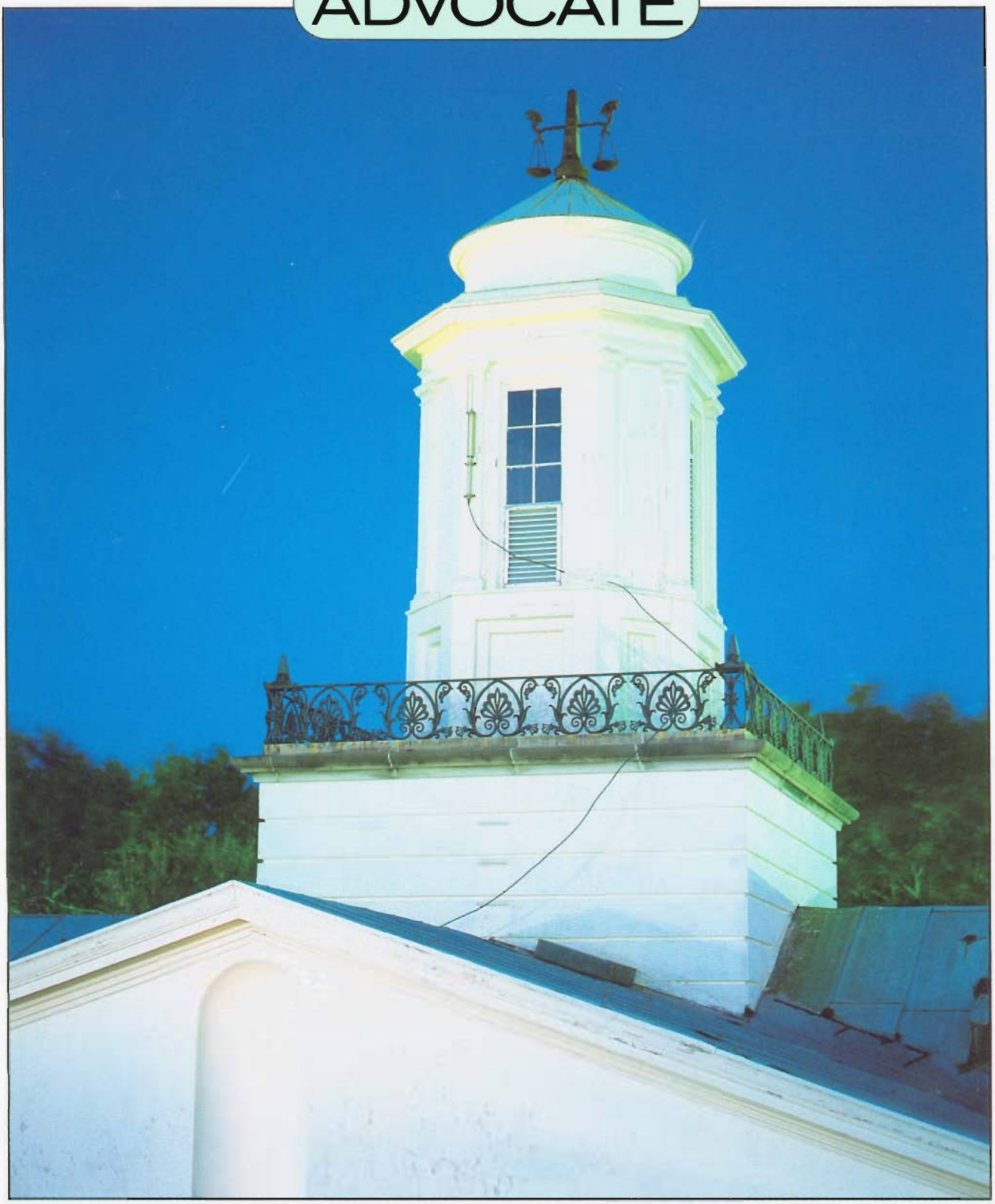
GEORGIA ADVOCATE



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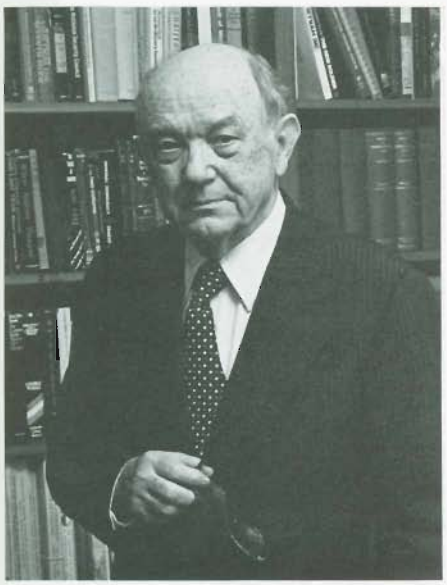
Creativity and The Law

Rusk at Commencement '86



Former United States Secretary of State Dean Rusk joined the Georgia law faculty in 1970 as Samuel H. Sibley Professor of Law. On May 17 he delivered the following address to the 1986 graduates of the School of Law and others assembled on historic North Campus for commencement exercises. In introducing his remarks he said, "When I was studying law at Berkeley before World War II, it was my fondest hope to become a professor of international law, and after a thirty-year detour, I finally made it."

When we think of creativity and invention, our minds usually turn to the artists, the scientists and those who are working in the fields of technology. Usually overlooked is the extraordinary creativity of the law over the centuries which has contributed so much to the well being of mankind throughout the world.

At the moment I cannot think of a so-called law in the natural sciences which is as old as the simple legal idea *pacta servanda sunt*—agreements are to be kept—a notion which is at least as old as the wheel. Over the years, law and the lawyers have fashioned the institutions and procedures by which, among other things, we settle our differences among ourselves, usually by peaceful means, and we can bring to bear to the service of mankind the great contributions of science and technology. One thinks of the law merchant, one thinks of the great codes of Hammurabi and the Books of Moses, of Justinian and Napoleon, a process which has such a strong influence upon all legal systems including our own. We think of the procedures by which we have powerful means for mobilizing capital, such things as the joint stock companies, we now call corporations, and other procedures. Because without those contributions of law, much of the benefit of science and technology perhaps would have been lost to the human race.

