Legal Profession in the Post War World

John W. Yeager

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THE LEGAL PROFESSION IN THE POST WAR WORLD

TODAY we are thinking of the future. When one addresses his thinking to the future, if it be constructive rather than idly ruminative, such thinking partakes of the speculative, the prophetic and the formulation of plans for the solution of problems which through retrospection and the course of contemporaneous experience and observation are going to require solution.

In discussing the subject of the legal profession in the era which is to follow the present war it shall be my purpose, so far as possible, to avoid the speculative and prophetic and limit myself to the known experience of the ages and of contemporaneous events and to attempt to present what I think will be the supreme challenge to the legal profession in the post war world.

For the purpose of this discussion I shall arbitrarily, for convenience and understanding, refer to the past decade or two and the present as the contemporary period.

I am repeating, but with a purpose, what every one here knows, when I say that the wisdom of the founding fathers gave us a Constitution, and a government designed to fit into the outline and framework of that Constitution. That
Constitution contemplated change and within its provisions provided the mechanics for change. The government thereunder organized has had an unbroken existence from that beginning down to the present time. True, there have been changes in the Constitution and conformable changes in the government and its organization. Forty-eight states are banded together agreeable to the form, substance and ideals of that Constitution.

Throughout all of the period since the adoption of the Constitution, except for temporary lapses usually in periods of war when lapses were considered by some necessary and by others at least expedient in the interest of national safety and security, our national government has quite jealously and zealously operated within its letter and spirit. I depart now from this subject to return later.

In the beginning the governmental establishment was divided into three departments, each in a sense independent of the others yet interlocking and interdependent for the accomplishment of the primary, the governmental purpose. They were the Executive, the Legislative, and the Judicial.

Little needs to be said about their varying functions except that the executive department was charged with the duties of executing the powers contemplated by the Constitution, executing the laws enacted by the legislative within the powers of this same Constitution and carrying into effect the judgments and decrees of the judicial. The legislative department was to enact needful legislation within the constitutional structure. The judicial department was to interpret the constitutional provisions, the legislative enactments and to ascertain and determine personal and property rights arising within the purview of this governmental organization and establishment and to enter judgments and decrees in accordance with such determinations.

Pertinent here is the inquiry: Where is the power of government under our Constitution? The answer is not difficult.
It is in the executive department, solely and exclusively there. The legislative may make laws but is without power to enforce them. The judicial may interpret the Constitution, laws and rights, and render decrees and judgments but is without any power of enforcement.

I have never quite comprehended the picture of "blind justice" but if some artist conceived and put on canvas "dumb justice" I think I should comprehend it fully. The significance of this is that the judicial department of government, in so far as the interpretation of the Constitution, of laws, and the determination and declaration of rights are concerned, must remain dumb, no matter how great the need, unless and until petitioned into action. Yes, the judicial department of government is entirely destitute of any semblance of initiative in the exalted duties it is called upon to perform and likewise destitute of any power to make effective its interpretations, determinations and decisions.

Of this lack of power there is no complaint. With unqualified sincerity it may be said that the judicial department of government has had little just cause for complaint against the executive department on account of failure to execute its processes. In truth the highest and finest tribute and compliment that could be paid to the genius of our governmental plan and organization is the fact that so rarely has the executive failed to respond to the demands of the legislative and judicial with the necessary power to carry into effect enacted laws and solemnly pronounced edicts and judgments.

I call attention to the destitution of power in the judicial department of government for the purpose of pointing to what to my mind will present the greatest challenge to the legal profession in the era which is to follow the war.

As a preliminary to what shall follow I want to make clear that I do not think for a moment that all virtue, all zeal, and all understanding resides in any one department of govern-
ment. It would be a sad commentary and I do not believe that this nation could have survived or can survive without a paramount integrity and understanding in all of its departments; but the highest integrity, be it personal or collective, or departmental, if you will, may and often does go astray and engage in excesses in the absence of check or counterbalance.

