"O'Er the Ramparts We Watched"

ADDRESS OF

J. STROM THURMOND
GOVERNOR OF SOUTH CAROLINA

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J. Strom Thurmond
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We are now witnessing a carefully organized campaign to have the federal government usurp jurisdiction in a manner which strikes at the very roots of our dual system of government. Politicians, more interested in bloc votes than the welfare of their country, are advocating a program which, if enacted, will end state sovereignty and local self-government, and will bring the individual citizens of this country under a measure of federal control not only not contemplated in the Constitution, but intended by that document to be forever impossible.

If the federal government takes from the states the right to hold their own elections to choose their federal officials; if the federal government takes over from the state and local authorities the police power; if the federal government usurps the functions of the State courts, and if the federal government assumes the right to control intrastate as well as interstate business and industry, and to tell employers whom they can and cannot employ, then our state capitols and county courthouses may as well close their doors.

Unless we reverse the trend toward centralization of power in Washington, our people are not only going to lose their economic freedom, but they are going to lose their individual freedom. God forbid that such a day should ever befall America.

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“And, as any survive who have had experience of oligarchi-
cal supremacy and domination, they regard their present con-
stitution as a blessing, and hold equality and freedom of the
utmost value. But, as soon as a new generation has arisen, and
the democracy has descended to their children’s children, long
association weakens their value for equality and freedom, and
some seek to become more powerful than the ordinary citizen.

And Polybius continues:

“When, in their senseless mania for reputation, they have
made the populace ready and greedy to receive bribes, the
virtue of the democracy is destroyed, and it is transformed
into a government of violence and the strong hand. For the
mob, habituated to feed at the expense of others, and to have
its hope of livelihood in the property of its neighbors, as soon
as it has got a leader sufficiently ambitious and daring . . .
produces a reign of mere violence. Then come tumultuous as-
semblies, massacres, banishments, re-divisions of land; until,
after losing trace of civilization, it has once more found a mas-
ter and a despot.”

We have barely entered upon the cycle of Polybius, but we
may well wonder whether we have arrived at that point when
“the children’s children” are losing their respect for equality
and freedom. We may well recall the words of Daniel Webster,
“God grants liberty only to those who love it, and will always
guard and defend it.”

The natural character of man is incompatible with the re-
straints of a collectivistic society. Unfortunately, in a world
shaken by the cataclysm of global war and its destruction,
the fear of insecurity has assailed our people as never before
in our history. It is this fear which prompts the individual to
lean upon governmental authority. We are afraid, and we
turn willingly to the nearest source of apparent strength, too
often those who utter the most beguiling promises.

The world is full of fear today. Economic chaos in Europe,
the threat of atomic warfare, the spread of alien philosophies
—all these things contribute to a widespread psychology of
insecurity.
What so many of us apparently have not learned is that submission to the conception of the “welfare state” is the poorest possible way to fulfill any desire for security.

Real and lasting security comes through a system of government which permits the greatest development of individual initiative. A system which encourages its citizens to rely on government for security, rather than their own individual enterprise, encourages a nation of weaklings. And a nation of weaklings has never survived.

There are, of course, many fields in which government can and should operate to provide improved living conditions, health, and security for unfortunate citizens. But nothing could be more un-American and more devastating to a strong and virile nation than to encourage its citizens to expect government to provide security from the cradle to the grave.

The United States is the noblest example of the system of individual initiative and free enterprise. Consider, as proof, the fact that we are today the leading hope of salvation to many millions in Europe who are victims of the theory that government should provide everything.

When Americans understand what is involved in a “welfare state,” they will resist with indignation when asked to toss their system of government aside, in order to adopt a way of life which has never, throughout all history, brought anything but regimentation to man, and the ultimate destruction of his freedom as an individual. We must not, however, be so deluded as to believe that we shall pass this crisis safely, unless every one of us who still retains his sense of proportion takes part actively and affirmatively in the defense of our heritage. The time for “viewing with alarm” has passed. The hour for action is at hand. As the Honorable James F. Byrnes recently cautioned, we must be on guard to prevent forces in Washington from leading us down the road to statism.

The challenge, by its very nature, is of the utmost significance to the members of the American Bar. As lawyers, we more readily perceive the stealthy march of precedent.

In the best tradition of our profession, we are charged with the duty of watching over the ramparts of liberty.