Along the way we learned that the profit motive is a powerful dynamo in driving a free enterprise economy. But in this past century or so we have also learned that that profit motive can become that overwhelming greed which can destroy the capitalist system itself. Beginning with President Theodore Roosevelt's trust-busting campaign, we have had to devise ways and means of protecting capitalism from capitalists through such things as antitrust, the Federal Reserve System, the Federal Deposit Insurance Corporation, the Food and Drug Administration, the regulation of certain monopolies, usually public utilities, and so forth.

When we think of creativity in the law, our minds necessarily turn to the extraordinary act of creation which we shall be celebrating for the next three years: an act which produced the Constitution of the United States. When we think of the Constitution, we properly remind ourselves that we are the heirs to several centuries of struggle in England through which constitutional restraints were placed upon the exercise of the raw powers of the state. A moment which I shall always cherish was the privilege I had in 1965 in going to Runnymede, the Field of Magna Carta, and there receiving from Her Majesty the Queen an acre of ground at Runnymede as a gift to the American people in memory of John F. Kennedy. This pleasant sentiment that each of us owns a little piece of Runnymede helps to remind us that our own constitutional history merged with that of England in the latter part of the 18th Century, and that the Petition of Right of 1628, the Habeas Corpus Act of 1679, the English Bill of Rights of 1689 are all a part of our own constitutional history.

One thinks of some of those old common law judges. Locked away in the dusty pages of Holdsworth's great *History of English Law* are accounts of some of those old judges who at the risk of their own lives over against the Crown and sometimes a hostile Parliament, put their arms around a prisoner at the bar and said, "You cannot do this to this man." If I may abuse a metaphor, gradually over a period of time and with much struggle, we took the old notion that the King can do no wrong and transferred it into the notion that if it is wrong the King cannot do it.

