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## UA45/6 Commencement Address

John Palmore

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COMMENCEMENT ADDRESS

Western Kentucky State University

August 1, 1975

John S. Palmore, Judge, Court  
of Appeals of Kentucky

One of the great philosophers of my profession, the late Mr. Justice Oliver Wendell Holmes, remarked that a longing for certainty and for repose dwells in every human mind, but that "certainty generally is illusion, and repose is not the destiny of man." "No concrete proposition," he said, "is self-evident, no matter how ready we may be to accept it."<sup>1</sup> And as the years pass by I find myself drawn to the conclusion expressed by an American poet whose identity I cannot recall but whose words I cannot forget, that nothing really is certain but change.

We have almost a fatal predilection in this country to regard the great men who drew up our constitutions, federal and state, as more infallible, more far-sighted, than any generation of human beings ever has been or is likely to be in the future. These men gave us not only great and lasting principles of liberty

<sup>1</sup>Holmes, The Path of the Law, 10 Harvard Law Review 457 (1897).

and justice, but also certain mechanical processes and institutions of government. The principles have endured rather well, but the institutions are badly in need of repair. We do our founding fathers an injustice when we attribute to their work a perfection of which no men are capable, an endurance that is impossible.

Of all the things we have in this country, aside from life itself, the most valuable is our liberty, the freedom to govern our own affairs as we see fit, subject only to the constitutional protections guaranteed to individuals and minorities. For some time now this freedom has been eroding away, and for no reason whatever except that we as a people simply have not appreciated the extent to which changes in our way of life have made familiar institutions and processes of government obsolete and have revealed some of their fundamental weaknesses. We do not have the time today to explore the subject in depth, but let me touch lightly on a few prominent examples.

Take a look at the Congress of the United States, 100 Senators and 435 Representatives. In 1789, when the Union was formed, life was much different from what it is today. Both transportation and communication were slow, and for that reason the various communities in the country were relatively isolated

and provincial. Sectional viewpoints differed far more than they do in this day of radio, television, and air travel. On matters of governmental concern the day-to-day needs and viewpoints of each part of the country could best be ascertained through the physical presence of representatives from each particular district. That is not true today.

One change is represented by the scientific public opinion poll, a device that was unknown until recent times. In major election contests these polls are indispensable. They enable the candidates to tell the public exactly what they know in advance the public wants to hear. Instead of hearing what the candidate thinks, we really hear what we ourselves think. As someone has expressed it, the men of principle so admired by DeTocqueville have been replaced by public relations experts.

Do we, in this setting, need 535 representatives in Washington? Can we, in fact, afford the luxury?

In fiscal year 1974 the cost of Congress was \$623 million. For 1975 it is estimated at \$741 million. For 1976 it is projected at \$879 million. That is \$1.6 million each for 535 people. What return do we derive from this expensive array of manpower? Well, in 1950, a quarter-century ago, the public debt was \$257 billion. Today it is estimated to be \$533 billion. In 25 years it has doubled. The interest alone comes to about

\$33 billion this year. We have heard clever economists say that this gargantuan debt is not so bad because, after all, we owe it to ourselves. If that is so, perhaps we should just cancel it out and stop paying all that interest. It is of no comfort that the people who collect it live in this country rather than Europe or Asia. The significant point to me is that I am on the paying end of the process and not on the collecting end. I suggest that virtually every one of you is in the same position.

Aside from this dismal financial performance, we witness today one of the most colossal spectacles of mass ineptitude on the part of a deliberative body in the history of mankind. Here is a Congress that is neither willing to let the president run the country nor able to run the country itself. If you owned a village grocery store, would you dare entrust its management to Congress— or, for that matter, to the state legislature? If not, then how can we expect them to manage successfully the much greater affairs of government?

A few days ago one of the well-known pollsters reported on the radio that over a fairly brief period of time confidence in state government had dropped from 44% to 16%, and in Congress from 42% to 13%. I thought I heard him add that garbage collectors

rank rather high in public confidence. (That was just prior to the sanitation-employees' strike in New York.) Anyway, the point is that these figures reflect a public awakening to the fact that the job is not being done as it ought to be done.

These comments are not intended to cast aspersion on the individual men and women who make up the Congress. Some, and perhaps most of them, are highly talented people. The problem is deeper than that. A major source of the trouble is the size and structure of the institution itself. It was not designed for the 20th century.