What are the ramparts of liberty of the American people?
Thomas Jefferson, the author of the Declaration of Independence, gave us the answer in 1811, when he wrote:

"The true barriers of liberty in this country are our State Governments."

The existence and strength of the sovereignty of the several States of the Union, within our federal system, were thus likened by the Sage of Monticello to the barriers in the Paris streets, which shielded the French people in their fight for individual liberty, and against the tyranny of a totalitarian state.

It is significant that the sovereignty of the several states was regarded as so important to the individual liberty of our people, that it was safeguarded and assured in the first 10 Amendments to the United States Constitution which have been rightly called the Bill of Rights of the American people.

After guaranteeing freedom of worship and the separation of church and state, freedom of speech, the right of peaceable assembly, the security of the home, the right of trial by jury, and other fundamental rights of free men, the Bill of Rights concluded with the declaration that the powers not delegated to the national government, nor prohibited to the states, are expressly reserved to the states respectively, or to the people.

The rights of the States under the Constitution, interpreted in accordance with the accepted canons of constitutional construction, are just as fixed as the boundaries or land lines of a farm. The federal government cannot cross these lines without trespassing on the rights of the States, and hence of the people. A farmer or landowner who permits trespassing, and does not protect his land lines, soon loses his property. A people who permit government to trespass on their liberties soon lose them.

The freedom we hold dear was not achieved by accident. It is primarily the result of the development of practical legal machinery, under an independent judiciary, permitting every man to have his day in court and his rights adjudicated. The contribution of the legal profession to this system represents centuries of struggle against the processes of autocracy. As lawyers, we have every reason to be proud of the rôle our profession has played throughout history in the preservation of freedom.
The Declaration of Independence, and the Constitution that followed, comprised a unique development in man’s effort to govern himself. But the philosophy from which these documents were derived was by no means new. It was the end product of the orderly evolution, principally among English-speaking peoples, of a democratic system. Correspondingly, the philosophy of authoritarianism which opposes it, is also not new. It had dominated many governments, and regimented many millions of people, before the phrase “taxation without representation” stirred America into action.

The heritage of individual liberty which we enjoy is in the English tradition, while that of the authoritarian state is Roman. Our tradition includes a judiciary which limits officialdom and safeguards individual interests. Conversely, those states founded on the Roman administrative system have subordinated the judiciary to a bureaucratic legal procedure, placing the demands of officialdom above those of the individual.

The history of Continental Europe demonstrates that wherever the judiciary has been made inferior to the legislator or the executive, individual freedom has been nullified. One of the great achievements of the founding fathers of our Republic was the creation of an independent judiciary—separate, distinct, and on an equal plane with the legislative and administrative functions.

They did so with full knowledge of purpose. They had been subject to the despotic rule of the absentee George III, whose tyranny violated the English democratic tradition. They were aware of the significance of the development in England, as early as the 12th century, of a system of jury trial. They recognized that, once trial by jury was established, the freedom of the English fluctuated as various kings manipulated the judiciary. Their revolt against George III, therefore, was not against English law and tradition, but against its violation.

These patriots, too, had studied the dangers of the Roman system, remembering that the downfall of the Roman republic began when the people, lazy from the blessings of freedom, had yielded their rights to that master politician, Julius Caesar. They recalled that one dictator after another followed Caesar, until the constitution of the Roman republic was a mere page in history.
One may trace the inspirations of the Americans of the 18th century to the teachings of Cicero, who was a disciple of Aristotle, and who made Greek philosophy accessible to the Romans. The Ciceronian theories of liberty were revived by the Italians in Florence 15 centuries after his death. From there they spread to Oxford University, to Thomas Moore and John Milton, and across the Atlantic to the American students of the 18th century, in New England and Virginia. As Thomas Jefferson pointed out, the Declaration of Independence was not really new, but was based on "the elementary books of public right, as Aristole, Cicero, Locke, Sidney, etc."

Jefferson and his contemporaries were not crackpots mouthing stray theories developed in the heat of the moment out of agitated minds. They were sincere, careful students of history, who were sensitive to the implications of the long and torturous process by which mankind, from his earliest days, had struggled for freedom. Their best thought was the fruit of generations of bloody struggle.

I think it well to point out, too, that they were dominated by the Christian tradition of morality. The concepts to which they held were closely identified with the Christian ideals of respect for human life, the worth of the individual, and a sense of personal responsibility. To put it one way, these Christian concepts represented the purpose, and the Ciceronian tradition represented the means, of democracy.

