President Fred C. Davison
Atlanta Rotary Club
July 9, 1979; 12:15 P.M., Merchandise Mart

It's a real pleasure to be with a group of fellow Rotarians and to see and greet so many old friends and colleagues. I appreciate this opportunity to share fellowship and some mutual concerns with you.

I want to speak today on a matter that affects us all. It is a subject I've addressed a number of times but recent events underscore its continuing relevance.

I am talking about federal intervention into our educational institutions, our private businesses, our professions and daily lives.

I am talking about the pervasive role that the federal legislative, executive and judicial branches now play in the activities and enterprises of all Americans.

The federal bureaucracy, the fourth branch of government, is a zealous participant in these governmental incursions.

I would like to focus first on the judiciary and the role of the courts in higher education.

Many of you read an essay in the January 22, 1979 issue of TIME magazine entitled "Have the Judges Done Too Much?"

Quoting in part, the writer said:

"Today many Americans...resent an ever-more-activist judiciary. Beware, warns a vocal group of scholars; the Imperial Presidency may have faded, but now an Imperial Judiciary has the Republic in its clutches. The fear, as Constitutional Scholar
Alexander Bickel once expressed it, is that too many federal judges view themselves as holding 'roving commissions as problem solvers, charged with a duty to act when majoritarian institutions do not.' Given license by a vague Constitution and malleable laws, and armed with their own rigorous sense of right and wrong, judges have been roving all over the lot: into school desegregation, voting rights, sex, mental health, the environment - the list goes on and on."

End of quotation.

Not all federal judges have assumed "roving commissions," of course, but those who have - have more than lived up to the writer's description.

Federal Judge Alex Lawrence, speaking at the University Founders' Day program in January, alluded to this development.

The Judge said that as a young man he had many ambitions. One time he wanted to be a fire chief, another time a police chief, another time a mayor, a school principal, and so on. Judge Lawrence said he solved his career problem by becoming a federal judge where he could be all of those things at once.

The Judge's humorous remark is extremely close to the reality we live with today, particularly in higher education.

I am an education administrator, not an attorney. My recent experiences as President of the University of Georgia, however, have brought me into very close contact with the law and given me far more legal experience than I ever expected or wanted.
Remarks by President Davison
Atlanta Rotary Club, 7/9/79

There's nothing like being a defendant in a 30 million-dollar law suit to give one instant perspective.

The basic vehicle used by federal courts to second-guess the judgments of education administrators is the Due Process Clause of the Fourteenth Amendment to the Constitution.

This clause provides, in part, that "No state shall...deprive any person of life, liberty, or property, without due process of law."

The elastic quality of this provision was described by Judge Learned Hand who observed that constitutional standards are only "word adjurations, the more imperious become inscrutable, but with only that content which each generation must pour into them anew in the light of its own experience.

The content ascribed to the Due Process clause in recent years by our courts has been elastic indeed, particularly where educational matters are concerned. Everything from hiring policies to disciplinary procedures have come under the scrutiny, and often the control, of the federal judiciary. Every academic grievance now becomes a constitutional law issue with a federal judge serving as arbitrator.

Former Supreme Court Justice William O. Douglas described the Due Process clause as the Constitution's "wild card that can be put to such use as the judges choose."

In a speech several years ago, Justice Douglas said that "Those (judges) who use it as the wild card often deny doing so, saying that Due Process is not subjective, that
Atlanta Rotary Club

it has its roots in civilized ideas of ordered liberty.
Yet no matter what the judges say, Due Process, as it is presently employed, is fickle and capricious."
End of quotation.

And with this broader and broader interpretation of the Fourteenth Amendment has come a broader exertion of judicial authority on our campuses.

This trend rejects the earlier, long-held narrow view regarding the application of the constitution to the college campus.

The former reasoning was that courts have no role in education except to insure that no state discriminates on the basis of race, color or creed.

Federal judge Wyzanski, in a 1959 case brought by a student dismissed for public criticism of his school's administration, stated the prevailing reasoning. He said, quote,

"Education is a field of life reserved to the individual states. If every grievance over every educational decision could be brought to federal court under the Fourteenth Amendment, every State College student, upon dismissal from such college, could rush to a Federal judge seeking review of the dismissal."
End of quote.

This decision had the net effect of declaring that attendance at a public college was a privilege and not a right protected by the Constitution.

That judicial thinking was said by legal scholars to be based
on two policy reasons. These were the concept of federalism which leaves education to the states and state courts, and the peculiar nature of academic institutions which makes intervention by the courts inadvisable and inappropriate.

This reasoning was thoroughly undermined in the 1960's and 1970's.

In the 1970 case, Graham versus Richardson, the decision stated that, quote, "this Court now has rejected the concept that Constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" End of quote.

This decision and others like it opened the door for federal judges to give any content they wished to constitutional standards and thus second-guess almost any educational decision.