It is most probable that even more of the difficulty inheres in the nature of any representative organization, and was there from the beginning. A legislative body composed of only three people would turn out legislation that the majority of the people in the country do not want. A, in order to get B's support for his bill, would support B's bill, even though he would be against it otherwise. The result would be the passage of B's bill though both A and C, being two-thirds of the whole body, would have been against it on the merits. That is a simple textbook illustration of how so much legislation that does not have the support of a majority of the people becomes law anyway. For a concrete example, I refer you to the

\$500 million Garrison Diversion Project in North Dakota. We are ruled by ad hoc combinations of minority interests, in a country in which government by the will of the majority is the backbone of its Constitution. That, I submit to you, is wrong.

Government by swap, or log-rolling, is aggravated and compounded by the number of individuals involved and by the amounts of money expended by the government. This is another great change that has taken place in government— the demand for and expenditure of amounts of money beyond the dreams of our forefathers. (May they rest in peace, but I cannot see how.) Each man trades his own votes to get in return what he needs for his own district in order to maintain popular approval, more commonly referred to as re-election. Failure to gain re-election being a fate worse than death, naturally it is too high a price to pay for the good of the country as a whole.

These are not the ideas of an irresponsible cynic. Just a few days ago I happened to read an extract from the 1973 Wincott Memorial Lecture, delivered by Professor F. A. Hayek (who shared the 1974 Nobel Prize for economics) at the Royal Society of Arts in London. After speaking of the threat

to liberty posed by inflation, he went on to discuss the threat to liberty posed by the virtually unlimited power of legislative bodies. Here, he said, the very power of a legislature makes it a prey to the special interests which want that power used to their particular advantages. While the mass of people may prefer free enterprise as against government control, most of the groups within the mass wish exceptions to be made in their favor. Hence "the ruling party would not retain a majority if it did not buy the support of particular groups by the promise of special advantages. This means in practice that even a statesman wholly devoted to the common interest of all the citizens will be under the necessity of satisfying special interests, because only thus will he be able to retain the support of a majority which he needs to achieve what is really important to him."

"The root of the evil is thus the unlimited power of the legislature in modern democracies, a power which the majority will be constantly forced to use in a manner that most of its members may not desire. What we call the will of the majority is thus really an artefact of the existing institutions, and particularly of the omnipotence of the sovereign legislature, which by the mechanics of the political



process will be driven to do things that most of its members do not really want, simply because there are no formal limits to its powers."<sup>2</sup>

So really, it can be said that the passage of time since the day of our founding fathers has revealed a basic flaw in the legislative institution by which government was to carry out the principles of liberty. As Oscar Wilde once said that in undertaking to create man in His image, God may have overestimated His own ability, our forefathers seem to have overestimated the capacity of man to put others before himself. It was too much to expect of human nature that individual public servants actually would sacrifice their own interests for the good of the whole people. But when we look at our representatives, we behold only our own faces, as in a mirror. It will be different only if we force it to be different. The mirror is quite impersonal.

We must not be afraid to question our institutions—even our holiest tenets and principles. If they are really sound they will stand the test, and emerge all the stronger. But where

<sup>2</sup>F. A. Hayek, Economic Freedom and Representative Government, reprinted in Law and Liberty, Vol. 2, No. 1, Summer 1975 (pub. by Institute for Humane Studies, Inc., Menlo Park, California.).

they are unsound, and not fitted to the exigencies of the day, they simply must be changed, and we must learn to trust and put to practical use the instrument of constitutional amendment. I suggest we might begin with reducing the size of Congress, limiting drastically the purposes for which it can appropriate money, and eliminating the immense burden of nonlegislative activities in which its members are forced to engage in order to please their constituents. But no structural improvement can succeed unless we as individual citizens face up to the hard reality that to be a Kentuckian first and an American second, or a Democrat first and an American second, is to be no American at all. As I say, the mirror is quite impersonal.

But enough, for the moment, of the infirmities of legislative performance. We have been equally remiss in neglecting to keep local government in fit condition to cope with the necessities of change.

For historic and practical reasons the staple source of revenue to finance the operation of local government has been the property tax. Real estate cannot be hidden and it is not easily moved away. Wherever or whoever the owner may be, there it is, and it can be seized and sold. Thus it has been a safe and enduring source of taxation. Moreover, there was a time, in

the early days of America, when the right to vote was restricted to the owners of real estate, which meant that those who paid the taxes were compensated by the privilege of controlling their local governments. All that has changed, and I think that today the property tax is the most universally detested tax since the day of the Boston Tea Party. At a national Governor's conference a month or so ago the chairman suggested that property taxes be abolished. That is a fine idea, but first let us consider how we are going to finance local government without it.