The English wound up with a system headed by the notion of parliamentary supremacy, but a Parliament which traditionally respects the great constitutional customs of the country. In this

country our Founding Fathers took a little different direction. By the way, among the 55 members of that Constitutional Convention, 30 were lawyers and beyond that, familiarity with the law was a part of the general education of men of affairs of that day. They labored well and in secret and produced a written constitution to operate as the supreme law of the land, enforceable by the courts at times over against both the Executive and Legislative branches of the government.

If any of you have an idea that Chief Justice John Marshall invented the idea of judicial review in the case of *Marbury v. Madison*, you can go back to the *Federalist Papers* and discover that that was a familiar concept of the day because the Constitution was the beginning point for determining what is the law.

The late Chief Justice Earl Warren came to this law school shortly before his death and on that occasion reminded us that if each branch of the federal government were to pursue its own powers to the end of the trail, our system simply could not function; it would freeze up like an engine without oil. Impasse is the theoretical chief threat to our constitutional system. If the separation of powers is a fundamental notion in our system, the other side of that same coin is the constitutional necessity for comity and cooperation among the branches of government. Our constitution forces us to seek a consensus, and that has been a powerful element of strength in our constitutional system, at least in the last hundred years or so.

If you consider the first ten amendments as part of the original Constitution (which is entirely appropriate), and you dismiss the two amendments on prohibition (which cancelled each other out), we have amended our Constitution only 14 times in 200 years. Those amendments have had to do with process—the election of senators, a two-term restriction on the presidency, votes for women, votes for eighteen-year olds, provisions for the disability of the president. We have not, thus far, cluttered up the Federal Constitution with those matters which can be dealt with by legislation, and we have not, thus far, started down the trail which would produce the kind of jungle in the Federal Constitution which we find in so many of our state constitutions. I hope we can respect that tradition, but I am not entirely sure about the future.

In early February we were treated to a rather remarkable bit of irony on which there was no comment at the time. On a certain Tuesday evening in early February, President Reagan went to a joint session of Congress to deliver his State of the Union address. In that address he called for a Constitutional Convention to require a balanced federal budget. On the very next day (on the Wednesday) he submitted a budget to Congress with a deficit of $150 billion in it. One can only speculate as to what he would have done on Wednesday if his proposal of Tuesday had been in effect. The truth is that the President and the Congress already have the constitutional power to balance the federal budget, and they would not dare adopt such an amendment without an exception clause for times of emergency. And until such time as the President and the Congress are prepared to balance the federal budget, they would simply live on that emergency clause. So at best such an amendment is much ado about nothing, and at worst it is playing a cynical game with the great creation of our Founding Fathers.

When it seemed apparent that the Equal Rights Amendment would not make its course to the very end, I suggested to some of my friends interested in that movement that they might consider doing the same thing by legislation. Section 5 of the Fourteenth Amendment clearly gives Congress this power to enforce the provisions of that Amendment, and it would be relatively simple for Congress to declare that the equal protection of the law shall not be abridged and then pick up the language of the United Nations Charter which is already a part of the law of our land—shall not be abridged on account of race, sex, language or religion. For whether the idea is inscribed in statute or by constitutional amendment, the courts would still have to find what are the reasonable classifications which permit some difference of treatment between male and female. Now, I must confess, and I may be branded a male chauvinist for this, I must confess that it is difficult for me to find constitutional underpinnings for regulations stating that public schools cannot have all boys choruses meetings after school unless they have reached the age in which their voices have changed; otherwise they must have girls in those choruses. I am not particularly enchanted by the notion that women sports writers have the right to wander around the locker room following a game. I wonder what old Benjamin Franklin would have thought of such a thing. Knowing something about the old man, my thought is that he would simply put on the door of the locker room a sign saying, "If you come in here, you must dress as we do."