The Fifth Circuit Court of Appeals, in a 1961 case, decided that remaining enrolled in a state college is an interest of "extremely great value." Therefore, it said, a student cannot be expelled for violation of conduct rules without procedural due process.

A 1975 decision of the United States Supreme Court found that students could not be suspended from school without some form of rudimentary due process.

This case, involving destruction of property and physical assault by some students, involved a ten day suspension. The Supreme Court concluded that attending school was a property right which could not be disturbed without some kind of hearing.
The dissenters raised questions about the scope of this decision. What about keeping a student after school, giving an F, changing a room assignment. The minority opinion noted:

"If, as seems apparent, the court will now require due process procedures whenever such routine school decisions are challenged, the impact upon public education will be serious indeed. The discretion and judgment of federal courts across the land often will be substituted for that of the 50 state legislators, the 14,000 school board and the 2,000,000 teachers who heretofore have been responsible for the administration of the American public school system."

End of quote.

The point is that hardly any area of education decision-making is exempt from judicial review and the consequent substitution of court judgments for those of our educators.

Let me cite a few examples of this wide-ranging situation.

--A state college was required by a federal court to grant official recognition to a chapter of the Students for a Democratic Society, an organization known for its violent nature.

--A federal court required a state university to make facilities available for a dance sponsored by a homosexual group.

--A court prohibited the president of a university from exercising responsibilities as publisher of a campus newspaper by deleting dirty words even though holding him personally liable for the paper's content.

--A court reviewed the academic record of a student in ruling on a petition for readmission.
The federal courts are by no means alone in the matter of pervasive governmental intrusion into higher education. The federal bureaucracy, strengthened by these court decisions, increasingly dictates policy and procedures to higher education.

Grove City College received a letter from the Department of Health, Education and Welfare ordering the institution to sign forms of compliance with Title IX regulations. The small school neither seeks nor receives federal funds. The president refused to sign the HEW form and was told his institution would be made to comply.

The hook used by HEW is that 140 students at Grove City receive federal tuition grants. The school said this constituted a contract between the student and the government and did not involve the institution.

The college president said that his institution has, as a matter of Christian belief, treated males and females equally since long before HEW came into existence. The institution believed it would be acknowledging HEW's claimed jurisdiction if the form were signed.

An administrative law judge upheld HEW's authority but said in his decision, quote:

"There was not the slightest hint of any failure to comply with Title IX, save the refusal to submit an executed assurance of compliance...This refusal is obviously a matter of conscience and belief."
Columnist George Will addressed this episode and expressed a view worth repeating. He said that:

"In the 1960s, government's goal became the promotion of equality. Rather than recognize that universities are meritocracies, and inherently unsuited to be instruments for that policy, government set about subverting the essence of universities—the rule of merit."

HEW's Title IX regulations on college athletics fit Mr. Will's thesis.

HEW is attempting to impose a formula approach to athletics that would replace the traditional standards of individual merit and ability. HEW's rules could completely change college athletics as we know them.

HEW proposes that the University of Georgia spend its athletic budget on an equal per capita basis per athlete

--regardless of the specific sport involved;
--regardless of the source of revenue for sports teams;
--regardless of spectator and participant interest;
--regardless of disparate expenses between fielding a team in one sport as opposed to another;
--regardless of the fact that our athletic program receives not a single dollar of federal funds.

HEW proposes that institutions spend, dollar for dollar, the same average amount of the athletic budget on each individual male or female student participating in sports.

This could result in a reduction of sports opportunity through elimination of some teams, reduction in level of play of the income-producing sport—football—which in turn will reduce the revenue gained, and other...
One end result could be reduction of opportunities for participation by both men and women since one answer is to reduce the number of teams within the sports program.

Another result could be a diminishing of the level of competition in all sports including football—the sport that now produces the income that supports all other teams at the University. A reduction in the level of competition in football would undoubtedly reduce the revenue generated.

One suggestion made to me by a member of Congress on a recent trip to Washington was to apply for federal aid to meet the expenditures required under proposed Title IX regulations.

Use of state or federal dollars to support our athletic program is totally unacceptable in my opinion. The other financial option, greatly increasing prices and fees charged spectators and students, is also unacceptable.

Nonetheless, if the per capita requirement stands, the University of Georgia athletic budget will have to increase by $1 million yearly.

The federal bureaucracy is not the mechanism established by the Constitution for education control.

Rather, our Constitution reserved the area of education to control by the states, by the people.

Freedom from centralized control allowed our American educational system to grow and flourish in a variety of forms serving a variety of educational needs. Our educational system, unfettered by federal control, grew to be one of the primary strengths of this, the greatest nation in the history of mankind.
That tradition of strength is gradually being eroded. We estimate conservatively that the University of Georgia now spends $5 million a year complying with federal regulations. This is not money spent in modifying facilities for the handicapped or making laboratories and classrooms safer. It is money spent, for the large part, in compiling reports, filling out forms, answering demands, printing symbols and signs, and a multitude of other requirements.