Thus we may be deeply proud that our heritage is the culmination of the highest and best intellectual and moral effort man has ever exerted in the field of government. This is our answer to those who contend that we are hidebound by an 18th century creed which is outworn and outmoded today.

The early Americans were sensible to the danger that their descendants would grow lax and begin to surrender their God-given rights of representative government, civil and religious freedom, and free enterprise. As a safeguard, they created a constitutional government with sufficient checks and balances to prevent the centralization of power and the usurpation of liberties. They provided two great levels of government—the national and the state—which were prohibited from encroaching one upon the other. They placed the center of power as close as possible to the people by reserving certain functions
to the states, where they originally rested, and by denying them to the central government. Thus they recognized that the people may more easily control their local and state governments, whereas they find it difficult to influence a distant authority.

It was never the intent of the Philadelphia convention of 1787 to confer arbitrary power upon a national government. Little attention was paid to the demand of Hamilton that an all-powerful central government be created, of which the states would be mere departments. Instead, it was the desire of the framers of the Constitution to set up an authority which would have power to act only in instances in which the state legislatures were unable to act.

As Jefferson said: “An elective despotism was not the government we fought for, but one which should not only be founded on free principles, but in which the powers of the government be so divided and balanced among several bodies, that no one could transcend their legal limits without being effectually checked and restrained by the others.”

And Madison called it a novel conception in which two kinds of government would operate, “at one and the same time upon the same individuals, harmonious with each other, with each supreme in its sphere.”

Thus a dual sovereignty system was provided, designed to protect the majority against itself as well as against the usurpation of its rights, and to protect the rights of the minority as against the majority.

But it is well to remember that dual sovereignty was designed not merely to divide authority, but to reserve all power with the people, where it belongs. As the 19th Amendment says: “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—(and here I like to interpolate the words ‘that is to say’)—to the people.”

The question of States’ Rights, therefore, is not mere rhetoric. It is in fact the device by which the people retain an important part of their power of self-government and therewith their individual liberties. It is the people’s guarantee of sovereignty, without which the development of an autocr-
racy is inevitable. The relationship of the states to the national government under our federal system is, as Woodrow Wilson said, "the cardinal question of our constitutional system." And Wilson added that this question "cannot be settled by the opinion of any one generation, because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question."

The framers of the Constitution contemplated that changing conditions might dictate the need for occasional revisions of or additions to the Constitution. They anticipated such a need with a provision for amendment. To guard against unconstitutional legislation, passed without submission to the people, final authority on constitutional questions was vested in an independent Supreme Court.

The great tradition of the Supreme Court has been, as Senator William E. Borah once said, that it has "remembered the Constitution, and thrown its shield about all who sought its protection."

Jefferson in 1825 questioned whether the Supreme Court had always adhered to this tradition, when he said:

"I see ... with the deepest affliction, the rapid strides with which the federal branch of our government is advancing towards the usurpation of all the rights reserved to the States, and the consolidation in itself of all powers, foreign and domestic; and that, too, by constructions which, if legitimate, leaves no limits to their power. It is but too evident that the three ruling branches (of the federal government) are in combination to strip their colleagues, the State authorities, of the powers reserved by them."

Last year retired Associate Justice Roberts, speaking as president of the Pennsylvania State Bar Association, referred to the general welfare clause and the interstate commerce clause as the "loopholes through which the federal invasion has poured into the domain of the States," and suggested a constitutional amendment defining the general welfare legislation proper for Congress, and what is a permissible federal regulation of interstate commerce. He added:

"We should at least discover whether there is a sentiment to preserve, protect, and foster State jurisdiction and State
power; or whether our people prefer something more nearly approaching alien systems, wherein the States are mere administrative districts of a central government."

The stream of articles and speeches on this question has reached torrential proportions. Constitutional authorities of importance have said that the Court no longer interprets the 10th Amendment in the traditional sense.

The issue of the current tendencies of the Supreme Court has a direct bearing on the question of the swiftness with which we are drifting toward socialism. For basically the question is one of legal polity. One must remember that the two opposing political forces represent the struggle between the supremacy of the independent judiciary and that of an administrative bureaucracy. The issue which lawyers must face, therefore, is whether continental influences of autocracy have invaded our system of judicial review of administrative action. This is a serious question which cannot be ignored by the conscientious lawyer today.