Under our constitutional system of government there are many checks and balances but under this system the last check, the final balance, is the judicial department of government. From the beginning there have been some who have not been in accord with this viewpoint but traditionally now and constitutionally, I think, we are thus committed. I should not like the day to come for departure therefrom.

In the light of history and the course of events, that this final check and balance imposed by our Constitution, or by tradition if you desire, is the final bulwark of constitutional government, can no longer be well denied. To it, when other men and departments have departed from rightful precepts and constitutional processes, a last appeal and petition remains. After that there is nothing. Not often has that petition and appeal been in vain. Not always, however, has the department been called upon to function in accordance with its purpose and design, and I think it not lese majeste to say that on occasion it has not functioned soundly or constitutionally. Also in instances other departments in a failure to comprehend, or desire to encroach, have usurped certain of the functions of the judicial department.

I am convinced that, in part because of a failure to recognize the proper function of the judicial department, in part with a recognition of it and a design to evade it, in part under seemingly necessitous situations justifying a departure from constitutional inhibition and directive, and in part under a real necessity growing out of war, at least in the contemporary period, there has been an encroachment upon the department and a departure from its available functions in a
degree which challenges the attention of not only the lawyer but of every person who cherishes the substance of our constitutional government and desires its perpetuity.

The motive behind the departure is not greatly important except to the degree it may control the effort necessary in a return to constitutional processes.

That there have been set up, at least in the contemporary period, organizations of far reaching importance having no sanction except executive directive or fiat cannot well be denied.

There have been set up in the same period a large number of organizations or boards by the executive by authority of the legislative or its acquiescence which the vast majority of the legal profession believe sincerely are without the framework of the Constitution. As to some of them, I think, there can be no doubt of their lack of constitutional background or functioning.

It would serve no useful purpose to name any such organizations here but I have in my possession an incomplete list of more than a hundred organizations bearing alphabetical appellations a perusal of which would at least cast doubt upon the question of whether or not some of them have authority to perform any constitutional function.

In this war period, as in all war periods, there have been departures from constitutional processes. Some of them can be justified on the ground of necessity. In fact I am willing to go so far as to say that defense of our country not only excuses but justifies measures not contemplated by constitutional processes. Necessity in time of war may transcend constitutional contemplation, even inhibition. The powers thus usurped, however, should be abandoned on the removal of such emergencies.

It makes little difference whether excess powers have been usurped and exercised on the basis of temporary necessity, mistaken right, or wilful inclination to transcend inhibition,
when you come to consider a return to proper bounds. Power once exercised is not easily taken away and the broader the aspect of the exercise of such power the greater becomes the difficulty in bringing it to an end.

We pass for the moment further consideration of the kind and type of usurpations to which attention has been called but in passing if we were to admit that all of the organizations I have in mind have had a proper source and are engaged in the execution of permissible constitutional processes and functions, still there remains just cause for complaint and alarm.

In the extension of the processes of not an insignificant number of the agencies and organizations created in the contemporary period a step has been taken which I hold without hesitation or equivocation is definitely sinister, unconstitutional and is threatening the very foundations of free government and the rights of people and property thereunder. I hold that due process of law is the backbone and last bulwark of free, of constitutional government, as we as Americans know it, and that with its loss or destruction chaos instead of order eventually is bound to obtain.

The extended process to which I have reference is the tribunal set up within the executive department of government for the settlement of controversies relating to the rights of persons and of property.

It is well known that today, with regard to quite a large number of industrial relationships affecting millions of workers and capital running into billions of dollars in value, there have been set up legislatively agencies which are operating within the executive department of government for the composition of disputes and difficulties, the findings upon fact of which have the force and finality of a judgment at law or decree in equity.

Lest I be misunderstood I want to say here that I do not condemn the setting up of administrative boards or tribunals
the purpose of which is to bring about accord and agreement in controversies, large and small. It is the power to make findings which carry such conclusiveness and finality that the judicial department of government is ousted of its function and parties thereby are denied the due process of law guaranteed by the Constitution that I denounce and abjure.