Under the Constitution of Kentucky city and county governments are limited to property taxes and license taxes on business. In 1891 that was enough, but today government is more expensive and more services are being demanded of it. The town marshal has been succeeded by a police force. The policeman no longer walks a beat. He rides an expensive piece of depreciating machinery. Dirt streets and cobblestones have given way to asphalt and concrete. The outdoor privy has been replaced by elaborate sewer and sewage disposal systems, the well and cistern by water purification and distribution systems. Lucky is the city that owns a power plant, and can use its electric rates to augment its failing tax revenues. But most

of them are not so fortunate.

With reckless abandon the legislature tells cities what work schedules they shall have and how much they must pay their firemen. What they do not tell them, however, is where they are going to get the money to do it.

Into this squeeze falls another new ingredient, collective bargaining by public employes. From the standpoint of equity and justice, why not? As a matter of fact, if employes of private business can strike, why should not public employes have that same right? Some day, I predict, it will come, willy-nilly. But where will the money come from?

Federal and state governments have pre-empted the income tax, the sales tax, and gasoline taxes. Only the occupational license tax (which in fact is another form of income tax) remains as a lucrative new source of local finance unless, perhaps, the legislature should see fit to leave a share of locally-collected sales taxes at home.

For the administrations that have succumbed to the pressures of politics and permitted their cities to reach a state of bankruptcy I have no pity and even less respect. If they could not stand up to do what was right they should not have accepted public office. Their loss would have been for the public good.

That this condition is taking hold of the entire

country, like some creeping paralysis or Lou Gehrig's disease, finds proof in one of the most incredible developments in American history. I refer to "revenue-sharing." I shall never forget Mayor Alioto's poignant cry, "Don't take it away—just leave some of it here!"

Can you imagine a government already more than \$500 billion in debt and running an annual deficit of some \$33 or \$34 billion sharing its revenues with every local government in America? Believe me, if I did not know better I would suspect that the first thing a new member of Congress does when he arrives at Washington is to visit some convenient opium den.

Stated simply, our cities are being strangled to death, and it is not beyond possibility that in the end they will just have to give up their separate corporate franchises and let central government take over. That would be tragic. It would be the end of home rule, and the end of liberty as we know it. Yet that is precisely what the opium of revenue-sharing has begun to do indirectly. With federal money comes federal control. No one understands that proposition better than do those who bear the responsibility of administering the affairs of this great university. With government grants come government regulations, government paperwork, government inspectors, government supervision,

and finally the death of any kind of individual enterprise. Once the yoke of federal bureaucracy is accepted, this country as a free society is dead. A king or a dictator can be found and deposed, but finding and deposing an entrenched bureaucracy will be like running a footrace in a bed of quicksand.

One of the ancient Greeks observed that taxation is the price of civilization. There is no way to avoid it if we are to have the advantages of civilization, foremost of which is the freedom of the people to govern their own affairs. If we do not pay for those advantages on a pay-as-you-go basis we will enslave our children. When a man consumes that which he has paid for with borrowed money, money he knows his children will have to repay, and without their consent, he steals from them. Have we not already stolen enough from our future generations?

Some states have sought to finance their governments with public lotteries. Not only has this proved to be something of a snare and a delusion from a financial standpoint, but it is morally unworthy as well. The costs of all gambling ventures are borne by the losers. Are these the people who have the moral responsibility for the support of government? The very question

tells the answer.

My time is running out, both here and at large. Most of you are of another generation. My concern is not for myself, but for you. In some respects I am proud of my generation. You may ask if they were brave. Ah, yes. They were brave. They were the men who stormed the beaches of Normandy and raised the flag on Suribachi. Did they love their country? Yes. They did not hesitate to answer her call— without fear and without question. But what price the glory if we let liberty go down the drain? I am ashamed that my generation seems to have had more courage than sense.

Another great philosopher of the legal profession (sharing that mantle with Holmes), the late Mr. Justice Benjamin Nathan Cardozo, observed that the future may judge us less leniently than we choose to judge ourselves. It is to his poetic pen also that we owe this closing thought: "The inn that shelters for the night is not the journey's end. The law, like the traveler, must be ready for the morrow."<sup>3</sup> You are the travelers who must be ready. For the sake of our grandchildren, please be awake.

<sup>3</sup> Benjamin Nathan Cardozo, The Growth of the Law, Yale University Press, 1923 (reprinted in Selected Writings of Benjamin Nathan Cardozo, Fallon Publications, New York, 1947).