That is $5 million that will not be spent on educating our sons and daughters, on support of research that would cure some societal ill, on reaching out to the people with our service programs.

The bewildering maze of regulations and rules issued by the bureaucracy grows in volume and complexity by the year.

One example of our experience concerns section 504 of the Rehabilitation Act of 1973. Thirteen lines in that law say that no person can be discriminated against in a program receiving federal funds simply because that person is handicapped.

That simple law was turned into volumes of regulations that required numerous compliance forms, plans and actions. The University of Georgia, in producing the report required under section 504, submitted a 1,000 page document.

Our past commitment with respect to the handicapped and long record of non-discrimination carries no weight. We must continually file forms and reports. All of us do this to the extent that I fear opportunities for handicapped citizens will get lost in the effort to satisfy HEW's single minded zeal.
The recent Supreme Court decision in the Davis v. Southeastern Community College case was a move toward common sense. It overruled HEW's requirement that a university had to offer surgical nurse training to a deaf person. No person capable of taking advantage of an educational opportunity should be denied one. However, reasoned judgments must be made. Emotionalism is not the road to equal opportunity.

This unending stream of directives, regulations and guidelines comes from a vast number of agencies.

The Library of Congress made a study a few years ago that showed 439 separate agencies, authorities and departments as having a hand in regulating education.

I do not believe that our nation can much longer stand the cost of our economy and spirit, to our business institutions and our educational institutions, of the excesses of federal regulation.

A study by the Arthur Andersen Company shows that 48 American companies spent $2.6 billion in 1977 to comply with the regulations of only six federal agencies. The total cost of federal regulation to our country this year, according to a current study, will be 100--billion--dollars.

The cost to the 48 companies studied by Arthur Andersen represents 15 percent of their total, combined net income after taxes.
I believe all of this leads us to the conclusion that something is out of balance, something has gone wrong with our American system.

We are trying to regulate, legislate and adjudicate equality. We are trying to tamper with our American standards of individual excellence, free enterprise and educational autonomy so that every person can be declared a success.

We are doing so even if our standards must be lowered to the point that in fact, we are all failures.

We have confused the distinction between equal opportunity to gain an education and equality of achievement in using that education. They are not the same thing.
As a nation, we have set goals which have less to do with the reward of excellence than with attempts to level all segments of our society.

We fear that setting a person or group of people apart from the rest is elitism, a word that has fallen into disrepute.

Elite, to some of us, has come to mean racist, or sexist, or undemocratic, or all of the above.

We have lost our national competitiveness. We are losing our world leadership role in the production of new technology and new medicines.

We have watched our nation from a position of superiority to one of parity to one of inferiority in military strength.

We have developed national hysteria over experimentation in recombinant DNA and nuclear energy.

I believe all of this has happened because of almost pathological fear of risk that has developed in our American life.

We fear failure, we fear the risk of failure so much that we are trying to regulate it away. We are trying to legislate and litigate ourselves into safe harbors, far from the dangers of taking risks.

We are trying to remove any standards that, if allowed to stand, mean that someone must risk failure if he is to try to succeed.

We are damaging our American character by leaving it to the federal government to make all our decisions.
We complain of inflation and high energy prices.

Meanwhile, a study by Arthur Andersen and Company shows that 40 American companies spent $2.6 billion in 1977 to comply with the regulations of six federal agencies. That figure is 15 percent of the total net income after taxes of those corporations. A current study shows that government regulation and enforcement will cost our nation 100 billion dollars this year. We are held ransom to the OPEC nations unilateral price increases for oil while 1,800 billion barrels of shale oil lie under three western states. At present rates of consumption, that is sufficient oil to run this country for more than 1,000 years.

We have forgotten the American way of dealing with crisis. We have forgotten that the national challenge of putting men on the moon in one decade, of developing synthetic rubber when 90 percent of the world's supply was captured by the Japanese and other achievements, such achievements, given a clear sense of national purpose, is equal to the task. We have forgotten what we can accomplish as a people when given the clear choice between success and disaster.

We have forgotten how to work together while allowing room for individual achievement and individual excellence.

There are some signs that we are coming back on course. Some of these indications are coming from the federal judiciary, particularly from the nation's highest court.
I do not believe we have yet failed as a nation. I do not, by any measure, believe we have lost.

I do believe we must bridle the trend to delegate control of our lives to our government and our courts.

I believe we must reverse the damage that has been done to education through erosion of its traditional strengths.

I believe we must let our educational system, still the envy of the entire world, function the way it functions best—in the hands of the people.

I am confident about the future because I believe that we can overcome our present problems and meet our coming challenges.

I believe that we have the will and strength to assert ourselves and correct deficiencies in our society.

I am certain that the University of Georgia will continue to stand for the best educational values and the strengths of the American system.

We have an excellent system of public higher education in our state. Our nation's strength is undergirded by our educational institutions and will continue to be.

I only remind you that we must not damage and finally destroy a system that has worked so well so long.

For the sake of our country and its future, this we must not allow to happen.

Thank you so much.