Nevertheless, this is a Constitution which has served us extraordinarily well. It has proved to be a living instrument, as some of our great judges have described it. It has adapted itself to the changes in life, and those have been extraordinary since the days of our Founding Fathers. So we have something to celebrate in these next three years.

Let me make a few comments about a speech which I made thirty years ago which was not listened to by those to whom the speech was made. I had been invited to speak to the alumni of the Harvard Law School in New York City, and since there are a lot of those people around there, there was a large turnout at the Harvard Club. Seated just to my right was Judge Learned Hand, and by that time he was getting quite old and indeed quite deaf. And as I spoke, he would tug on my coat and say such things as "that's the stuff," "pour it on," "give it to them,"—and what he thought was a whisper was picked up by the microphone and carried all over the room. The audience became so enchanted with wondering what the old judge was going to say next, they paid no attention whatsoever to me. I had made a study of the curricula of liberal arts colleges at that time and found that although liberal arts colleges claimed to talk about life as a whole, almost none of them said anything about the law, despite the fact that law is the most pervasive part of our human environment in the course of our daily lives. We may differ among ourselves as to the philosophical or religious origins of our individual liberties, but out there in the real world, these liberties are validated largely by law. From the moment each one of us wakes up in the morning, until we go to sleep at night, we pass through hundreds upon hundreds of actual or potential legal relationships. Many of

L. Clifford Adams, Jr. (Class of '60, representing LSA), Dean J. Ralph Beaird, Dean Rusk and President Fred C. Davison at Graduation '86.

them are not activated, because we don't punch in the nose everyone we pass on the street. Nevertheless, it is the law which permits us to predict with a high degree of accuracy how others are going to act and permits each one of us to pursue our eccentric orbits with a minimum risk of collision with others.

Those who have the greatest stake in the law are those who want to be most different, because it is the law that prevents their being snuffed out like gnats by the overwhelming majority. Indeed, under our constitutional system, we have a constitutional democracy which does not mean that the passing whims of a majority can carry the day as far as the law is concerned.

Let me just say to the members of the graduating class that you are entering a profession which at its best has been a noble profession. We still have a great deal of unfinished business ahead of us to which you must address yourselves during the decades which belong to you. I have in mind, for example, the war which is being waged on our society by organized crime, particularly those elements in it which fatten themselves by feeding poisonous drugs to children and adults alike. I am thinking of arrangements which we are going to have to make to prepare for the day when the oil reserves of the world begin to diminish sharply, and the increasing care we will have to take to be sure that mankind itself does not inflict irreparable damage upon this thin biosphere in which our species must live. I think of the prospect that one of the oldest causes of war in the history of the human race, the pressure of people upon resources, is being revived by exploding populations in a world in which destructive power is almost beyond imagination.

Among these assets upon which you can build is the creative capacity of law. Whatever you do in your personal lives and your private practice, the mantle of statesmanship falls upon you—you cannot avoid it whether you like it or not. You will be called upon in your own communities and in the state and nation as a whole to think again about those great creative contributions made by lawyers and law over the centuries. I would urge you to move into the future with hope and confidence (two essential ingredients for a democratic political system and a free enterprise economy), because we are passing on to you more than 40 years since a nuclear weapon has been fired in anger. That is something of some importance, because if we should ever have a nuclear war, it would not only eliminate the answers, it would eliminate the questions. Mr. Khrushchev was not kidding when he once said, "In the event of a nuclear war, the living will envy the dead." Nevertheless, despite some of the Doomsday talk you hear, I myself cannot put my finger on a real situation in the real world which is pointing toward nuclear war. And so, I would urge you to move ahead with confidence. You're going to make it; I have no doubt about it—none whatever. I shall not be able to travel with you along on that journey, but I assure you, you will never have a dull moment. In any event you take with you the best wishes and the blessings of an old man.