It may be objected that my thesis in this connection is baseless since provision is made for review by the courts. In answer I assert that, notwithstanding the right of review provided, the findings on fact of many of these boards and agencies have the force and finality of a judgment at law or decree in equity amounting to denial of due process of law.

In review of the decisions of such tribunals the courts are not permitted to weigh the facts. On review if the findings are supported by any facts the court is bound to accept them as conclusive. The facts in opposition may have overwhelming weight, yet they must be disregarded by the court on review.

It may be urged that this is no obstacle in the path of due process of law since in the judicial department of government with regard to certain types of litigation the reviewing court on the facts looks only to see if the findings are supported by some evidence.

The fallacy of such argument is not hard to find.

I think that no lawyer will disagree with the proposition that in order that due process of law may be afforded there must be an opportunity to litigate in all its phases a controversy in a court having jurisdiction of the controversy. That means that the right must exist whereby a litigant may submit his facts for determination in the light of the applicable legal principles. A lawsuit is not in essence a determination of legal principles but is basically a factual controversy submitted for decision. In the absence of the right to a factual determination within the judicial department of government there can be no due process of law.
The appellate procedure within the judicial department provided by constitution or statute is a process of law but it does not pertain to due process within the meaning of the Constitution. When there may be a determination of the facts and law in the court of original jurisdiction the constitutional requirement with reference to due process is satisfied. Without this opportunity there, or on appeal, there is no due process. Ordinarily appellate procedure in the courts is unrelated to due process. Ordinarily it is only a superimposition upon the court where due process is afforded. It becomes the court wherein due process is afforded only when there for the first time all questions of law and of fact may be inquired into. It is not objectionable thereafter that no review of the facts may be had on appeal or error, but, as stated before, if there is no place for hearing in a court for an entire examination of the controversy there is not due process of law.

Those who do not look with disfavor on a departure from a rigid adherence to constitutional principle but recognize the departure say in this wise: Well, what of it? What difference does it make? Are there not those in the executive department or the industries and groups involved as capable of making these decisions as those in the judicial department. The answers to the first two questions will pervade the ensuing statements. As a specific answer to the third, I am not prepared to say no, and if I answer yes, I must do so with a number of "ifs."

The first "if" is, are the members of the agency likely to be biased? The second is, do they have sufficient background of training? The third is, do they have a personal or community interest in the result? The fourth, to whom or what are they responsible in the rendition of a decision? Fifth, does their tenure depend upon a particular or peculiar response in the rendition of a decision? Sixth, would they likely be influenced by current political trend and philosophy?
Certainly, to say the least, in bilateral agencies, that is boards made up of partisans, of which there are a number, if the disagreement is truly controversial, no member is likely to decide against the interest he represents. Also, it is well known from observation and experience that an executive, having adopted a particular political philosophy which embraces a particular program or programs, does not appoint to its agencies men who are unwilling to render service conformable to that philosophy. Likewise, too often positions of prominence are filled by the politically active rather than those who have become competent by training and experience.

Constitutional departure, in the light of experience, is fraught with the gravest of dangers to our system of government. This is particularly true if the departure is an encroachment of the executive or legislative department or both upon the judicial. Jealousy of the judicial department on account of the encroachment is not the motive for the complaint voiced here.

The foundational principle upon which our judicial system is based was that in order that justice might be insured controversies, large and small, must be submitted in surroundings and under conditions free from bias and prejudice and removed from the influence connected with interest. In matters of state it was recognized that there ought to be a forum wherein there could be a check upon Congress, and the executive department, even to its highest member. For this purpose an impartial judiciary was designed. It was thought that this was necessary insurance against excesses and a guaranty that constitutional processes would be adhered to.

The wisdom of the founding fathers in this connection cannot well be denied. I think no one will contend that government can or will be safe if its chief leader by himself or through his subordinate shall be the sole judge of the con-
stitutionality of his administrative and executive acts. That would be dictatorship and not constitutional government.

