Anti-Trust Laws regulating monopolies, Fair Trade legislation administered by the Federal Trade Commission, legislation regulating telegraph, telephone, and radio communications, Food and Drug Statutes, The Securities Exchange Act and the National Labor Relations Act are a few illustrations of modern regulatory legislation which rest on the provision in the constitution of 1787 providing that "Congress shall have power to regulate commerce among the several states."

Some persons think that we do not have as much federal social legislation as is desirable. They point with particular regret to the holding of the Supreme Court that under the commerce clause Congress has no power to control child labor. Other persons think that we already have too much federal control of economic and social affairs. No one supposes, however, that it is possible to have the advantages of our modern industrial system without more regulation than we had in the comparatively simple social structure of the
early nineteenth century. While opinions will naturally vary as to the desirability of particular acts, the basic problem which confronts us is one of retaining traditional political ideals and at the same time securing the necessary economic control.

In recent years in our efforts to solve this problem, we have adopted an administrative device which has involved a relaxation of one of the traditional democratic safeguards. The new device is the administrative agency and the traditional safeguard which has been relaxed is the doctrine of separation of powers. This doctrine prescribes that laws should be enacted by one branch of government, construed by a second, and executed by a third. This tripartite division of powers requires the coordinated action of independent departments of government in the process of enforcing laws against recalcitrant individuals. Although the process is a slow one, it offers substantial protection against encroachments on individual freedom and individual property rights. Tyranny cannot prosper in a system in which all laws are framed by one independent body, interpreted by a second and executed by a third. Unfortunately a cumbersome system of this type is not effective in meeting the need for rapid, detailed, adjustment of regulations of a complicated economic structure.

The need for some modification of our traditional pattern of governmental powers was first felt during the great commercial, industrial development of the late nineteenth century. Thousands of farmers and business men were economically dependent on railroad transportation, and yet the railroads were free to set their charges as they saw fit and to discriminate between shippers according to their own convenience. Many persons sought governmental protect-
ion against the abuse of this economic power. An ordinary act of Congress would not solve the problem. Effective regulation required a large number of specific rules based on elaborate and technical information. Once promul-
gated the rules would require frequent prompt interpretation by persons thoroughly conversant with the railroad business; and the execution or admin-
istration of those rules would require a similar staff of experts. In 1887
in order to meet this need Congress enacted legislation establishing the Interstate Commerce Commission. In its legislation Congress merely outlined the general functions of the commission; the enactment of the myriad of specific rules as well as the primary responsibility for the interpretation and administration of the rules was left to the Commission. By this act, legislative, executive, and judicial discretion were reposed in a single agency of government in order to secure adequate efficiency in dealing with an economic problem.

With the continued growth in complexity of our social and economic society during the past fifty years we have increased our use of the administrative agency until there are now more than one hundred of them in our federal government. This development has not been confined to newly created bodies. Traditional departments such as Treasury and Labor are no longer mere executive offices with small advisory staffs. Each of these departments is organized into numerous divisions, many of which are in reality administrative agencies, as, for example the Wages and Hours division of the department of Labor. It has been estimated that the total number of cases decided in a single year in all the federal courts combined is approximately 20,000. In contrast it is reported that the department of Treasury alone has handled more than 600,000
cases in a similar period. The administrative agency has become the dominant element in the operation of our government.

In our extensive use of administrative agencies we have not completely abandoned the doctrine of separation of powers but we have greatly modified its effectiveness as a safeguard against undue concentration of power. This is not a result which has been consciously sought. It is a by-product of the adaptation of our governmental machinery to modern economic and social problems. This is an adaptation which has been necessary to afford the efficiency in regulation which the electorate has demanded. We must not let our eagerness for efficiency jeopardize individual liberties and individual property rights. The preservation of these values distinguishes a democracy from a government which is merely efficient.

Limited discretion in our law administrators was a part of our democratic machinery at its inception. We have widened that discretion and increased the functions of government to a point where the realization of democratic ideals is vitally dependent on the soundness of the judgments of our thousands of public officials. This is the government which we have shaped, and our responsibility as citizens does not end with tacit assent to new laws and new devices. By increasing the powers and discretion of our government officials we have increased our own task of securing well trained public servants who are earnestly striving for the preservation of democratic values. This is not a duty which can be completely discharged by perfunctory casting of a ballot at periodic elections. We have a continuing responsibility to make sure that elective and appointive officials are properly trained and intelligently selected. This means that our active concern with government
must start with the education of those who become legislators, department administrators, lawyers, judges and other government officials. We must insist that our educational institutions maintain the highest standards of professional competence. These standards of professional competence must include an appreciation of social and governmental problems as well as an understanding of professional rules and facility in professional skills. It is also our responsibility to see to it that qualified persons are chosen for public office. To this end we must study the qualifications of candidates for elective office; we must take an active part in politics in order to make sure that competent persons are nominated. Through various group organizations we must find means of exerting effective, intelligent direction over the appointment of the thousands of non elective officers. Under our present structure of government if we fail to achieve our democratic ideals it will be because we have left too much to others and have not done enough ourselves.

Democracy is not an abstract formula. It is a way of thinking and a way of living for each of us. It presupposes a personal belief by each of us in representative government, in the validity of the theories of freedom of speech and other personal liberties. Belief in these ideals must be accompanied by active participation in the governmental process in order to secure their realization. We freely concede that democracy is worth fighting for. We must recognize that it is also worth working for, continuously, undramatically, realistically. Only by active, intelligent participation by the people can there be a realization of our ideal of a government for the people.