A few years ago Dean Roscoe Pound had the following to say on this subject:

"Today, ideas of public law imported from Continental Europe are being taught and urged against our American legal constitutional polity. We are being told that a constitutional democracy is a contradiction in terms. We are told that the bill of rights is founded on 18th century philosophical ideas of natural rights which the world has outgrown. We are told that the separation of powers and consequent high position of the judiciary in our polity is not more than 18th century political fashion, based on a mistaken notion of Montesquieu as to the British constitution of his time. In the rise of political absolutism throughout the world, we, too, show signs of becoming infected."

As an indication of the infection, we may ponder the words of an Associate Justice of the Supreme Court to the effect that judicial review of administrative action is a "mischievous abstraction."

If our judicial review system is a "mischievous abstraction," then democracy may prove to be but a myth and a delusion, and our republic a whitecap on the sea of history.
Such statements are best considered in the light of the immense body of rules and regulations promulgated by federal departments and bureaus, with the force of law but discoverable in no statute book, and enforced, not in a court of law, but before the very bureaus which made the rules. We may well ask whether such bureaus do not thereby become legislator, judge, and executive all rolled into one, in direct conflict with our juridical system.

Man’s most uplifting achievements have always been generated by the struggle of the individual to improve himself. This conflict is a natural expression of the deepest traits of character. It has produced all the great works of art, all the great inventions, and all the economic means by which the comforts of life are distributed to the greatest numbers of men. The struggle for individual excellence is a manifestation of the fundamental religious nature of man, which causes him to yearn for the loftiest spiritual values.

Man’s most successful efforts to recognize the upward struggle of the individual, and to give it full play in society, are to be found in the United States Constitution and the form of government it has produced.

On the other hand, the nature of collectivism is to sublimate individual thought and action. It tends to quench the spark which prompts men to seek individual excellence. It is a restricting force, a restraint upon the natural qualities of man.

More than a century ago, Count de Tocqueville contrasted democracy and socialism in the following words: “Democracy extends the sphere of individual freedom, socialism restricts it. Democracy attaches all possible value to each man, socialism makes each man an agent. Democracy and socialism have nothing in common except one word—equality. But notice the difference—while democracy seeks equality in liberty, socialism seeks equality in restraint.”

The conflict in America today is one of individualism versus collectivism, which is basically one of the nature of man himself; equality of liberty versus equality of restraint. Is man’s best intellectual and moral power to be found in individual effort? Or is he, like most animals, best adapted to running in the herd and blindly following the leader?
It goes without saying that the United States has been the world's finest example of the value of faith in individual freedom of action. The very act by which our country was created was one of belief in democratic freedom and individual initiative. As Woodrow Wilson once put it, "America was created in order that every man should have the same chance as every other man, to exercise mastery over his own fortune."

I have said that the members of the American bar have a primary responsibility in this crisis, because the problem is basically one of legal polity. The ways and means of meeting this challenge are of immediate concern to every one of us.

I think our best efforts in this direction may perhaps be made by means of a militant advocacy of constitutional democracy, through and by education. By that I mean not merely advocacy of democratic principles in the public schools, but in all possible educational processes.

Americans need to know the historical background of our noble traditions. They need to know how and why freedom for the individual is impossible under socialism. They must know where the road to socialism leads in the end. And, finally, they must know and be able to recognize the danger signals as they appear on the national scene.

We must bring Americans into closer communion with our ideals. To do so, we must first arm ourselves with a thorough knowledge of our subject. Thus equipped, we must become individual fighting advocates of the democratic way.

We must speak on the subject as often as possible, in private as well as in public. Through the press, on the radio, in the homes, the churches, and the schools, we must make our advocacy a compelling and eloquent voice. We must utilize the very spirit of individual action which is at the core of our democracy, and we must make that spirit work again, as it has so many times at the hour of crisis.

Let us remember our glorious heritage, citing the deathless words that have preserved it for us. Let us take courage as Washington did, when he replied to General Howe's assertion that the American cause was lost:

General Washington replied, "For myself, I'd have died within if I'd surrendered. The spirit of liberty moves over
earth like flame, and finds fresh home when the old’s burned out. It stands over this, my country, in this dark year, and is a pillar of fire to show us an uncouth clan, a dream that men shall walk upright, masterless, doff a hat to none, and choose their gods.”

So said Washington. And in this hour, his “flame of liberty” is spreading still.

Let us, like Washington, watch “o’er the ramparts,” and let us keep our beloved country forever “the land of the free.”