It is not that judges are more wise than presidents or governors or lawmakers that the constitutional power and prerogative of the judiciary should be preserved, but that constitutional processes shall be preserved in order that our children and our children's children may enjoy the benefits of a free society.

The force of this may not be countered by the contention, no matter how well founded, that on occasion in the courts justice has gone astray or that some men filling judicial positions have been found unworthy. The results of such situations must be deplored but these do not militate against the wisdom and ultimate efficacy of the system. Correction may be accomplished in this by time and the vigilance of the citizens.

Having called attention to what I believe in time will present one of the greatest crises in American government, I think the time has come when remedial measures should be considered. I do not believe that much can be done before the war is ended except to plan. In the plan and program which I have to suggest I am convinced that the legal profession must carry the largest share of the burden.

The executive department is not likely to surrender voluntarily many of the unconstitutional functions it has by its own initiative arrogated to itself. The legislative may attempt to take away some of them but negative legislation of such character would be of only a small measure of value. The legislative may take away some or all of its delegated unconstitutional power but a continuance of functioning in some degree is inevitable unless restraint is imposed.

For a return to governmental functioning within the constitutional framework other than by voluntary surrender by the executive and by repeal or restrictive legislation by the legislative, resort must be had to the judicial department and persuasive influence.
I shall not be surprised if you inquire, in the light of what has been said concerning the lack of the power of the judicial department to initiate action, how it is possible to accomplish the end suggested.

The answer and the degree of the answer must be found in the response of the lawyer to the demand in this and a few other respects. Two of the other respects shall be mentioned first.

The lawyer who, with a conviction that there ought to be a return to constitutional government, when he finds himself engaged by the executive in, or finds himself in contact with, situations constituting departures from constitutional processes must use his persuasive influence in an effort to bring about abandonment thereof.

When he finds himself a member of the lawmaking body his voice and his vote must ever be in support of movement toward return of constitutional government. The exercise of persuasive influence should be recognized as a duty of every citizen whether or not he be a lawyer.

When he alone as a lawyer may function in the retention and restoration of constitutional government, is in the courts, in the bringing of action and defense of action wherein processes are subjected to constitutional scrutiny and examination. In the law colleges of the country when he finds himself a teacher he must be prepared to instill in the minds of his students true understanding. In his social and professional engagements he must seek to fortify men and women in the fundamental principles which we as lawyers know have made us great in the family of nations. First and last he must keep active his dedication by citizenship and oath to the protection and defense of the Constitution. This is no small task but if our institutions are to continue and future generations are to retain democratic freedom he must not, he dare not fail.
One other situation hereinbefore referred to calls for attention and to it I address a few closing words. I refer to the excesses over and beyond constitutional processes in time of war, excesses of necessity which have not been condemned.

Provision should be made, to the extent that foresight will allow, which will take such necessitous situations out of the category of usurpation of power and constitutional violation in case we shall ever become engaged in another war.

One result of this would be that power limited to and exercisable under an emergency would automatically lapse with the expiration of the emergency and no effort would be called for in order to bring about a return to otherwise constitutional processes. That this would be worth while can hardly be doubted. To say the least it would relieve against uncertainty and indecision and hasten a return to normal conditions following war.

Other benefits of this would be multitudinous, not the least of which would be confidence in the integrity and honesty of those empowered to govern, a thing which has been so lamentably absent during the period of preparation for and engagement in war. The lack of a clear, constitutional definition of war power has been, as every one who reads must know, the cause of volumes of crimination and recrimination, much of it unjustified when analyzed in the light of the necessities of war. It has made of war a football of partisan politics to a degree that I doubt not that because of it the war effort has been sadly impeded. The shame for this must fall upon those in all parties who have sought to use the war for partisan political gain.

The provision should be a constitutional amendment declaring the war powers of the executive and of the legislative
departments of government. The effort in this respect calls for leadership, and where can better leadership be found than in the legal profession?

The problems of the lawyer will be multitudinous and in many respects different in the post war period from those with which he was confronted before the war, but in my humble opinion these outlined here present his greatest challenge.

John W. Yeager.